# 1960

# CANADA
# LAW REPORTS

## Supreme Court of Canada

Editors

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OTTAWA, 1961

# JUDGES

OF THE

# SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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The Honourable PATRICK KERWIN, P.C., *Chief Justice of Canada.*

The Honourable ROBERT TASCHEREAU.

The Honourable CHARLES HOLLAND LOCKE.

The Honourable JOHN ROBERT CARTWRIGHT.

The Honourable GÉRALD FAUTEUX.

The Honourable DOUGLAS CHARLES ABBOTT, P.C.

The Honourable RONALD MARTLAND.

The Honourable WILFRED JUDSON.

The Honourable ROLAND A. RITCHIE.

ATTORNEY GENERAL OF CANADA

The Honourable EDMUND DAVIE FULTON, Q.C.

SOLICITORS GENERAL OF CANADA

The Honourable LÉON BALCER, Q.C.

The Honourable WILLIAM J. BROWNE, Q.C.



83924-1—1½

## ERRATA
## in volume 1960

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Page 286, line 1 of Caption. Delete "Plea of guilty".

Page 286, lines 1 and 2 of Headnote. Read "The accused was summarily tried by a magistrate and convicted of impaired driving".

Page 403, fn. (1). Read "[1896] 2 Q.B. 167".

Page 474, fn. (1). Read "[1960] S.C.R. 294".

Page 474, fn. (2). Read "[1960] S.C.R. 286".

Page 485, line 5. Read "Despatie".

Page 539, line 3 of Caption. Read "R.S.B.C. 1948, c. 16, s. 14".

## UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between November 30, 1959, and November 28, 1960, delivered the following judgments which will not be reported in this publication:

*Alexander and Kelley v. The Queen* (Exch.), appeal dismissed with costs, April 26, 1960.

*Bank of Montreal v. Watier*, [1960] Que. Q.B. 725, appeal dismissed with costs, October 4, 1960.

*Barron v. Min. of Nat. Rev.*, [1959] Ex. C.R. 479, appeal dismissed with costs, November 24, 1960.

*Bellavance-Gagné v. Banque Provinciale du Canada* (Que.), appeal dismissed with costs, June 13, 1960.

*Berger v. Cukoff*, [1959] Que. Q.B. 694, appeal dismissed with costs, January 26, 1960.

*Bernier v. Breton* [1959] Que. Q.B. 625, appeal dismissed with costs, March 14, 1960.

*Black v. British American Oil and Cdn. Kellog Co.* (B.C.), appeal dismissed with costs, November 22, 1960.

*Blockley v. Prudential Transport Co.* (Que.), appeal allowed and cross-appeal dismissed with costs, June 24, 1960.

*Boisjoly v. The Queen*, [1960] Que. Q.B. 776, appeal quashed, October 31, 1960.

*Boland v. Minister of Highways for Ontario*, [1959] O.W.N. 261, appeal dismissed with costs, November 21, 1960.

*Boland v. Par-Tex Foundation Co.* (Ont.), appeal dismissed with costs, June 8, 1960.

*Boland Foundation v. Moog and Moog* (Ont.), appeal dismissed with costs, November 9, 1960.

*Calhoun v. City of East Kildonan* (Man.), appeal dismissed with costs, May 17, 1960.

*Clemens v. Clemens-Brown and International Nickel*, [1958] O.W.N. 200, appeal as against both respondents dismissed with costs, February 5, 1960.

*Colonial Coach Lines v. Bazinet* (Ont.), appeal dismissed with costs, June 9, 1960.

*Concrete Column Clamps Ltd. v. Montebello et al*, [1959] Que. Q.B. 230, appeal and cross-appeal dismissed with costs, November 30, 1959.

*Consumers Acceptance Corp. v. Soulière*, [1959] Que. Q.B. 712, appeal allowed with costs, October 4, 1960.

*Crozier v. Sirsiris* (B.C.), appeal allowed with costs, November 30, 1959.

*de Mariassy v. Ratelle et al*, [1959] Que. Q.B. 343, appeal dismissed with costs, February 22, 1960.

*Desjardins v. Will & Baumer Candle Co.*, [1958] Que. Q.B. 84, appeal dismissed with costs, February 24, 1960.

*Drost v. Dey*, 20 D.L.R. (2d) 88, appeal dismissed with costs, February 23, 1960.

*Finley v. Ladouceur*, [1959] Que. Q.B. 801, appeal and cross-appeal dismissed with costs, November 30, 1959.

*Fortin v. Gendron*, [1959] Que. Q.B. 254, appeal dismissed with costs, March 8, 1960.

*Fortin v. M. Cloutier Hamel*, [1959] Que. Q.B. 254, appeal dismissed with costs, March 8, 1960.

*Fortin v. R. Hamel*, (1959] Que. Q.B. 254, appeal dismissed with costs, March 8, 1960.

*Gagnon v. The Queen* (Exch.), appeal dismissed with costs, April 11, 1960.

*Kepe v. Bell* (Ont.), appeal dismissed with costs, November 7, 1960.

*Lindsay v. City of Montreal*, [1959] Que. Q.B. 436, appeal dismissed without costs, February 26, 1960.

*McFabridge et al v. Bank of Montreal*, 17 D.L.R. (2d) 557, appeal dismissed with costs, May 18, 1960.

*Marcell's Motor Express Inc. v. Breslin*, [1960] Que. Q.B. 394, appeal dismissed with costs; cross-appeal dismissed without costs, May 30, 1960.

*Marsolais v. City of Montreal*, [1960] Que. Q.B. 184, appeal dismissed without costs, February 26, 1960.

*Maryland Casualty Co. v. Gagnon*, [1959] Que. Q.B. 347, appeal allowed, judgment at trial restored, with costs, March 14, 1960.

*Moule v. N. B. Electric Power Commission*, 22 D.L.R. (2d) 253, appeal dismissed with costs, if demanded, June 24, 1960.

*Nolan and McQuatt v. McKenna and Kargus*, (1959) 28 W.W.R. 572, appeal dismissed with costs, October 13, 1960.

*Panos v. Pulos* (Que.), appeal dismissed with costs, March 7, 1960.

*Pitre v. The Queen*, [1960] Que. Q.B. 397, appeal allowed, and conviction set aside on question of identification, February 24, 1960.

*Rousseau v. Banque de Montréal*, [1959] Que. Q.B. 709, appeal dismissed with costs, October 4, 1960.

*Roy v. Lavallée*, [1960] Que. Q.B. 438, appeal dismissed with costs, June 6, 1960.

*St. Michel Uranium Mines Ltd. (changed to Calumet Mines Ltd.) v. Rayrock Mines Ltd.*, 15 D.L.R. (2d) 609, appeal dismissed with costs, March 23, 1960.

*Sherbrooke, City of v. Fortin*, [1960] Que. Q.B. 110, appeal dismissed with costs, May 16, 1960.

*Sherbrooke, City of v. Fortin es-qualité* [1960] Que. Q.B. 110, appeal dismissed with costs, April 11, 1960.

## MOTIONS

*Andsten and Petrie v. The Queen* (1960), 32 W.W.R. 329, leave to appeal refused with costs, October 4, 1960.

*Barron v. Minister of National Revenue*, [1959] Ex. C.R. 470, motion to add new evidence refused with costs, October 24, 1960.

*Boisjoly v. The Queen*, [1960] Que. Q.B. 776, leave to appeal refused, November 21, 1960.

*Cappello v. The Queen*, 123 C.C.C. 391, leave to appeal refused, November 21, 1960.

*Carnochan v. Public Trustee* (Ont.), motion to quash granted, March 30, 1960.

*Clemens v. Brown et al*, 22, D.L.R. (2d) 545, motion for rehearing refused with costs, April 27, 1960.

*Cook v. The Queen*, 127 C.C.C. 287, leave to appeal refused, October 4, 1960.

*Côté v. The Queen*, [1959] Que. Q.B. 620, leave to appeal refused, May 30, 1960.

*Courtney & Ryan v. Registrar of Motor Vehicles* (Ont.), leave to appeal refused, December 5, 1960.

*Crawford et al v. Attorney-General of British Columbia et al*, [1960] S.C.R. 346, motion for rehearing refused with costs, June 24, 1960.

*Duquette v. The Queen*, [1960] Que. Q.B. 778, leave to appeal refused, June 24, 1960.

*Grant v. St. Lawrence Seaway Authority et al*, 23 D.L.R. (2d) 252, leave to appeal refused with costs, June 6, 1960.

*Guay v. The Queen* (Que.), leave to appeal refused, May 30, 1960.

*F. W. Horner Ltd. v. Gilbert Surgical Co.*, [1960] O.W.N. 289, leave to appeal refused with costs, June 6, 1960.

*Huffman v. The Queen*, 28 C.R. 5, leave to appeal refused, April 11, 1960.

*Johnston v. The Queen* (Ont.), leave to appeal refused, November 21, 1960.

*Keoghan v. The Queen*, 32 C.R. 296, leave to appeal refused, March 22, 1960.

*Kinzel v. Carlson* (Sask.) leave to appeal refused with costs, February 1, 1960.

*Kolodziej v. Gayford*, 19 D.L.R. (2d) 777, motion to adduce new evidence and leave to appeal refused with costs, January 26, 1960.

*Leblanc v. Ziebell*, [1960] Que. Q.B. 518, leave to appeal refused with costs, February 1, 1960.

*Long Branch v. Bihun*, [1960] O.W.N. 485, leave to appeal refused, December 5, 1960.

*Lyness v. The Queen* (Ont.), leave to appeal refused, May 16, 1960.

*McKee v. The Queen*, 32 C.R. 117, leave to appeal refused, February 1, 1960.

*McKnight v. The Queen* (1959–60), 30 W.W.R. 86, leave to appeal refused, March 8, 1960.

*McPherson and Kestenberg v. The Queen*, 32 C.R. 1, leave to appeal refused, February 18, 1960.

*Marsh v. Greene*, [1959] O.W.N. 386, leave to appeal refused with costs, January 26, 1960.

*Martel v. Syndicat des Employés* (Que.), leave to appeal refused, June 6, 1960.

*Maryland Casualty Co. v. Gagnon*, (Que.), motion to vary judgment refused with costs, April 26, 1960.

*Re Northlands Grading & Earth Moving Co. Ltd.*, 24 D.L.R. (2d) 768, leave to appeal refused, November 17, 1960.

*Penziwol v. Syrota and Pollock* (Man.), motion to quash granted and leave to appeal refused with costs, January 26, 1960.

*Queen, The v. McKenzie*, (1960), 31 W.W.R. 337, leave to appeal refused, May 16, 1960.

*Queen, The v. Ménard*, [1960] Que. Q.B. 398, leave to appeal refused, February 18, 1960.

*Rochon v. Castonguay* (Que.), leave to appeal refused with costs, November 10, 1960.

*Scharinger v. The Queen* (Ont.), leave to appeal refused, May 9, 1960.

*Simmons v. McKinnon* (Ont.), leave to appeal refused with costs, May 16, 1960.

*Société des Usines v. Rhone-Poulenc* (Exch.), leave to appeal refused, August 12, 1960.

*Storey v. The Queen* (B.C.), leave to appeal refused, December 12, 1960.

*Truscott v. The Queen*, 32 C.R. 150, leave to appeal refused, February 24, 1960.

*Turpentine & Rosin v. The Queen* (Exch.), leave to appeal refused, March 7, 1960.

*Upper Ottawa Improvement Co. et al v. Hydro-Electric Power Comm.*, 19 D.L.R. (2d) 111, motion to amend statement of claim refused; leave granted to file written argument on civil law, June 13, 1960.

*Vancouver v. Brandram-Henderson*, motion to vary judgment refused with costs, June 24, 1960.

*Vermette v. The Queen*, [1960] Que. Q.B. 778, leave to appeal refused, June 24, 1960.

# A TABLE
## OF THE
# NAMES OF THE CASES REPORTED
# IN THIS VOLUME

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## Q



## R



## S



## S—Concluded



## T



## V



## W

# A TABLE
## OF THE
# NAMES OF THE CASES CITED
# IN THIS VOLUME

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### A



### B





83924-1—2

B—Concluded



C



D

## D—Concluded



## E



## F



## G



## H

H—Concluded

L—Concluded



M



N

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## R

R—Concluded



S

S—Concluded



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W

# THE SUPREME COURT OF CANADA

## GENERAL ORDER

WHEREAS by virtue of Section 103 of the Supreme Court Act, R.S.C. 1952, c. 259, as amended by R.S.C. 1952, c. 335, and the Statutes of Canada, 1956, c. 48, the undersigned Judges of the Supreme Court of Canada are empowered to make general rules and orders as therein provided;

IT IS ORDERED that the Rules of the Supreme Court of Canada be and they are hereby amended in accordance with the paragraphs numbered 1 to 3, both inclusive, which follow:

1. That the following be substituted for Rule 3:

RULE 3. At any time after the service or filing of a notice of appeal, whichever happens first, the respondent may apply to the Court for an order quashing the appeal.

2. That the following be substituted for Rule 59:

RULE 59. Unless the appeal is brought on for hearing by the appellant within one year next after the service or filing of the notice of appeal, whichever happens first, it shall be held to have been abandoned without any order to dismiss being required, unless the Court or a Judge shall otherwise order, and the Registrar may upon application by the respondent tax costs and issue a certificate of dismissal.

3. That the following be substituted for Rule 100:

RULE 100. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends upon the hearing of an appeal to contend that the decision of the court below should be varied, he shall, within fifteen days after the service of the notice of appeal, or such further time as may be prescribed by the Court or a Judge in Chambers, give notice of such intention to all parties who may be affected thereby. The omission to give such notice shall not in any way interfere with the power of the Court on the hearing of an appeal to treat the whole case as open, but may, in the discretion of the Court, be ground for an adjournment of the appeal or for special order as to costs.

The said amendments shall come into force on the 1st day of January, 1961.

And the Registrar of the Court is directed to take all necessary action to effect the tabling of this Order before the Houses of Parliament in the manner provided by Section 103 of the Supreme Court Act.

DATED at Ottawa, this 1st day of November, 1960.

P. KERWIN C.J.
ROBERT TASCHEREAU
C. H. LOCKE
J. R. CARTWRIGHT
GÉRALD FAUTEUX
D. C. ABBOTT
R. MARTLAND
W. JUDSON
ROLAND A. RITCHIE

# COUR SUPRÊME DU CANADA

## ORDONNANCE GÉNÉRALE

CONSIDÉRANT que l'article 103 de la Loi sur la Cour suprême, chap. 259 des Statuts revisés du Canada de 1952, modifiée par le chap. 335 des Statuts revisés du Canada de 1952 et le chap. 48 des Statuts du Canada de 1956, autorise les juges soussignés de la Cour suprême du Canada à édicter des règles et ordonnances générales de la manière y prévue;

IL EST, PAR LES PRÉSENTES, ORDONNÉ que les Règles de la Cour suprême du Canada soient modifiées en conformité des paragraphes 1 à 3, inclusivement, qui suivent, et elles sont, par les présentes, ainsi modifiées:

1. La Règle 3 est remplacée par ce qui suit:

RÈGLE 3. En tout temps après la signification ou la production d'un avis d'appel, selon la première qui a eu lieu, l'intimé peut demander à la cour une ordonnance en annulation d'appel.

2. La Règle 59 est remplacée par ce qui suit:

RÈGLE 59. A moins que l'appelant n'inscrive l'appel pour audition dans l'année qui suit la signification ou la production de l'avis d'appel, selon la première qui a eu lieu, l'appel est censé avoir été abandonné sans que soit nécessaire une ordonnance de rejet, sauf si la cour ou un juge en ordonne autrement, et le registraire, à la demande de l'intimé, peut taxer les frais et émettre un certificat de rejet.

3. La Règle 100 est remplacée par ce qui suit:

RÈGLE 100. Il n'est nécessaire, en aucune circonstance, qu'un intimé donne avis de motion par voie de contre-appel, mais si un intimé a l'intention, lors de l'audition d'un appel, d'alléguer que la décision du tribunal inférieur devrait être modifiée, il doit, dans les quinze jours qui suivent la signification de l'avis d'appel, ou dans tout autre délai que peut prescrire la cour ou un juge en chambre, notifier son intention à toutes les parties qui peuvent y être intéressées. Le défaut de donner ledit avis ne peut en aucune manière restreindre le pouvoir de la cour, à l'audition d'un appel, de considérer la cause entière comme ouverte; mais il peut, à la discrétion de la cour, constituer un motif pour l'ajournement de l'appel, ou pour une ordonnance spéciale quant aux frais.

Lesdites modifications entreront en vigueur le premier jour de janvier 1961.

Le registraire de la Cour est chargé de prendre les mesures nécessaires pour effectuer le dépôt de la présente ordonnance devant les Chambres du Parlement, de la manière prévue par l'article 103 de la Loi sur la Cour suprême.

DATÉE, à Ottawa, ce premier jour de novembre 1960.

P. KERWIN J.C.C.
ROBERT TASCHEREAU
C. H. LOCKE
J. R. CARTWRIGHT
GÉRALD FAUTEUX
D. C. ABBOTT
R. MARTLAND
W. JUDSON
ROLAND A. RITCHIE

# CASES

DETERMINED BY THE

# SUPREME COURT OF CANADA
# ON APPEAL

FROM

# DOMINION AND PROVINCIAL COURTS

80665-3—1

CANADIAN CAR & FOUNDRY COMPANY LIMITED (*Defendant*) ..... APPELLANT;

1959

*Jun. 4, 5
Nov. 30

AND

W. E. DINHAM (*Plaintiff*) ..... RESPONDENT;

AND

BROTHERHOOD RAILWAY CARMEN OF AMERICA ..... MISE-EN-CAUSE.

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

*Labour—Collective agreement—Retirement plan during life of agreement instituted unilaterally by employer—Whether violation of seniority provisions in agreement—Grievance of compulsory retired employee dismissed by Council of Arbitration—Whether entitled to action for wrongful dismissal—Jurisdiction of Council of Arbitration.*

The plaintiff, who had been in the defendant's employ for several years, was retired from service under a retirement plan instituted by the defendant and requiring all employees over 65 to be retired. The plaintiff was then 72 years of age. The collective agreement in force at the time between the defendant and the mise-en-cause contained no retirement provision on account of age, but provided for a reduction of the work force according to seniority. The management had also the right to discharge for cause. The plaintiff lodged a grievance before a Council of Arbitration, but the grievance was dismissed. He then commenced this action, alleging that the arbitrator's decision was null and void and claiming damages for illegal termination of employment. The trial judge dismissed the action on the ground that there had been no violation of the conditions of the collective agreement. This judgment was reversed by the Court of Appeal.

*Held:* The appeal should be allowed and the action dismissed.

The plaintiff, although he had not been obliged to invoke the grievance procedure, was bound by the decision of the Council of Arbitration. The council had jurisdiction to render the decision it did, its proceedings were conducted according to law and, therefore, its decision was final and binding upon all parties concerned and was not subject to review upon the merits by the Courts.

Moreover, the collective agreement did not touch upon the question of retirement age. The determination of that question was clearly a function of management, and the exercise of this function was not a violation of the seniority provisions of the agreement.

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Judson JJ.

1959

CDN. CAR & FOUNDRY CO. LTD. v. DINHAM et al.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Smith J. Appeal allowed.

*J. L. O'Brien, Q.C., E. E. Saunders and P. Casgrain,* for the defendant, appellant.

*P. Cutler* and *R. Lachapelle,* for the plaintiff, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal, by leave of the Court of Queen's Bench, from a judgment of that Court[1], rendered March 27, 1958, reversing a judgment of the Superior Court and maintaining respondent's action against appellant for damages in the amount of $800, claimed to have been caused by the wrongful dismissal of respondent from appellant's employ.

The facts can be shortly stated. On February 11, 1954, appellant entered into a collective agreement with the mise-en-cause covering wages and working conditions for certain designated employees of appellant in Montreal. This agreement, which ran for one year from October 1, 1953, was in force in June 1954 when appellant instituted a pension plan for its employees (including the employees subject to the said collective agreement) and at the same time put into force a retirement plan under which all employees over the age of 65 were compulsorily retired from the company's service. Among the employees retired were respondent and fifty-seven other employees whose wages and working conditions were also covered by the said collective agreement.

At the request of respondent and these other employees, appellant's right to retire them was submitted to a Council of Arbitration pursuant to the provisions of the *Quebec Trade Disputes Act,* R.S.Q. 1941, c. 167, as amended. The employees contended that the compulsory retirement of employees reaching the age of 65 years constituted a violation of the terms of the collective agreement and was in direct violation of s. 24 of the *Labour Relations Act,* R.S.Q. 1941, c. 162A, as amended. The majority of the Council of Arbitration held that appellant had not violated the terms of the collective agreement nor the provisions of the *Labour*

[1] [1958] Que. Q.B. 852.

*Relations Act* and that it had not acted in any way contrary to public order in terminating the employment of respondent and the fifty-seven other employees.

Following the decision of the Council of Arbitration, respondent (and a number of the other employees affected by the decision) instituted actions in damages for wrongful dismissal against appellant. In the present action, respondent asked that the decision of the Council of Arbitration be declared null and void and be annulled, and that appellant be condemned to pay him $800 as damages. It might be noted in passing that, in his declaration, respondent did not challenge the jurisdiction of the Council of Arbitration to hear and determine the question, but claimed, in para. 5, that its decision was null and void "in that it did alter, amend, or modify clause 17, paragraph (*e*) of the said collective contract or agreement". In its defence to respondent's action, appellant pleaded that respondent was bound by the decision of the Council of Arbitration, and also that appellant was not obliged, by the collective agreement, to keep respondent in its employ after he had reached the age of 65 years.

At the trial, the only witness called was respondent, whose testimony was limited to a statement of his age—which was then 72 years—his length of service with appellant, and the fact that his employment and that of a number of other employees had been terminated on June 30, 1954. As to other pertinent facts, both parties relied on the facts set out in the majority decision of the Council of Arbitration, which was filed as an exhibit by respondent.

This Council of Arbitration had been appointed, pursuant to the provisions of the collective agreement and of the *Quebec Trade Disputes Act*, by the Minister of Labour for the Province of Quebec, cl. 17(*e*) of the collective agreement dealing with arbitration reading as follows:

> 17. (*e*) *CONCILIATION OR ARBITRATION*: The parties to this agreement may refer any unsettled dispute to Conciliation and Arbitration in accordance with the Trades Dispute Act. Such Arbitration Board shall be composed of one (1) representative selected by the Company, one (1) representative selected by the Union of Lodges 322 and 930, and a Chairman mutually agreed upon by the representatives of both parties. Should the representatives fail to agree upon a Chairman, the Minister of Labour of the Province will be requested to name a Chairman. After such Arbitration Committee has been formed, it shall meet and hear the evidence of both sides and render a decision within seven (7) days of the completion

1959

CDN. CAR & FOUNDRY CO. LTD. v. DINHAM et al.

Abbott J.

of the taking of evidence. The majority decision of the Arbitration Board shall be final and binding on all parties. The Arbitration Board shall not alter, amend or modify any clause in this agreement.

The matter referred to the Council of Arbitration was respondent's complaint, framed in the following terms:

> Details of grievance . . . The Company violated the Seniority Clause of the Controlling Agreement in the case of Mr. W. E. Dighan (sic) Badge No. 1537, 17 years service with the Company. This man is being laid off according to a new policy established by the Company in regard to employees of 65 years of age or more.
>
> By applying this policy the Company forfeith (sic) his engagement of abiding by the rule set out in the Collective Agreement which govern both parties.
>
> Therefore it is hereby that all money lost by the above mentioned employee due to the application of this rule, be reimbursed until reinstated back at work.

Public hearings were held by the council as required by the statute, at which the respondent and the mise-en-cause were represented by counsel. In its majority report, the council set out in detail the submissions of both the mise-en-cause and of appellant, and carefully reviewed those submissions. It stated that the position taken by respondent and by the mise-en-cause was that the collective agreement precluded appellant from compulsory retiring, by reason of age, the respondent and the other employees subject to the said collective agreement while that agreement continued in force. Appellant, on the other hand, took the position that it had consistently refused to negotiate with the mise-en-cause with respect to retirement or severance plans—giving as its reason that it was impracticable to do so because of the numerous unions to which its employees belong across Canada—and that it was entirely the prerogative of the management to institute retirement plans and to establish a mandatory retirement age. Appellant also contended that its right to retire or terminate the employment of over-age employees was beyond the scope of the collective agreement.

The conclusion of the majority of the Council of arbitration was expressed by its chairman in the following terms:

> I must find that the Company has not violated any of the terms of the Collective Agreement, or any provisions of the Labour Relations Act, or that it has acted in any way contrary to public order in terminating the employment of W. E. Dinham and the 57 other employees in respect of which grievances were filed in the circumstances in which the same was done and, as a result the Company cannot be compelled to reinstate in

employment such employees or to compensate them for the periods which have elapsed since their services were so terminated.

The learned trial judge did not find it necessary to deal with the question of the binding effect of the report of the Council of arbitration. He held on the facts that respondent had failed to establish that there was anything, either in his contract of hire or in the collective agreement, which deprived appellant of its right to terminate the respondent's contract at any time, without cause, upon giving him the notice of termination prescribed by law, and he dismissed the action.

The Court of Queen's Bench[1] allowed respondent's appeal, but all three members of the Court delivered separate reasons for judgment, and all appear to have treated the action as an appeal from the majority report of the Council of Arbitration. Mr. Justice St-Jacques found that the collective agreement was a definite contract of hire for a period of one year and could only be terminated for cause. Mr. Justice Bissonnette found that appellant was bound towards respondent under a contract of hire for a fixed period, and that the termination of respondent's contract, because of age, was a violation of the seniority clause in the collective agreement. Neither of these learned judges discussed the provision in the agreement that "the majority decision of the Arbitration Board shall be final and binding on all parties". Mr. Justice Hyde found that respondent had been hired for an indefinite period and were it not for the fact of the collective agreement there would appear to be no doubt that his employment was legally terminated. He considered, however, that the individual agreement of lease and hire of services between appellant and respondent and the collective agreement must be read together and that the terms of the collective agreement precluded appellant from retiring respondent merely on grounds of age. Mr. Justice Hyde, who was the only member of the Court who touched directly on the question, found that the report was not final and binding upon the parties. He referred to it in the following terms:

> The existence of the arbitration clause in the agreement and the fact that arbitration was resorted to does not deprive appellant of his recourse to the Courts under his contract of employment with his employer. It is that contract which respondent terminated and although we are obliged

[1] [1958] Que. Q.B. 852.

1959

CDN. CAR & FOUNDRY CO. LTD. v. DINHAM et al.

Abbott J.

to consider the terms of the collective agreement as well the arbitrators had jurisdiction over that agreement only and not over appellant's individual contract with respondent.

With the utmost respect for the learned judges below, who appear to have held a contrary view, in my opinion the respondent was bound by the decision of the Council of Arbitration.

It is clear that, unless respondent had acquired some special right under the collective agreement, appellant was entitled to terminate the contract of hire of respondent's services at any time, for any reason, upon giving to him the notice of termination required under the *Civil Code*. Although he was not obliged to do so, respondent (and the other employees referred to) sought to have the legality of his compulsory retirement dealt with by arbitration under the provisions of cl. 17(*e*) of the collective agreement which I have quoted. Respondent, both before the arbitrators and in the present action, took the position that the question as to whether his compulsory retirement was a breach of his rights under the collective agreement was a dispute which the Council of Arbitration had jurisdiction to decide.

Respondent did not attempt to show that the Council of Arbitration acted in an arbitrary or capricious manner or in any other way contrary to law. His only attack upon the decision is contained in para. 5 of his declaration, which reads as follows:

> 5. A decision was rendered by the arbitration board, which is null and void, in that it did "alter, amend or modify" clause 17, paragraph *e* of the said collective contract or agreement;

No evidence whatever was adduced to establish that the Council of Arbitration in rendering its decision purported to "alter, amend or modify clause 17, paragraph (*e*)". On the contrary, the report makes it quite clear that the arbitrators proceeded to make their inquiry in strict accordance with the requirements of the clause in question and of the *Quebec Trade Disputes Act*. In my opinion, the Council had jurisdiction to render the decision which it did, its proceedings were conducted according to law, and, that being so, its decision was final and binding upon all parties

concerned and is not subject to review upon the merits by the Courts; s. 34(*a*) of the *Quebec Trade Disputes Act*, R.S.Q. 1941, c. 167; *Mantha* vs. *City of Montreal*[1].

While that is sufficient to dispose of the appeal, in view of the basis upon which the action was dealt with in the Courts below, I think I should add that I am in agreement with the decision of the arbitrators.

The collective agreement is stated to be an agreement "covering wages and working conditions for the designated employees of the Dominion and Turcot Plants, Montreal, Quebec," of the appellant. The determination of a mandatory retirement age, applicable to all employees, is clearly a function of management. While it may well be that the age at which such compulsory retirement should become effective could be made the subject of a collective agreement, the agreement under consideration here, does not touch upon it.

As will be seen from perusal of the agreement, seniority rights have no direct relationship to the age of an employee, but generally speaking are based upon length of service of such employee in a particular department or classification. A man 65 years of age might well have less seniority than a very much younger man. In my opinion, compulsory retirement at age 65 is not a violation of the clauses in the collective agreement respecting seniority rights, nor did appellant violate any other provision of the collective agreement when, during the pendancy of that agreement, it established, as company policy, that all employees in all divisions of the company should be retired upon attaining the age of 65 years.

For the foregoing reasons, I would allow the appeal with costs here and below, and restore the judgment of the learned trial judge dismissing respondent's action with costs.

*Appeal allowed with costs.*

*Attorneys for the defendant, appellant*: *Magee, O'Donnell & Byers, Montreal.*

*Attorneys for the plaintiff, respondent*: *Cutler & Lachapelle, Montreal.*

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[1] [1939] S.C.R. 458, 4 D.L.R. 425.

1959
*Jun. 17, 18
Nov. 30

WESTERN LEASEHOLDS LIMITED ...APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Income tax—Capital gain or income—Company—Powers under memorandum of association—Moneys received for options to purchase oil rights—Moneys received when options exercised—Moneys received for leases—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 4—The Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4, 127(1).*

In 1944, the appellant company and Western Minerals Ltd. (see *infra* p. 24) were incorporated and were at all relevant times owned and controlled by the same shareholders and directors. The declared objects of each company included, *inter alia,* the carrying on of the business of drilling for, producing and marketing oil, and the acquiring by purchase, lease, concession or licence mineral properties or any interest therein and selling and disposing of or otherwise dealing with the same or any interest therein. Western Minerals Ltd. acquired the freehold mineral rights in some 496,000 acres, and the appellant company acquired the right to lease or sublease these rights on a 10 per cent. royalty basis.

In 1946, the appellant company, by arrangement with Western Minerals Ltd., granted to Shell Oil Co. an option to purchase the mineral rights in a certain acreage in consideration of the sum of $30,000. In 1947, the appellant received $250,000 from Imperial Oil Ltd. for a similar option. In 1949, and 1950, Imperial Oil Ltd. exercised its option and paid the appellant a sum of nearly $2,000,000. In 1949, the appellant received over $900,000 in respect of a leasing agreement made by Western Minerals Ltd. with a group called the Barnsdall Group.

The Minister treated all these amounts received by the appellant as income from a business. The Minister's assessment was upheld by the Exchequer Court.

*Held:* The payments received by the appellant company were taxable as income.

It was contemplated that by granting subleases, reservations or options or otherwise turning to profitable account the rights held by the appellant under its contract with Western Minerals Ltd., moneys might be realized which would enable the appellant eventually to produce and market oil. Consistently with one of its declared objects, the appellant carried on the business of dealing with the rights it had acquired with a view to profit. The moneys it received were all profits realized from the business of dealing in the mineral rights. *Anderson Logging Company v. The King,* [1925] S.C.R. 45, applied.

*PRESENT: Taschereau, Locke, Martland, Judson and Ritchie JJ.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada[1], affirming an assessment made by the Minister of National Revenue. Appeal dismissed.

*H. H. Stikeman, Q.C.*, and *J. A. Robb*, for the appellant.

*D. W. Mundell, Q.C.*, *A. L. DeWolf* and *K. E. Eaton*, for the respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal from a judgment delivered in the Exchequer Court[1] by Cameron J. by which the appeals of the present appellant from assessments for income tax for the taxation years 1946, 1947, 1949 and 1950, except as to certain matters which were disposed of by the consent of the parties at the trial, were dismissed. As to the matters last mentioned the assessments were referred back to the respondent to enable him to make the reassessments necessary to carry out the agreement made. In respect to the taxation years 1946 and 1947 the present appellant had appealed to the Income Tax Appeal Board which, by a decision of the majority, dismissed the appeals and the appeal from that judgment was disposed of by Cameron J.: in respect of the other two years, the appeals were taken direct to the Exchequer Court from the decision of the Minister.

In the year 1943, Eric L. Harvie, a barrister practising in Calgary, acquired the right to a conveyance of the freehold mineral rights in some 496,000 acres of land in Alberta from the British Dominions Lands Settlement Corporation and the interest of Anglo-Western Oils Limited which held a 999-year lease of such mineral rights. The consideration for the purchase was the sum of $10,000 and the covenant of Mr. Harvie to indemnify the said vendors from any liability for taxes upon the property so agreed to be transferred.

After the purchase minority interests in these rights were sold or given by Mr. Harvie to two of his partners in the legal firm of which he was the senior member, a member

[1] [1958] Ex. C.R. 277, [1958] C.T.C. 257, 58 D.T.C. 1128.

1959

WESTERN LEASEHOLDS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

of his office staff, certain members of his family and a geologist by name DeKoch. The majority interest, however, at all times remained in him.

In April 1944, Mr. Harvie caused to be incorporated two companies, Western Leaseholds Limited, the present appellant, (hereinafter referred to as "Leaseholds") and Western Minerals Limited (hereinafter referred to as "Minerals"). Each of these companies was incorporated by a Memorandum of Association under the provisions of *The Companies' Act,* R.S.A. 1942, c. 240, and were companies limited by shares. The Memorandum of Association and the Articles of Association adopted by each was identical and each was authorized to issue 50,000 Class "A" common shares and 50,000 Class "B" common shares without nominal or par value.

The objects stated in the Memorandum of Association of the appellant are to be considered. These were stated with particularity and at considerable length. They included the objects of acquiring by purchase, lease, concession or licence mineral properties, reservations, concessions or any interest therein and to lease, place under licence, sell, dispose of and otherwise deal with the same or any interest therein; to prospect for and develop, *inter alia,* petroleum and natural gas properties and to sell or otherwise dispose of the same or any part thereof and to produce and deal in petroleum products. In view of the wide powers vested in a company limited by shares by s. 19 of *The Companies' Act,* except such as may be expressly excluded by the Memorandum, the objects of the company might have been expressed with much greater brevity and this was the view of Mr. E. D. Arnold, one of Mr. Harvie's partners, who drafted the Memorandum and who acquired an interest in the properties. However, on the direction of Mr. Harvie, the objects were stated at length, including the above mentioned specific matters.

By an agreement dated July 7, 1944, made between Mr. Harvie and Minerals, he transferred to that company all his right, title and interest in and to the mineral rights purchased by him as aforesaid. Minerals, on its part, agreed to assume the obligations of Mr. Harvie under his agreement with the former owners, except the payment of taxes

against any of the said lands, and to grant to him at his request an option to his nominee in a form then agreed upon.

On the same date he entered into an agreement with Leaseholds by which he assigned to it the rights acquired by him under his agreement with Minerals, except as to the shares allotted to him, in consideration of the allotment to him or his nominees of all its authorized capital, perpetual redeemable debentures of the face value of $250,000 and the performance by it of all its obligations under a document referred to as a "Document for Leases" which was made bearing the same date between Minerals, described as the "Owner" and Leaseholds, described as the "Operator".

By this last mentioned agreement Minerals granted to Leaseholds the right to acquire leases of the said minerals in a form agreed upon, each lease to be for such term as should be specified by Leaseholds, provided that the term of any lease so granted should not extend beyond December 31, 2940. The agreement provided that Leaseholds might operate under any lease granted to it either on its own behalf or by subleasing the minerals to others. The royalty payable to Minerals was 10 per cent. of the current value of the production.

In January 1945, the British Dominions Lands Settlement Corporation on the direction of Mr. Harvie conveyed the title to the mineral rights direct to Minerals and in due course certificates of title were obtained in the name of that company. In the case of the majority of the lands the certificates showed Minerals to be the owner of an estate in fee simple in all mines and minerals other than gold and silver which might be found to exist within, upon or under the lands described. In the case of some of the titles, however, there were specific reservations of other minerals, such as coal. The leasehold rights of Anglo-Western Oils Limited were apparently also transferred or surrendered to Leaseholds at the same time.

In the result, at the time of the transactions hereinafter referred to which took place prior to December 31, 1950, Minerals was the registered owner of an estate in fee simple

1959

WESTERN LEASEHOLDS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

of the mineral rights and Leaseholds entitled to obtain leases of such rights or any part thereof in its own name upon the agreed terms.

It is necessary for the determination of the question as to the liability of the appellant to taxation in these years to examine with some care the business actually carried on by it.

On October 4, 1944, the firm of Harvie & Arnold wrote to A. E. Verner of Innisfree, Alberta, saying that they had been instructed by Leaseholds to say that in consideration of the sum of $1,146.35 the company would, up to June 1, 1945, refrain from leasing the petroleum or natural gas rights in 14 quarter sections of land in Alberta which were described and that upon application by Verner at any time up to the date mentioned and upon his submitting evidence that he had actually spudded in and was drilling a well on any quarter section of the said land grant to him a lease of such rights upon such land upon the terms and conditions usually contained in such leases by the Canadian Pacific Railway Company in respect to its lands, the royalty reserved to be 12½ per cent and an annual rental of $1 a year. The letter further stated that if the option to obtain a lease of a quarter section was exercised before June 1, 1945, the company would, in consideration of a further payment, refrain from leasing the petroleum and natural gas rights for a further period, and in the event of this option in turn being exercised in respect of any quarter section, upon consideration of a further payment, to extend the option to June 1, 1946.

On October 10, 1945, Leaseholds wrote to George Cameron of Vermilion, Alberta, saying that in consideration of the payment of a sum of $682.30 it agreed to refrain for a period of 9 months from October 1, 1945, from leasing the petroleum or natural gas rights in 7 designated sections of land in Alberta, and that upon application of any time during the said period the company would cause Minerals to grant leases of these rights in the said lands or any part of them upon the terms and conditions contained in that company's Standard Form of Petroleum and Natural Gas Lease.

The rights given by these two letters are referred to in the evidence as reservations and at some time, apparently in the year 1944, Leaseholds granted to Rusylvia Oils Limited, a company, all the shares of which were owned by Mr. Harvie, a reservation on some 20,000 acres of the lands in question. The evidence does not disclose what amounts, if any, were paid by this company for this reservation or its exact nature, but the auditor's report of June 21, 1948, dealing with the accounts of the company as at December 31, 1947, stated that there was an account payable by Rusylvia Oils Limited of $1,059.05.

The profit and loss account for the company as shown in the auditor's report shows for the year 1944 income from reservations of lands, $1,228.92: for 1945, $1,185.24 and for 1946, $639.68 in addition to an amount of $79.60 referred to as "income from lease". For the year 1947 nothing is shown as having been received from reservations, but $4,228.59 was shown as "income from oil royalties" and $3,137.70 from "gravel lease and royalties". The amounts shown received from these 4 years were simply carried into the general accounts of the company as receipts from its operations which in each year showed a loss.

By an agreement dated May 15, 1946, Minerals and Leaseholds granted to Shell Oil Company of Canada Limited the right to purchase in fee the petroleum and natural gas and related hydrocarbons other than coal in 299,948.87 acres of the lands referred to. The arrangement had theretofore been negotiated by Leaseholds with the Shell Company, and as the fee of the mineral rights was in Minerals and the Shell Company wished to have an option to purchase the said rights outright, it was necessary for Minerals to join in the agreement. The option to purchase was given in consideration of the payment of $30,000 and was for the balance of the calendar year 1946, but provided for an extension for 4 further years upon the making of further payments and provided the price per acre to be paid for rights purchased during the term of the option. This option was not exercised and the rights of the Shell Company terminated on December 31, 1946. The amount so paid by it was shown in the balance sheet of the company for 1946 as capital surplus.

1959

WESTERN LEASEHOLDS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

Contemporaneously with the making of this agreement, Minerals and Leaseholds entered into a further agreement, reciting the circumstances under which the agreement was to be made with the Shell Company and stipulating that in the event of that company purchasing any mineral rights under the agreement, Minerals should receive out of the purchase price $2 per acre in full settlement of its interest and that Leaseholds should be entitled to any balance.

On November 1, 1946, Leaseholds granted a lease of the petroleum and natural gas rights in 3 quarter sections of land in the vicinity of Leduc, Alberta, to Imperial Oil Limited. This lease was for a term of 10 years certain at a yearly rental of $1 per acre and a royalty of 12½ per cent. of any production obtained. The lease obligated the lessee to commence drilling at some point on the leased area within 6 months, and unless production was obtained to drill certain further wells with the details of which we are not concerned.

On the same date Minerals granted to Leaseholds a lease of these 3 quarter sections for a term of 10 years certain which might be extended in certain events and which reserved a royalty of 10 per cent. of any production to Minerals.

The auditors report for the year 1947 does not give any detail of the amounts, if any, received in respect of this lease, a lump sum being shown for the royalties received, and it does not appear that any amount was paid to the company in consideration of granting the lease. The report gives certain particulars of the amounts shown as received from gravel leases, however, $2,000 being shown as received from Albert Gaumont as settlement for the years 1944, 1945 and 1946 in respect to gravel taken from the properties leased by the company, and a further sum of $977.70 as royalty for gravel taken in 1947. This amount was said to have been allocated 4/5ths to Minerals and 1/5th to Leaseholds.

By letter dated February 4, 1947, signed by Leaseholds and Minerals the two companies granted to Imperial Oil Limited an option exercisable at any time up to December 31, 1951, to purchase the petroleum and natural gas rights and related hydrocarbons other than coal in 193,135

acres of the lands which were particularly described in an attached schedule. The option payments were to be $50,000 annually with the privilege to the optionors to require prepayment of all of such payments on or before June 1, 1947. The price to be paid per acre and the royalty reserved, without any drilling commitment, which varied in each year, were stipulated and it was provided that all taxes and other carrying charges were to be paid by the optionee during the term of the option in respect to acreage covered in the option and in lands purchased. Prepayment of the 5 years' option payments was required by the optionors and the sum of $250,000 paid and shown in Leaseholds' accounts for 1947 as capital surplus.

By a letter dated December 31, 1947, addressed by Leaseholds to Minerals and approved by that company, it was stated that the parties had agreed that Leaseholds was entitled to retain the sum of $250,000 option money paid by Imperial Oil Limited in advance and that as the royalties payable in respect of any rights purchased by Imperial Oil Limited were less than the 10 per cent. royalty payable by Leaseholds under its agreement with Minerals, Leaseholds was given the exclusive option of purchasing from time to time up to 7 per cent. of any such royalty as might become payable upon defined terms.

By an agreement dated January 1, 1949, made between Minerals and the Barnsdall Oil Company and three other companies, to be referred to hereafter as the "Barnsdall group", the latter acquired certain rights in the petroleum, natural gas and related hydrocarbons in 146,279 acres of the lands. The negotiations leading up to this agreement had apparently been carried on by Leaseholds but the Barnsdall group wished to have their agreement direct with the registered owner of these rights and Minerals entered into the agreement at the request of Leaseholds.

By the agreement entered into which was referred to thereafter by the appellant as a "lease", Minerals granted to the Barnsdall group the exclusive right and privilege to explore by geological, geophysical and other means and to drill, produce and remove from the lands the petroleum substances the property of the owner which might be found to exist therein. The agreement was expressed to be for

1959

WESTERN LEASEHOLDS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

a primary term of 20 years from December 31, 1948 and for extended terms thereafter upon defined conditions. The expressed consideration payable by the lessees was the sum of $10, but as the evidence disclosed, the Barnsdall group paid to Leaseholds a further sum of $914,243.75 as consideration for the granting of the lease. The rights leased were not for a solid block of land but were for individual parcels which, throughout the area, immediately adjoined parcels in which Minerals retained the petroleum rights. There was no covenant in the agreement binding the lessees to drill for oil other than a covenant which appeared under a subheading "offsets" whereby the lessees agreed that in the event a well was drilled on an offset location and petroleum substances were produced the lessees were obligated to drill a well on the unit contiguous to the drill site from which production was being taken to a depth sufficient to penetrate any zone within the same geological period from which the offset well has obtained production. The lessees further agreed to pay a royalty of 12½ per cent. of all petroleum substances taken from the lands or the proceeds of the sale thereof.

Presumably it was agreed as between Minerals and Leaseholds at the granting of the Barnsdall lease as to the disposition to be made of the large cash payment to be made by that group, but this was not reduced at the time to writing.

Imperial Oil Limited, by a series of letters dated respectively February 2, 1949, July 26, 1950, October 3, 1950, and November 29, 1950, exercised its option to purchase the mineral rights in approximately 6,000 acres of the lands and by letters bearing these dates made the payments stipulated for by the agreement of February 4, 1947, and requested conveyances to it of the said rights. By a letter dated December 29, 1950, the company exercised its option upon the balance of the rights and requested a conveyance. The $250,000 which had been paid as consideration for the granting of the option was by the terms of the agreement applicable upon the purchase price and the balance remaining payable upon the exercise of the option on December 29, 1950 was $1,902,041.65 which was then paid.

While Imperial Oil Limited had requested conveyances of the mineral rights in each of these letters, that company apparently decided that it was preferable to obtain a lease from Minerals, this was agreeable to the appellant and such a lease for the entire area in respect of which the option had been given and which was determined to be 193,137.79 acres in extent was granted bearing date December 30, 1950. Such lease was for a term of 979 years at a yearly rent of $1 and royalties of 9 per cent. of the petroleum and natural gas produced reserved and a like royalty upon what were referred to as "plant products". Other terms of this lease, of importance to the parties, have no relevance to the matter under consideration.

By a document referred to as "Agreement of Settlement and Adjustments" dated December 30, 1950, Minerals and Leaseholds settled and defined their respective interests in the lease of the 3 quarter sections granted to Imperial Oil Limited at Leduc on November 1, 1946, the lease to that company of December 30, 1950, and the Barnsdall lease. This was rendered necessary by the fact that while Leaseholds was entitled to lease all of these lands, the actual leases made had been made at its request by Minerals. As to these three leases it was agreed that Leaseholds should retain all moneys paid by Imperial Oil Limited "as the purchase price for the said lease under the terms of the option letter dated the 4th of February, A.D. 1947" excepting the sum of $234,394.68 which was said to be the amount paid by Leaseholds to Minerals as consideration for reducing the royalty payable under the agreement for leases from 10 per cent. to 9 per cent. As to the Barnsdall lease it was agreed that it had been made by Minerals at the request of Leaseholds and as between the parties was to be considered as a sublease granted by Leaseholds under a further lease to be entered into on that date. It was provided that Minerals would forthwith enter into a new lease in an agreed form covering the petroleum and natural gas rights on approximately 293,568 acres which included the lands covered by the Barnsdall lease. Leaseholds, on its part, agreed to surrender to Minerals all other rights and interests

1959
WESTERN LEASEHOLDS LTD.
v.
MINISTER OF NATIONAL REVENUE
Locke J.

under the agreement for leases of July 7, 1944. The other considerations for the granting of the new lease are not relevant to the matters to be considered.

The questions to be determined are as to the liability of the appellant to income tax upon the $30,000 received from Shell Oil Company on May 15, 1946: $250,000 received from Imperial Oil Company Limited on February 4, 1947: $27,606.25 received from that company in 1949: $914,243.75 received from the Barnsdall group on February 22, 1949: and $1,953,771 received from Imperial Oil Company Limited in December of 1950.

The contention of the appellant put briefly is that these amounts were received from the sale of rights which in its hands were a capital asset. The respondent contends that each of the amounts were profits from a business carried on by the taxpayer in each of these years.

The statute applicable to the payments received in 1946 and 1947 is the *Income War Tax Act,* R.S.C. 1927, c. 97, as amended. Section 3 of that statute defines "income" as including the annual net profit or gain from a trade or commercial business or calling.

The payments received in the years 1949 and 1950 are subject to the provisions of *The Income Tax Act* of 1948, c. 52. The following sections are to be considered:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

Section 127(1):

In this Act,

* * *

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

The learned trial judge, after reviewing the evidence, said in part:

> In my view, no distinction can be drawn between the five items of profit now under consideration. They are all gains which fall within the test laid down in *California Copper Syndicate v. Harris*, (1904) 5 T.C. 159. . . .
>
> Generally speaking, a business is operated for the purpose of making a profit and the pursuit of profits may be carried on in a variety of ways and by different operations. In the instant case, it seems to me that the business of Leaseholds was carried out in two stages and involved two different operations. While the purpose of ultimately developing its own resources may have been kept in mind throughout, the first operation necessarily consisted of the acquisition and disposition of mineral rights so as to acquire funds with which to enter into the second stage, namely, the drilling for and operation of oil and gas wells on its own account. The possibility of disposition of the mineral rights had been contemplated since the company was formed. In dealing with its mineral rights in this fashion, it did not do so accidentally but as part of its business operations, and although possibly that line of business was not of necessity the line which it hoped ultimately to pursue, it was one which it was prepared to undertake, and, by its charter, had power to undertake.
>
> * * *
>
> In my opinion, the profits here in question were gains made in the carrying on or carrying out of a business and in the scheme for profit-making. Those relating to the years 1946 and 1947 are therefore within the definition of income as found in s. 3(1) of the *Income War Tax Act*: . . . Those profits relating to the years 1949 and 1950 fall within the provisions of ss. 3 and 4 of *The Income Tax Act* 1948 and are therefore taxable profits.

These findings of fact as to the nature of the business which the appellant intended to carry on and that actually carried on during the years in question are, in my opinion, completely supported by the evidence.

As the evidence discloses, it was at the direction of Mr. Harvie that the Memorandum of Association of the company included among the declared objects the carrying on of the business of drilling for, producing and marketing oil and also the acquiring by purchase, lease, concession or licence mineral properties or any interest therein and selling and disposing of or otherwise dealing with the same or any interest therein. In *Anderson Logging Company v. The King*[1], Duff J., as he then was, said that if the transaction in question belongs to a class of profit-making operations contemplated by the Memorandum of Association, *prima facie* at all events the profit derived from it is a profit

[1] [1925] S.C.R. 45 at 56, 2 D.L.R. 143.

1959

WESTERN LEASEHOLDS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

derived from the business of the company. That presumption may, of course, be negatived by the evidence as was done in the case of *Sutton Lumber & Trading Company v. The Minister of National Revenue*[1]. In the present case, however, the evidence, far from negativing the presumption, appears to me to support it.

The evidence given by the witness Harvie which was accepted by the learned trial judge showed that it was his intention and the intention of his associates that the appellant would carry on the business of drilling for, producing and marketing oil. Before this purpose could be accomplished, it was necessary to determine whether oil was present in the area in paying quantities. It is made manifest by the evidence that it was also contemplated by them that by granting subleases, reservations or options or otherwise turning to profitable account the rights held under its contract with Minerals moneys might be realized which might enable it eventually to produce and market oil.

The area in which these rights were held was some 775 square miles in extent and to adequately explore it to determine whether it contained oil in paying quantities required an expenditure of moneys which was entirely beyond the financial capacity of the appellant. The means adopted to insure the exploration of the large area covered by the options granted to the Shell and Imperial Oil companies and that leased to the Barnsdall group was to require payment of these large amounts for the granting of the options and the lease respectively. The increase in the cost to the optionees of acquiring title to the mineral rights from year to year during the term of the options was designed to insure that the work of exploration would be done with at least a greater degree of expedition than if the price from year to year remained constant.

It is to be remembered that by the agreement for leases made between Minerals and the appellant on July 7, 1944, the appellant was entitled to the grant of leases in its own name and that it was given the privilege of subletting the rights to the others. This appears to me to clearly indicate that it was contemplated that the appellant might turn its

[1] [1953] 2 S.C.R. 77, 4 D.L.R. 801, [1953] C.T.C. 237, 53 D.T.C. 1158.

rights to profitable account by granting subleases for such consideration as it might be able to obtain from others as well as by operating on its own account.

The reservations given to Verner on October 4, 1944, to George Cameron on October 10, 1945, and to Rusylvia Oils Limited and the payments received for these reservations were treated simply as part of the business of the appellant and the moneys received carried into its general accounts and treated as receipts from its business. There had apparently been some prior commitment to Verner by the former owners which Mr. Harvie required the appellant to carry out by granting the reservation but this did not apply to the case of Cameron. The evidence as to the arrangement made with Rusylvia Oils Limited for a reservation of 20,000 acres is rather vague and may have been given in pursuance of a commitment by the former owners of the mineral rights. The payments received from that company, however, were apparently carried into the company's general income as in the case of Verner and Cameron. The royalties received from Imperial Oil Limited under the lease granted by the appellant of November 1, 1946, were similarly treated as part of the company's business receipts. Similarly the $2,000 received from Albert Gaumont for gravel taken from the properties leased during the years 1944, 1945 and 1946 and the further amount paid in 1947 were treated as business receipts of the company.

I agree with the learned trial judge that as regards the liability to taxation there is no sound distinction to be drawn between the five items of profit under consideration. The fact that those controlling the company intended at the outset that its principal or one of its principal activities should be the production and sale of oil does not really touch the question to be decided. Before a start could be made in carrying out that purpose it was necessary to determine the existence of oil. That the appellant, consistently with one of its declared objects, carried on the business of dealing with the rights it had acquired from Minerals with a view to profit appears to me to be demonstrated by the evidence. In my view the moneys received from Verner, Cameron and Rusylvia Oils Limited for the reservations granted to them, from the Shell and Imperial Oil companies

1959

WESTERN LEASEHOLDS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

for the granting of the options, and by the latter company for the granting of the lease and the amount paid by the Barnsdall group were all profits realized from the business of dealing in these mineral rights equally as were the royalties reserved which also formed part of the consideration for the granting of these various rights. The fact that it was intended that the moneys so realized would be utilized to finance the production of oil is an irrelevant circumstance in determining whether what was done was in truth the carrying on of a business for the purpose of making profit.

I would dismiss this appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Stikeman & Elliott, Montreal.*

*Solicitor for the respondent: A. A. McGrory, Ottawa.*

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1959

*Jun. 17, 18
Nov. 30

WESTERN MINERALS LIMITED .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Income tax—Capital gain or income—Company—Powers under memorandum of assosiation—Money received under oil leasing agreement—The Income Tax Act, 1948(Can.), c. 52, ss. 3, 4.*

In 1944, the appellant company and Western Leaseholds Ltd. (see *ante* p. 10) were incorporated and were at all relevant times owned and controlled by the same shareholders and directors. The declared objects of each company included, *inter alia*, the carrying on of the business of drilling for, producing and marketing oil, and the acquiring by purchase, lease, concession or licence mineral properties or any interest therein and selling and disposing of or otherwise dealing with the same or any interest therein. The appellant acquired the freehold mineral rights in some 496,000 acres, and Western Leaseholds Ltd. acquired the right to lease or sublease these rights on a 10 per cent. royalty basis.

In 1950, the appellant company, at the request of Western Leaseholds Ltd., leased certain acreage to Imperial Oil Ltd. on a 9 per cent. royalty basis. The money for the lease was paid by Imperial Oil Ltd. to Western Leaseholds Ltd., which in turn paid to the appellant

*PRESENT: Taschereau, Locke, Martland, Judson and Ritchie JJ.

in the years 1949 and 1950 a sum of over $234,000. The Minister treated this amount as taxable income, and this assessment was upheld by the Exchequer Court.

*Held:* The money in question was taxable income.

Western Leaseholds Ltd. was under no liability to pay any royalty to the appellant except in respect of leases granted to it. It was under no legal obligation to pay these moneys. The receipt of these moneys by the appellant should be treated as moneys paid to it in the ordinary course of its business of dealing in mineral rights with a view to profit, and as such, part of its income for the purposes of taxation. Even if Western Leaseholds Ltd. had been under any legal liability for the payment of royalty in respect of the mineral rights leased in this case, the moneys received formed part of the appellant's taxable income.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada[1], affirming an assessment made by the Minister of National Revenue. Appeal dismissed.

*A. S. Pattillo, Q.C.,* and *J. B. Tinker,* for the appellant.

*D. W. Mundel, Q.C., A. L. DeWolf* and *K. E. Eaton,* for the Respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal from a judgment of Cameron J. delivered in the Exchequer Court[1] which dismissed the appeal of this appellant from assessments under *The Income Tax Act* for the taxation years 1949 and 1950. By the consent of the parties the evidence given on an appeal by Western Leaseholds Limited (referred to hereafter as "Leaseholds") before the Exchequer Court was made applicable to the present matter and the judgment delivered by Cameron J. disposed of both appeals[1].

In the reasons for judgment in the case of Leaseholds which will be delivered contemporaneously with the giving of judgment in the present matter I have stated at length the facts concerning the incorporation of these two companies, both of which were incorporated at the instance of Mr. Eric L. Harvie, a barrister practising in Calgary. I refer to the facts as there stated without repeating them.

The present appeal concerns the liability of the appellant to taxation on a sum of $34,850.13 received by it in the year 1949 from Leaseholds and a further sum of $199,544.55 from that company in 1950.

[1] [1958] Ex. C.R. 277, [1958] C.T.C. 257, 58 D.T.C. 1128.

1959

WESTERN MINERALS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

It is the contention of the appellant that these two amounts represent moneys received from the realization of what was a capital asset in its hands, that asset being what is said to have been a right to be paid a royalty by Leaseholds of 10 per cent. of the value of the production of petroleum in the area in which the mineral rights were leased to Imperial Oil Company. The respondent contends that these are simply moneys realized in the course of the carrying on of the appellant's business of dealing in the mineral rights acquired by it in 1944 with a view to profit.

The evidence is by no means clear as to the true nature of the consideration for the making of these payments by Leaseholds.

In the balance sheet of the appellant for the year 1949 prepared by its auditors and filed with the income tax return there appeared an entry which read:

Realization from the sale of a royalty interest .....$ 34,850.00

This was treated as a capital gain by the auditors. For the year 1950 the balance sheet showed a like entry with the amount of realization stated at $234,395. There are deductions from the latter amount which reduced the amount in question for the year 1950 to that first above stated.

The Minister, in making his assessment for these years, treated the amounts as business receipts of the company for the purpose of computing its taxable income.

The appellant filed notices of objection to the disallowance of its claim that these were receipts from the realization of a capital asset and these notices form part of the record. The objection to the assessment for the year 1949 claimed that pursuant to the agreement made by the appellant with Leaseholds on December 31, 1947, whereby it had granted to that company the right "to purchase up to 7% of the said 10% gross royalty on the lands included under the Imperial Oil option" at the prices stated, Leaseholds had purchased 6 per cent. of the aforesaid gross royalty at a purchase price of $34,850.13 calculated in accordance with the aforesaid agreement. The reason for the purchase was stated to be that as the royalty payable by Imperial Oil under the option exercised in that year was merely 4 per

cent. and since "Western Leaseholds, in turn, was required to pay a 10% gross royalty to the taxpayer, the purchase had been necessary."

In respect to the year 1950, the objection stated that when the Imperial Oil Company exercised its option in 1950 in respect of 190,929.29 acres it had been agreed between Leaseholds and Minerals that the latter should grant a lease direct to Imperial Oil reserving a 9 per cent. royalty. As this was 1 per cent. less than Leaseholds was required to pay under the option it held from the appellant, Leaseholds was required to account to the appellant for the 1 per cent. difference which it did

> by buying a 1% gross royalty from the Apellant at the price for royalty above set out, being $199,544.55 (after an adjustment to a payment received in 1949 by the Appellant in connection with the same transaction).

In the Agreement for Leases dated July 7, 1944, made between the appellant and Leaseholds, the appellant granted to the former company:

> . . . the sole and exclusive right to acquire a lease and/or leases of the said minerals in the form and upon the terms and conditions included in the draft lease attached hereto as Schedule "B", and subject to the terms and conditions hereinafter set forth.
>
> The Owner will grant the Operator a lease or leases covering any or all of the said minerals in respect to any or all of the said lands as may be from time to time requested by the Operator.
>
> * * *
>
> IT IS UNDERSTOOD AND AGREED that the Operator shall be entitled to operate the said leases on its own behalf or may at its sole election grant subleases in respect to any or all of the said minerals . . . .

The draft lease which formed Schedule "B" to the agreement was expressed to be between Minerals as lessor and Leaseholds as lessee: the consideration expressed was the sum of $1, and in addition it was provided:

> . . . that the Operator shall and will pay a royalty in cash of 10% of the current market value at the time and place of production of all leased substances produced, saved and sold from the said leased lands.

As the evidence disclosed, the option dated May 15, 1946, which was given to the Shell Oil Company was an option to purchase in fee the mineral rights, and Minerals, as the owner, of necessity joined as a party in giving it. While that option was dropped and nothing further paid by the

1959

WESTERN MINERALS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

optionee, the option granted, if exercised, required a payment of a fixed sum per acre and in addition a royalty which increased from year to year during the term of the option varying from 2½ per cent. to 6½ per cent. No lease of the area was then granted to Leaseholds and accordingly no royalty would have become payable by it under the agreement of July 7, 1944, if production of oil had been obtained. The parties however, by an agreement made contemporaneously with the granting of the option to the Shell Company which recited that the companies considered that it was in their mutual interests to grant the option, agreed that in the event that Shell purchased any of the mineral rights, Minerals would accept $2 per acre as settlement for its interest in the rights so purchased. It does not appear that it occurred to Mr. Harvie and his associates who directed the policy of both companies that under this option, if exercised, any liability for royalty would attach to Leaseholds in respect of any production obtained.

When the Imperial Oil option was given on February 7, 1947, it gave to the optionee the right to acquire the fee in the mineral rights in consideration of a fixed price per acre and a royalty which varied from 3 per cent. to 7 per cent. dependent upon the year in which the option was exercised. On December 31, 1947, after the Imperial Oil Company had paid the $250,000 as payment for the option for five years, Leaseholds wrote a letter addressed to Minerals which was approved by the latter, which, after referring to the option granted, said in part:

> You agree that we are entitled to retain the sum of $250,000 option money paid by Imperial and are under no liability to account to you in respect thereof.
>
> Under our Lease with you, you are entitled to a 10% royalty, but under the Imperial Option the royalty reserved graduates from 3% to 7%, depending on the year of purchase, and you hereby grant us the exclusive option of purchasing from time to time up to 7% of your royalty on the following basis:

| | *Per Acre* |
|---|---|
| On the first 10,000 acres ..... | $2.63 for each 1% purchased. |
| " " second " " ..... | 2.10 for each 1% purchased. |
| " " third " " ..... | 1.58 for each 1% purchased. |
| " " balance of acreage ..... | 1.05 for each 1% purchased. |

It is to be noted that this letter states that under Leasehold's lease Minerals was entitled to a 10 per cent. royalty but there was, in respect to these lands, no such lease and no such liability. The liability under the agreement of July 7, 1944, was only in respect of leases granted to Leaseholds. The agreement contained no provision for Minerals granting leases to others, and accordingly there could be no such liability in the case of the option to Imperial Oil which was for the sale of the mineral rights outright or under the lease which was eventually granted unless such liability was imposed by some further agreement made between the parties.

When, however, the Imperial Oil Company had exercised its option and paid the consideration, a further agreement was made between the appellant and Leaseholds dated December 30, 1950, described as an "Agreement of Settlement and Adjustments". The agreement provided, *inter alia*, that the rights of Leaseholds under the agreement of July 7, 1944, were to be terminated on the completion of the arrangements provided for which required Minerals to grant a lease in a form which was made a schedule to the agreement of all of the mineral rights in the area less those in the area in respect of which a lease had been granted on November 1, 1946, to Imperial Oil Limited, referred to as the "Leduc Lease" and the 193,137.79 acres covered by the lease to Imperial Oil dated January 15, 1951. A further term of the agreement was that Leaseholds should be entitled to retain all moneys paid by Imperial Oil Limited "as the purchase price for the said lease" under the terms of the option letter dated February 4, 1947, except the sum of $234,394.68:

> . . . being the amount paid by Leaseholds to Minerals as consideration for reducing the royalty payable under the Agreement for Leases from 10% to 9%, which sum was computed on the basis set forth in letter between the parties hereto dated the 31st day of December, A.D. 1947.

Mr. Harvie, who, through his majority share interest, controlled both companies, gave evidence at the trial, but said nothing about these payments. Mr. Arnold, a director, who was in close touch with the management of both companies during this period, merely produced the letter of December 31, 1947, signed by the parties without comment.

1959

WESTERN MINERALS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

Mr. H. W. Meech who was secretary of both companies in November 1947 and thereafter simply said that the agreement said that the sum was paid by Leaseholds to Minerals as consideration for reducing the royalty payable under the Agreement for Leases and that the amounts were computed in accordance with the schedule set out in the agreement. The agreement was that dated December 31, 1947.

As the Agreement for Leases dated July 7, 1944, obligated Leaseholds to pay, *inter alia,* a royalty of 10 per cent. of the value of production only upon lands leased to it by Minerals and as the option given to Imperial Oil on February 7, 1947, was for a sale outright of the mineral rights upon defined terms and as, when the option was exercised for the balance of the lands in 1950, a lease of the remaining 190,929.29 acres was, at that company's request, substituted for a conveyance of the mineral rights, Leaseholds was under no liability to pay any amount as royalty to Minerals when that transaction was completed unless some independent agreement was made between them whereby it assumed such liability. As to this it is sufficient to say that there is no evidence of any such agreement. The appellant indeed does not appear to suggest that any such agreement had been made.

It will be seen that the letter of December 31, 1947, above quoted says that "under our lease with you, you are entitled to a 10% royalty", but this is inaccurate. There was no such lease of the area affected by the Imperial Oil option and no liability accordingly under the Agreement for Leases. Similarly the recital in the Agreement of Settlement of December 30, 1950, says that the amount in question was paid as consideration for reducing the royalty payable under the Agreement for Leases when, in truth, no royalty was payable by Leaseholds under that agreement.

The various positions taken by the appellant in regard to the making of these payments has not been consistent. In the notice of objection to the assessment in regard to the payments made in 1949 it was said that the sum of $134,850.13 was paid to purchase 6 per cent. of the gross royalty reserved which presumably meant the royalty payable under the Agreement for Leases. However, for the year 1950, the notice of objection stated that the moneys had

been paid to purchase a 1 per cent. gross royalty from the taxpayer, this apparently referring to the gross royalty payable under the terms of the Imperial Oil option. The settlement agreement, however, says that the moneys were paid as the consideration for reducing the royalty payable by Leaseholds.

In the reasons for judgment delivered by Cameron J. it is said that counsel for Minerals had contended that "in effect, Leaseholds purchased 1% of the Imperial Oil royalty from Minerals". The learned judge rejected this contention since he considered that it was clear that after December 30, 1950, Minerals was entitled to the full royalty of 9 per cent. and Leaseholds to no part of it. He considered that the only reasonable interpretation to put upon that part of the Agreement of Settlement and Adjustments referred to was that Minerals thereby agreed to cancel that part of their contract of July 7, 1944, by the terms of which Leaseholds was bound to pay Minerals 1 per cent. more royalty than Imperial Oil would pay by the terms of the new agreement of December 30, 1950.

I am unable, with great respect, to agree with this conclusion since Leaseholds was under no liability to pay any royalty except in respect of leases granted to it.

The argument addressed to us by counsel for the appellant is that the amount was paid to Minerals and received by it as the consideration for commuting its right to receive the larger royalty which is to adopt the finding made by the learned trial judge. In the absence of any evidence of an agreement imposing such liability, the receipt of these moneys by the appellant should, in my opinion, be treated as moneys paid to it in the ordinary course of its business of dealing in the mineral rights with a view to profit, and as such, part of its income for the purposes of taxation. Once it is shown that Leaseholds was under no legal obligation to pay these amounts, the whole basis of the appellant's argument disappears.

While this is, in my view, fatal to the appeal, I would add that if Leaseholds had been under any legal liability for the payment of royalty in respect of the mineral rights

1959

WESTERN MINERALS LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

acquired by conveyance or lease by Imperial Oil Limited, I would agree with the learned trial judge that the moneys received form part of its taxable income.

The Memorandum of Association of the appellant declared the same objects as those stated in that of Leaseholds. As the learned trial judge has pointed out, the evidence makes it clear that Minerals never intended to go into production on its own account and it could make a profit only by the disposal in one form or another of such mineral rights as it owned. The source of these moneys is not in doubt. They form part of the amounts paid by Imperial Oil Limited—to adopt the language of the Agreement of Settlement of December 30, 1950—as "the purchase price for the said lease". I think it impossible to distinguish receipts of this nature from rents and royalties received under the lease when granted in determining whether they are taxable as income.

I would dismiss this appeal with costs.

*Appeal dismissed with costs*

*Solicitors for the appellant: Stikeman & Elliott, Montreal.*

*Solicitor for the respondent: A. A. McGrory, Ottawa.*

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1959

*Jun. 15, 16
Nov. 30

THE ATTORNEY-GENERAL FOR ONTARIO AND DISPLAY SERVICE COMPANY LIMITED .... APPELLANTS;

AND

VICTORIA MEDICAL BUILDING LIMITED, THE ROYAL BANK OF CANADA, J. IRVING OELBAUM AND TOCA INVESTMENT ESTABLISHMENT .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Constitutional law—Mechanics' liens—Trial of mechanics' lien actions by Master in County of York—Whether s. 31(1) of the Mechanics' Lien Act, R.S.O. 1950, c. 227, as amended by 1953, c. 61, s. 21, giving such*

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott, Martland, Judson and Ritchie JJ.

*powers to Master, ultra vires—Whether violation of s. 96 of the B.N.A. Act—Whether legislation in relation to procedure in civil matters under s. 92(14) of B.N.A. Act—The Judicature Act, R.S.O. 1950, c. 190, ss. 67, 68—Review of the history of the Mechanics' Lien Act.*

Section 31(1) of the *Mechanics' Lien Act*, which confers upon the Master or Assistant Master in the County of York, Ontario, jurisdiction to try mechanics' lien actions, is *ultra vires*.

*Per* Kerwin C.J.: Applying the test set forth in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1949] A.C. 134, the jurisdiction conferred upon the Master by the impugned legislation broadly conforms to the type of jurisdiction exercised by the Superior, District or County Courts at Confederation. Section 31(1), in attempting to confer jurisdiction upon the Master in all cases no matter what the amount claimed might be, is beyond the jurisdiction of the Legislature of the Province. There is no similarity to references directed under ss. 67 and 68 of the *Judicature Act* of Ontario. Here the Master issues a final judgment subject only to appeal to the Court of Appeal. This is not a matter of procedure within s. 92(14) of the *B.N.A. Act*, and the position is not bettered because of s. 31(2) of the *Mechanics' Lien Act*.

*Per* Locke, Cartwright, Abbott, Martland and Judson JJ.: Even though this is a case where the Province has increased the jurisdiction of a provincially appointed judicial officer, by redistributing the work within a s. 96 Court and assigning new work to this officer, nevertheless the legislation is *ultra vires*. It is in conflict with the appointing power under s. 96 of the *B.N.A. Act* for two reasons, namely, the nature of the jurisdiction conferred upon the Master and the fact that he is given power of final adjudication in these matters, subject to the usual right of appeal to the Court of Appeal as from a single judge.

The nature of the jurisdiction, which is clearly defined by s. 31(1) of the Act, is a very wide departure from the work usually assigned to the Master. The legislation makes him a judge in this particular type of action. All his functions are exercised in an original way and constitute a new type of jurisdiction for the Master which in many aspects is not merely analogous to that exercised by a s. 96 judge but is, in fact, that very jurisdiction, limited only to one particular field of litigation. There is usually no inherent jurisdiction in the office of the Master. Everything the Master does must be authorized. This does not mean, however, that the Legislature can assign any and all work to him. Section 96 operates as a limiting factor.

As to the mode of exercise of the jurisdiction, the Master, being the only trial officer in the County of York, gives a final adjudication, subject to an appeal to the Court of Appeal. He is not acting as a referee under ss. 67, and 68 of the *Judicature Act*. A distinction was correctly drawn below between the position of the Master exercising delegated jurisdiction as a referee and his position when he exercises original jurisdiction under s. 31(1). Anything that he does on a reference depends for its validity on the judge's original order. On the other hand, under the impugned legislation, the Master issues a judgment which is subject to a direct appeal to the Court of Appeal. This assignment of the power of final adjudication goes beyond procedure and amounts to an appointment of a judge under s. 96 of the *B.N.A. Act*.

1959

ATTY-GEN. FOR ONTARIO AND DISPLAY SERVICE CO. LTD. v. VICTORIA MEDICAL BLDG. LTD.

The legislation is not saved by s. 31(2) of the Act, since the jurisdiction of the judge can only be sought if one or other of the litigants chooses to apply for it and is assumed only in the judge's discretion. *Per* Locke, Martland and Ritchie JJ.: There is no analogy between the limited and controlled jurisdiction of the Master on a reference and the original jurisdiction under the authority which the Act purports to confer, and which is not subordinate to but in substitution for the jurisdiction of a judge of one of the Courts within the interdment of s. 96 of the *B.N.A. Act*. That jurisdiction is not a mere change in the procedure of provincial Courts.

APPEAL from a judgment of the Court of Appeal for Ontario[1], quashing a judgment of the Master in a mechanics' lien action for want of jurisdiction. Appeal dismissed.

*D. B. Black,* for the appellant Display Service Co. Ltd.

*D. S. Maxwell* and *L. A. Chalmers,* for the Attorney General of Canada.

*A. Kelso Roberts, Q.C., C. R. Magone, Q.C.,* and *Miss C. M. Wysocki,* for the Attorney-General for Ontario.

THE CHIEF JUSTICE:—This is an appeal in a mechanics' lien action against a decision of the Court of Appeal for Ontario[1] which had allowed an appeal by the Royal Bank of Canada from a judgment of the Master of the Supreme Court of Ontario at Toronto and had quashed that judgment. The Court of Appeal proceeded on the ground that the Master had no jurisdiction to pronounce judgment because s. 31(1) of *The Mechanics' Lien Act,* R.S.O. 1950, c. 227, as amended in 1953 by s. 21 of c. 61, was *ultra vires* the Legislature of the Province of Ontario. An appeal to this Court was launched by the plaintiff lienholder, Display Service Co. Limited, but the Attorney-General for Ontario was added as a party and he also appealed. One of the defendants who was a first mortgagee has foreclosed and, as a result, neither it, nor any other defendant, took part in the appeal. The Attorney General of Canada was permitted to intervene and counsel on his behalf filed a factum and supported the judgment of the Court of Appeal. The Attorneys-General of the other Provinces were notified but did not apply for leave to intervene.

[1] [1958] O.R. 759, O.W.N. 93, 16 D.L.R. (2d) 1.

The judgment of the Master declared that the plaintiff was entitled to a lien for a large sum of money under *The Mechanics' Lien Act* upon the land owned and occupied by Victoria Medical Building, Limited. Before any evidence was taken counsel for that company had consented to judgment for the amount claimed. The company was required to pay the money into Court on or before a fixed date, in default of which the land was to be sold and the purchase money applied as set forth in the judgment. The land being in the County of York the Master tried the action pursuant to subs. (1) of s. 31 of the Act, as amended in 1953. That subsection, and subs. (2) as amended in the same year which will be referred to later, read as follows:

> (1) The action shall be tried in the county or district in which the land or part thereof is situate before a judge of the county or district court, provided that where the land is situate wholly in the County of York the action shall be tried before a Master of the Supreme Court or an Assistant Master.
>
> (2) Notwithstanding subsection 1, upon the application of any party to an action, made according to the practice of the Supreme Court, and upon notice the court may direct that the action be tried before a judge of the Supreme Court at the regular sittings of the court for the trial of actions in the county or district in which the land or part thereof is situate.

The Court of Appeal considered that s. 96 of the *British North America Act*, 1867, applied and that the Legislature was attempting to confer upon a provincial appointee, the Master of the Supreme Court of Ontario, powers that appertained only to judges of the Superior, District or County Courts. The Attorney-General for Ontario contended that at the date of Confederation the Master was a judicial officer exercising a jurisdiction like that conferred upon him by *The Mechanics' Lien Act* and that an extension of his jurisdiction beyond that possessed by him at Confederation does not necessarily violate s. 96. He also contended that the Legislature was merely dealing with the constitution, maintenance and organization of provincial Courts including procedure in civil matters within Head 14 of s. 92 of the *British North America Act*. The relevant provisions of that Act are the following:

> 92. In each Province the Legislature may exclusively make Laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—
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> * * *

1959

ATTY-GEN. FOR ONTARIO AND DISPLAY SERVICE CO. LTD. v. VICTORIA MEDICAL BLDG. LTD.

Kerwin C.J.

14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

* * *

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

100. The salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

129. Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act.

At the time of Confederation in 1867 a lien of a contractor on the land on which he had constructed a building or of one who had furnished material incorporated in a building or of a wage earner who had worked on such building was unknown to the common law, whereunder the right of a person to retain property upon which he had performed labour applied merely to personal property. It was only in 1873, by 36 Vict., c. 27, that the Ontario Legislature enacted "An Act to establish Liens in favour of Mechanics, Machinists and others". These liens and the rights of the holders thereof were widened in scope by subsequent legislation but by the terms of the first enactment, where the amount of the claim was within the jurisdiction of the county or division courts respectively, proceedings to recover the same according to the usual procedure of the said court by judgment and execution might be taken in the proper division Court or the county Court of the county in which the land charged was situate. The judge of the said Courts might proceed in a summary manner by summons and order, might take accounts and make the necessary enquiries, and in default of payment might direct the sale

of the estate and interest charged at such time as the same could be sold under execution. In other cases the lien might be realized in the Court of Chancery according to the usual procedure to that Court.

Undoubtedly the decision of the Court of Appeal for Ontario in *French v. McKendrick*[1], relied upon by the appellant and the Attorney-General for Ontario, was approved by this Court in *Reference Re Adoption Act, etc.*[2], but at p. 417, Sir Lyman Duff speaking for the Court pointed out the true meaning of that decision, viz, that Division Courts, Courts established before Confederation, exercising jurisdiction in contract and in tort within defined limits as to amount and value, presided over, by the statute constituting them, by a County Court judge or by a member of the Bar named as deputy by one of the judges, were not Courts within the scope of s. 96 of the *British North America Act* and that, therefore, the enactment authorizing the appointment of a deputy judge from the Bar by a county judge was competent as well as legislation enlarging the pecuniary limits of jurisdiction. In *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*[3], the Judicial Committee of the Privy Council, at p. 152, noted that a passage from the judgment of the Board by Lord Blanesburgh in *O. Martineau v. City of Montreal*[4] had been made the basis for the proposition that it is incompetent for provincial Legislatures to legislate for the appointment of any officer of any provincial Court exercising other than ministerial functions. They agreed with the view expressed by Sir Lyman Duff in the *Adoption Act* case that that was a wholly unwarranted view of *Martineau's* case which was directed neither to Courts of summary jurisdiction of any kind nor to tribunals established for the exercise of jurisdiction of a kind unknown in 1867.

Furthermore it was pointed out in the *Labour Relations* case that it was sufficient for the purpose of the decision of the *Reference Re Adoption Act* for Sir Lyman Duff to pose this question:—"Does the jurisdiction conferred upon

[1] (1930), 66 O.L.R. 306, [1931] 1 D.L.R. 696.
[2] [1938] S.C.R. 398, 9 D.L.R. 497, 71 C.C.C. 110.
[3] [1949] A.C. 134, [1948] 4 D.L.R. 673.
[4] [1932] A.C. 113, 1 D.L.R. 353, 52 Que. K.B. 542.

1959

ATTY-GEN. FOR ONTARIO AND DISPLAY SERVICE CO. LTD. v. VICTORIA MEDICAL BLDG. LTD.

Kerwin C.J.

magistrates under these statutes broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of s. 96?" In the *Labour Relations Board* case Their Lordships pointed out that if the same alternative had been presented to them they might well answer it in like manner, but they preferred to put the question in another way which might be more helpful in the decisions of similar issues, namely:—"Does the jurisdiction conferred by the Act on the appellant Board broadly conform to the type of jurisdiction exercised by the Superior, District or County Courts?"

In the early days of *The Mechanics' Lien Act* in Ontario questions were raised as to whether a lien attached upon an engine house and turn-table of a railway company and it was argued that a lienholder was in a better position than an execution creditor and that the true analogy was with a vendor's lien. In *King v. Alford*[1], Chancellor Boyd following *Breeze v. Midland R.W. Co.*[2], stated that a vendor's lien arises out of the very nature of the transaction and is inapplicable to a lien created by the statute. While he pointed out that the Act itself rather indicates an analogy with proceedings by way of execution, he did not lay stress upon the point but at p. 646 referred with approval to Pomeroy's Equity Jurisprudence ss. 1238-9, where it was stated that mechanics' liens "are enforced by ordinary equitable actions resulting in a decree for sale and distribution of the proceeds identical in all their features with suits for the foreclosure of mortgages by judicial action".

Notwithstanding the fact that mechanics' liens were unknown at the time of Confederation, my view is that Pomeroy correctly stated the nature of the action given by *The Mechanics' Lien Act* and that to apply the test set forth in the *Labour Relations Board* case the jurisdiction conferred upon the Master by subs. (1) of s. 31 of *The Mechanics' Lien Act* broadly conforms to the type of jurisdiction exercised by the Superior, District or County Courts at Confederation. This is not to say that, if it were so provided, a judge of a Division Court could not exercise the

[1] (1885), 9 O.R. 643. [2] (1879), 26 Gr. 225.

power to give judgment for the amount claimed and for the sale of the land so long as the amount involved was within the jurisdiction of the Division Court or that such powers might not be exercised by a member of the Bar named as deputy by one of the judges,—following *French v. McKendrick* as approved in the *Adoption Act* case. Here, however, the amount involved is large and beyond the jurisdiction of a Division Court. The attempt to confer jurisdiction upon the Master in all cases no matter what the amount claimed might be is beyond the jurisdiction of the Legislature of the province.

This is not similar to references directed under ss. 67 and 68 of *The Ontario Judicature Act*. There the Master acts as a referee pursuant to an order of a judge and he makes a report which is subject to variation by a judge. In the present case the Master issues a final judgment, which requires no confirmation, but remains in full force and effect unless set aside upon appeal to the Court of Appeal. This is not a mere matter of procedure within Head 14 of s. 92 of the *British North America Act* and the position is not bettered because of subs. (2) of s. 31 of *The Mechanics' Lien Act*. That subsection requires action by one of the litigants as well as the exercise of a discretion by a Supreme Court judge.

The appeal should therefore be dismissed but under the circumstances there should be no costs.

The judgment of Locke, Cartwright, Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] which holds that s. 31(1) of *The Mechanics' Lien Act*, R.S.O. 1950, c. 227, is beyond the powers of the Ontario Legislature in so far as it requires County of York actions to be tried before a Master or an Assistant Master of the Supreme Court of Ontario. Section 31(1) reads:

> The action shall be tried in the county or district in which the land or part thereof is situate before a judge of the county or district court, provided that where the land is situate wholly in the County of York the action shall be tried before a Master of the Supreme Court or an Assistant Master.

[1] [1958] O.R. 759, O.W.N. 93, 16 D.L.R. (2d) 1.

1959

ATTY-GEN. FOR ONTARIO AND DISPLAY SERVICE CO. LTD. v. VICTORIA MEDICAL BLDG. LTD.

Judson J.

The point of attack on the legislation is that this grant of jurisdiction to the Master involves a violation of s. 96 of the *British North America Act*, which reads:

> The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

The issue is, therefore, a very narrow one, the appointing power expressed in s. 96 being raised as a barrier against an attempted provincial distribution of function within the Court itself. The function in question is obviously judicial in character and is being exercised by an officer of one of the Courts mentioned in s. 96. The ratio of the judgment under appeal may be briefly stated in these terms: The Master, who is a judicial officer of the provincial Supreme Court, cannot be given this judicial power by s. 31(1) of *The Mechanics' Lien Act* because he then has a jurisdiction which "broadly conforms to the type of jurisdiction" exercised by those judges named in s. 96 of the *British North America Act*. This is said to be so even though *The Mechanics' Lien Act* creates entirely new rights, unknown either at common law or in equity because it gives the Master, as the trial officer, unlimited authority over all those matters covered by the Act, many of which are normally to be found within the jurisdiction of a Superior Court judge. Lastly, the judgment denies any analogy which might save the legislation between the position of the Master exercising delegated jurisdiction under an order of reference made by a judge pursuant to *The Judicature Act* and his position in exercising original jurisdiction under s. 31(1) of *The Mechanics' Lien Act*.

The position taken by the Attorney-General for Ontario is that this assignment of function to the Master is legislation in relation to procedure in civil matters under s. 92(14) of the *British North America Act*; that at the date of Confederation the Master was a judicial officer exercising a like jurisdiction, and that an extension of this jurisdiction in this case does not violate s. 96 of the *British North America Act*.

*The Mechanics' Lien Act* was first enacted by the Legislature of Ontario in 1873 (36 Vict., c. 27). A statutory lien was given to mechanics, machinists, builders, contractors

and other persons doing work upon or furnishing material to be used in the construction of buildings. The Act conferred jurisdiction to enforce the lien upon the County or Division Courts where the amount of the claim was within the jurisdiction of these Courts. Beyond these limits, the jurisdiction was in the Court of Chancery. The Master's jurisdiction to try the action first appeared in 1890, 53 Vict., c. 37, in *An Act to Simplify the Procedure for Enforcing Mechanics' Liens*. This legislation also abolished the writ of summons in these actions. Proceedings were to be instituted by the mere filing of a statement of claim in the office of the master or official referee having jurisdiction in the county where the lands were situate. By *The Mechanics' Lien Act*, (1896), 69 Vict., c. 35, s. 31, provision was made for the trial of these actions by the Master in Ordinary, a local Master of the High Court, an Official Referee or a judge of the High Court. At this point, jurisdiction was withdrawn from the County and Division Courts and the High Court Judge and the Master were left with concurrent jurisdiction. The section in its present form goes back to 1916 when it was enacted by 6 Geo. V, c. 31, s. 1, which provided for the trial of County of York actions before the Master and outside actions before the County or District Court Judge. A new Act was passed in 1923 (13 and 14 Geo. V, c. 30) which preserved this position but added what is now s. 31(2) giving any party the right to apply for a trial before a Judge of the Supreme Court. Under this subsection the judge has no initiative. This rests with the litigants and the judge's order is a discretionary one and does not issue as a matter of course. I have referred to the history of the legislation because it shows the development of the policy of the Legislature now expressed in s. 47(1) of the Act to have these liens enforced at the least expense, with procedure as far as possible of a summary nature, and it is, I think, accurate to state that most of this litigation in the County of York has been, since 1916, dealt with by the Master or Assistant Master in accordance with the expressed policy of the Act.

This is not a case where the Province has appointed a new judicial officer to preside over a newly created court or tribunal but one where the Province has increased the

1959

ATTY-GEN. FOR ONTARIO AND DISPLAY SERVICE CO. LTD. v. VICTORIA MEDICAL BLDG. LTD.

Judson J.

jurisdiction of a judicial officer already appointed by the Province. There is no question here of the use of a device to create a new s. 96 court with a new s. 96 judge under another name. What is happening is that work is being redistributed within the s. 96 court itself and new work assigned to a provincially appointed judicial officer. In a sense it is not even an exclusive assignment when a judge of the court, on motion by one of the parties, has the power of removal under s. 31(2).

Nevertheless, it is my opinion that the judgment under appeal is well founded and that this legislation is in conflict with the appointing power under s. 96 of the *British North America Act,* and I reach this conclusion for two reasons—the nature of the jurisdiction which is conferred upon the Master and the fact that he is given the power of final adjudication in these matters, subject to the usual right of appeal to the Court of Appeal as from a single judge.

The nature of the jurisdiction is clearly defined by s. 32(1) of the Act:

> 32.(1) The Master, Assistant Master and the county or district judge, in addition to their ordinary powers, shall have all the jurisdiction, powers and authority of the Supreme Court to try and completely dispose of the action and questions arising therein, including power to set aside a fraudulent conveyance or fraudulent mortgage, or a mortgage which amounts to a preference within the meaning of the *Bankruptcy Act* (Canada), or of *The Assignments and Preferences Act,* and all questions of set-off and counterclaim arising under the building contract or out of the work or service done or materials furnished to the property in question.

This is a very wide departure from the work usually assigned to the Master. This legislation makes him a judge in this particular type of action, which is essentially one for the enforcement of a statutory charge on the interest in the land of the person who is defined as the owner. The constituent elements of the jurisdiction are fully analysed in the reasons of the Court of Appeal. In addition to the matters mentioned in s. 32(1) and the enforcement of the charge itself, they comprise unlimited monetary claims, the power to appoint an interim receiver of the rents and profits of the land or a trustee to manage and sell the property and the power to make a vesting order in the purchaser and an order for possession. All these functions are exercised in an original way and constitute a new type of jurisdiction

for the Master which in many aspects is not merely analogous to that exercised by a s. 96 judge but is, in fact, that very jurisdiction, limited only to one particular field of litigation. While it is true that the Master's jurisdiction is very varied in character, it is, I think, largely concerned with preliminary matters and proceedings in an action, necessary to enable the case to be heard, and with matters that are referred to that office under a judge's order. There is no inherent jurisdiction in the office as there is in the office of a Superior Court judge. I am content to adopt the judgment of Harvey C.J.A. in *Polson Iron Works v. Munns*[1], for its account of the historical origins of the office and the broad outlines of the jurisdiction, and it is sufficient to say that everything the Master does must be authorized by the *Rules of Practice, The Judicature Act* or some other statute. This does not mean, however, that the Legislature can assign any and all work to him. Section 96 operates as a limiting factor. If this were not so, there would be nothing to prevent the withdrawal of any judicial function from a s. 96 appointee and its assignment to the Master.

The mode of exercise of the jurisdiction in question is also significant in the determination of this dispute. The Master, under this legislation, is the only trial officer in the County of York. He gives a final adjudication, subject to an appeal to the Court of Appeal. He is not acting as a referee under ss. 67 and 68 of *The Judicature Act*. These sections read:

67. (1) Subject to the rules and to any right to have particular cases tried by a jury, a judge of the High Court may refer any question arising in an action for inquiry and report either to an official referee or to a special referee agreed upon by the parties.

(2) Subsection 1 shall not, unless with the consent of the Crown, authorize the reference to an official referee of an action to which the Crown is a party or of any question of issue therein.

68. In an action,

(*a*) if all the parties interested who are not under disability consent, and where there are parties under disability the judge is of opinion that reference should be made and the other parties interested consent; or,

(*b*) where a prolonged examination of documents or a scientific or local investigation is required which cannot, in the opinion of a court or a judge conveniently be made before a jury or conducted by the court directly; or,

[1] (1915), 24 D.L.R. 18.

1959

ATTY-GEN. FOR ONTARIO AND DISPLAY SERVICE CO. LTD. v. VICTORIA MEDICAL BLDG. LTD.

Judson J.

(c) where the question in dispute consists wholly or partly of matters of account,

a judge of the High Court may at any time refer the whole action or any question or issue of fact arising therein or question of account either to an official referee or to a special referee agreed upon by the parties.

These sections may be traced back to the *Common Law Procedure Act of Upper Canada*, 1856 (Can.), c. 43, and still further to the English *Common Law Procedure Act*, 1854, 17-18 Vict., c. 125, and are the necessary source of the judicial power to direct a reference concerning the matters dealt with in the sections, for there is nothing inherent in the office of a Superior Court Judge which would justify such a reference. The judgment under appeal correctly draws a distinction between the position of the Master exercising delegated jurisdiction as a referee under ss. 67 and 68 of *The Judicature Act* and his position when he exercises original jurisdiction under s. 31(1) of *The Mechanics' Lien Act*. Anything that he does on a reference depends for its validity on the judge's original order. His findings must be embodied not in a judgment but in a report which is subject to control of the judge on a motion for confirmation, variation or appeal; *Martin v. Cornhill Insurance Co. Ltd.*[1]. On the other hand under the impugned section the Master issues a judgment which is subject to a direct appeal to the Court of Appeal.

At first glance, it might be thought that the Legislature, which can authorize a judge to direct a reference in the circumstances mentioned in ss. 67 and 68 of *The Judicature Act*, could decide that in a particular case there should be no need of delegation but a direct assignment of function with a consequent simplification of civil procedure. But I am satisfied, as was the Court of Appeal, that the assignment of the power of final adjudication to the Master goes beyond procedure and amounts to an appointment of a judge under s. 96 of the *British North America Act*. The position of the Master as a referee acting under a judge's order and reporting back to the Court is fundamentally different from his position under the impugned legislation as an independent trier of fact and I think that the Court of Appeal was right in rejecting any analogy between the two positions.

[1] [1935] O.R. 239, 2 D.L.R. 682.

For the same reason, I agree with the Court of Appeal in its decision that s. 31(2) does not save this legislation. This section reads:

> 31. (2) Notwithstanding subsection 1, upon the application of any party to an action, made according to the practice of the Supreme Court, and upon notice the court may direct that the action be tried before a judge of the Supreme Court at the regular sittings of the court for the trial of actions in the county or district in which the land or part thereof is situate.

While the jurisdiction of the judge is not completely ousted by the Act, it can be sought only if one or other of the litigants chooses to apply for it and it is assumed only in the judge's discretion. This section leaves untouched the fundamental objection to the legislation that a grant of original jurisdiction to the Master in a case of this kind cannot stand in view of s. 96.

The problem, in the precise form in which it appears in this litigation, is not new. It was dealt with by the Alberta Court of Appeal in *Colonial Investment and Loan Co. v. Grady*[1], where a unanimous Court held that the Legislature could not direct that actions for the enforcement of mortgages and agreements of sale should be brought before the Master. This legislation gave the Master unlimited jurisdiction within the fields assigned to him and the power to pronounce a final judgment subject to the usual right of appeal direct to the Appellate Division. In *C. Huebert Ltd. v. Sharman*[2], the Manitoba Court of Appeal invalidated a section of *The Mechanics' Lien Act* which authorized the judge of the Court having jurisdiction in these matters (in this case the County Court) to refer the whole trial of the action to the referee in chambers of the Court of King's Bench. The ratio of the decision was the same as in the present case—the nature of the jurisdiction and its exercise by a provincially appointed officer of the Court, including the power of final adjudication.

I would dismiss the appeal but without costs. The only issue here was the constitutional one, the subject-matter of the litigation having disappeared as a result of a foreclosure action brought by a mortgagee who had priority over the lien.

[1] (1915), 24 D.L.R. 176, 8 A.L.R. 496.
[2] [1950] 2 D.L.R. 344, 58 Man. R. 1.

1959

ATTY-GEN. FOR ONTARIO AND DISPLAY SERVICE CO. LTD. v. VICTORIA MEDICAL BLDG. LTD.

Ritchie J.

The judgment of Locke, Martland and Ritchie JJ. was delivered by

RITCHIE J.:—I have had the benefit of reading the decisions of the Chief Justice and Mr. Justice Judson in this case, and as I agree with their reasons and conclusion it would be superfluous for me to retrace the ground which they have covered so fully.

I would like, however, to address myself briefly to the interesting and careful argument of the Attorney-General of Ontario to the effect that actions brought to enforce mechanics' liens, as they consist "wholly or in part of matters of mere account", are the type of "matters" which at and before Confederation could be and were referred by order of the Court or a judge to officers of the Court for final determination under the provisions of the *Common Law Procedure Act of Upper Canada,* 1856 (Can.), c. 43, s. 84 *et seq.* and that it therefore follows that the provisions of *The Mechanics' Lien Act,* R.S.O. 1950, c. 227, s. 31 *et seq.* do not create a new jurisdiction for masters and assistant masters but simply constitute a procedural change for the purpose of simplifying administration by doing away with the requirement of an order of the Court and conferring the necessary authority directly on masters and assistant masters to try and completely dispose of such actions where the land is situate wholly in the county of York which change is well within the legislative competence of the provincial Legislature by virtue of the provisions of ss. 129 and 92(14) of the *British North America Act.* Section 84 of the said *Common Law Procedure Act, supra,* reads as follows:

> If it be made to appear, at any time after the issuing of the writ to the satisfaction of the Court or a Judge, upon the application of either party, that the matters in dispute consist wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court, or in country causes to the Judge of any County Court, upon such terms as to costs and otherwise as such Court or Judge shall think reasonable; and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a Jury upon the matter referred.

One of the main premises on which the foregoing proposition rests is that an "award" made by an officer of the Court pursuant to the said s. 84 was accorded a degree of finality which does not attach to a "report" made in accordance with s. 71 of the Ontario *Judicature Act* (hereinafter referred to as the "*Judicature Act*"), and it was strongly contended that the cases of *Brown v. Emerson*[1], *Cruikshank v. Floating Swimming Baths Company*[2] *and Lloyd v. Lewis*[3], served to bear out this contention.

That such an "award" was "final between the parties" unless moved against in the time provided by s. 89 of the *Common Law Procedure Act* is clear from the terms of that section, see *Cumming v. Low*[4], but it is not possible to assess the quality or effect of the "award" or "report" itself without having regard to the latter words of the said s. 84 which provide that "The award or certificate of such referee, shall be enforceable by the same process as the finding of a jury on the matter referred". See in this regard *White v. Beemer*[5], *per* Boyd C. at 532 and *Cook v. The Newcastle and Gateshead Water Company*[6].

If the effect of such an "award" was indeed equivalent to the finding of a jury and enforceable only by order of the Court, then it is at once apparent that a wide gulf is fixed between the jurisdiction of an officer of the Court acting on such a compulsory reference and that of a master or assistant master acting under s. 31 *et seq.* of *The Mechanics' Lien Act* and thereby endowed with all the powers of the Supreme Court (s. 32(1)).

There is, however, a more fundamental factor which lies at the very root of all the cases above referred to and that is that the jurisdiction of the master, referee, arbitrator or other officer to whom a matter has been referred either for award, report or decision in all instances finds its source in and is limited and controlled by an order granted in the discretion of a judge, and in my view this factor of itself invalidates the analogy between the jurisdiction of a master to whom a matter was referred under the *Common Law*

[1] (1856), 17 C.B. 361, 139 E.R. 1112.
[2] (1876), 1 C.P.D. 260.
[3] (1876), 2 Ex. D. 7.
[4] (1883), 2 O.R. 499.
[5] (1885), 10 P.R. (Ont.) 531.
[6] (1882), 10 Q.B.D. 332.

1959

ATTY-GEN. FOR ONTARIO AND DISPLAY SERVICE CO. LTD. v. VICTORIA MEDICAL BLDG. LTD.

Ritchie J.

*Procedure Act* or indeed under *The Judicature Act* and that of a master or assistant master acting under the authority which *The Mechanics' Lien Act* purports to confer.

Much of the work entrusted to masters and assistant masters by *The Mechanics' Lien Act* is no doubt the same as the type of work done by masters pursuant to order of the Court at and before Confederation, but "the type of work done" and "the type of jurisdiction exercised" are two very different things and the type of trial jurisdiction exercised by masters under both the *Common Law Procedure Act* and under ss. 67 and 68 of *The Judicature Act* before and since Confederation is a subordinate and delegated jurisdiction dependent for its existence in each case on the exercise of the discretion of a judge whereas the jurisdiction which *The Mechanics' Lien Act* purports to accord to masters and assistant masters is original jurisdiction directly conferred by legislation and is not subordinate to but in substitution for the jurisdiction of a judge of one of the courts within the intendment of s. 96 of the *British North America Act*.

There can be no doubt as to the right of the Province to effect changes in the procedure of provincial Courts but authority to control the manner in which jurisdiction is to be exercised is not the same thing as the authority to appoint the judges entrusted with exercising it and provincial control of the administration of provincial Courts exceeds its limit when it is assumed that it includes the right so to change the means of enforcing jurisdiction as to change the type of jurisdiction itself from that of a subordinate judicial officer to that of a Court within the intendment of s. 96 while at the same time retaining the right to appoint such an officer.

*Appeal dismissed without costs.*

*Solicitors for the appellant, Display Service Co.: Black, Bruce & Black, Toronto.*

*Solicitor for the Attorney General of Canada: W. R. Jackett, Ottawa.*

*Solicitor for the Attorney-General for Ontario: C. R. Magone, Toronto.*

*Solicitors for the Royal Bank of Canada: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.*

1959

ATTY-GEN. FOR ONTARIO AND DISPLAY SERVICE CO. LTD. *v.* VICTORIA MEDICAL BLDG. LTD.

Ritchie J.

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WORLDWIDE EVANGELIZATION CRUSADE (CANADA) (*Plaintiff*) APPELLANT;

AND

THE CORPORATION OF THE VILLAGE OF BEAMSVILLE (*Defendant*) ..... RESPONDENT.

1959

*Jun. 10
Nov. 30

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Taxation — Municipal — Missionary training centre — Whether property exempt from municipal taxation as "seminary of learning maintained for philanthropic or religious purposes"—The Assessment Act, R.S.O. 1950, c. 24, s. 4(5).*

The plaintiff, a non-profit evangelical corporation, owned properties in the defendant municipality, which it used for training and preparing persons to be missionaries in foreign fields. The training given consisted of Scripture readings and general religious discussions, and in learning skills considered valuable to missionaries, such as cooking, sewing, motor mechanics, carpentry, etc. There was no fixed curriculum.

The plaintiff sued the municipality for a declaration that the properties were exempt from taxation under s. 4(5) of *The Assessment Act*, which provides exemption from tax for buildings used *bona fide* "in connection with and for the purposes of a seminary of learning maintained for philanthropic or religious purposes, the whole profits of which are devoted or applied to such purposes". The action was dismissed by the trial judge, and this judgment was affirmed by a majority in the Court of Appeal.

*Held* (Kerwin C.J. and Judson J. dissenting): The plaintiff was entitled to the exemption claimed.

The word "seminary" standing by itself, has no fixed legal meaning. It is not a term of art and its primary meaning is simply a place of education. The proper way to decide whether para. 5 of s. 4 of the Act applied was not to compare the plaintiff's method of instruction with that given in other institutions falling within the description of "seminary of learning", but rather to inquire whether those in attend-

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

1959

WORLDWIDE EVANGELIZATION CRUSADE (CANADA) v. VILLAGE OF BEAMSVILLE et al.

ance learned to fulfil better and more effectively the religious purpose to which they had dedicated themselves. The evidence showed that that result was achieved.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of LeBel J. Appeal allowed, Kerwin C.J. and Judson J. dissenting.

*P. B. C. Pepper*, for the plaintiff, appellant.

*G. M. Lampard, Q.C.*, for the defendant, respondent.

The judgment of Kerwin C.J. and Judson J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—I agree with the reasons given by Schroeder J.A. The appeal should be dismissed with costs.

The judgment of Locke, Cartwright and Martland JJ. was delivered by

CARTWRIGHT J.:—This as an appeal from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from a judgment of LeBel J., as he then was, whereby the appellant's action for a declaration that certain property owned by it situate in the respondent village is exempt from taxation was dismissed. Mackay J.A., dissenting, would have allowed the appeal and granted the declaration.

The relevant facts are not in dispute. They are conveniently summarized in the following passage in the reasons of Mackay J.A.:

> The Plaintiff is a corporation incorporated by Letters Patent issued pursuant to the provisions of The Ontario Companies Act. The Letters Patent provide that the corporation shall be carried on without the purpose of gain for its members, and that any profit or other accretions to the corporation shall be used in promoting its objects. The purposes and objects of the corporation as set out in the Letters Patent are:
>
> > "To train, equip and send missionaries for service in the foreign countries in which the Worldwide Evangelization Crusade operates; to maintain and support such missionaries; to disseminate missionary and spiritual literature and information; and to do all such other things as are incidental or conducive to the attainment of the above objects."
>
> The properties owned by the appellants are two adjoining house properties known as Numbers 127, 133 and 149 King Street, in the Village of Beamsville. The permanent staff, who live on the premises, are Mr. Arthur E. Frid, Canadian Secretary and Executive Officer of the appellant corporation, his wife, who is a former school teacher; Miss Evelyn Thomas,

[1] [1957] O.R. 80, 6 D.L.R. (2d) 605.

a former school teacher and also a qualified dietitian, and Miss Annabel Truedson, also a former school teacher, who acts as treasurer and as secretary and assistant to Mr. Frid.

The only purpose for which the premises are said by the appellant to be used is for training and preparing candidates for service as missionaries in foreign fields. The students are persons who are either graduates of recognized Bible Schools and ordained for the ministry, or persons who are qualified to be ordained, and in addition to these students, missionaries who are former graduates of the institution and who have served as missionaries in foreign fields, are required, when they return to Canada, on furlough to attend in the dual capacity of students taking a refresher course and as instructors to give instruction and counsel in regard to problems and conditions encountered by them in their work as missionaries, to those students who have not yet served as missionaries.

While there is no fixed curriculum, the staff and all students each morning, for two and a half hours, attend a meeting for Scripture reading and general religious discussion, including the application of the lessons of the Scriptures to practical daily problems of living and working, particularly with relation to missionary work in foreign fields. During the rest of the day the students are given instruction in dietetics, cooking, sewing, motor mechanics and carpentry, a knowledge of such skills being considered necessary to enable them to successfully carry on their work as missionaries in foreign fields under primitive conditions. The minimum length of time the students are required to attend at the institution is six months and the maximum two years. There are no examinations and the length of time the students attend depends on the discretion of the staff, the students being allowed to leave and enter missionary work when the staff feel that they are qualified to do so. The institution is financed by voluntary contributions. The students do not pay any fees or make any payment for board and lodging. The staff do not receive any salaries.

The appellant's claim to exemption is based on para. 5 of s. 4 of *The Assessment Act*, R.S.O. 1950, c. 24, but it will be convenient to set out paras. 4 and 6 of that section also:

4. All real property in Ontario shall be liable to assessment and taxation, subject to the following exemptions from taxation:—

* * *

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

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

1959

WORLDWIDE EVANGELIZATION CRUSADE (CANADA) v. VILLAGE OF BEAMSVILLE et al.

Cartwright J.

6. The buildings and grounds not exceeding in the whole fifty acres of and attached to or otherwise *bona fide* used in connection with and for the purposes of a seminary of learning maintained for educational purposes, the whole profits from which are devoted or applied to such purposes, but such grounds and buildings shall be exempt only while actually used and occupied by such seminary, and such exemption shall not extend to include any part of the lands of such a seminary which are used for farming or agricultural pursuits and are worked on shares with any other person, or if the annual or other crops, or any part thereof, from such lands are sold.

It is conceded that the activities carried on by the appellant in the buildings and grounds for which it claims exemption are "for religious purposes" but the respondent contends that those activities are not such as to bring the appellant's institution within the meaning of the word "a seminary of learning" as used in para. 5.

I agree with the view expressed by Schroeder J.A. that the word "seminary", standing by itself, has not acquired any fixed legal meaning. It is not, in my opinion, a term of art and its primary meaning is simply a place of education.

It is, however, argued for the respondent that the phrase "a seminary of learning" requires as a condition of its application to any institution that the instruction given therein shall be of a higher standard of scholarship and erudition than that given in the appellant's establishment, and shall approximate that given in universities. One difficulty that I have in accepting this argument is that any institution fulfilling the suggested requirements would appear to fall within either para. 4 or para. 6 of s. 4, and para. 5 would become unnecessary.

It appears from uncontradicted evidence that the purpose of those attending the appellant's establishment is to learn how to become missionaries or, in the case of those who are already engaged in that calling, to become better missionaries. It further appears that there has been great success in achieving the desired result. Learning to be better missionaries is no mere by-product or chance result of these persons living and working together in this establishment; it is the primary purpose of their association. That the subjects of their study comprise only the Holy Scriptures and those practical skills useful in the mission field does not, in my opinion, render the word "learning" inapt to describe their activities.

In my opinion, the proper way to decide whether para. 5 is applicable is not to compare the appellant's method of instruction with that given in other institutions which undoubtedly fall within the description of "seminary of learning", but rather to inquire whether those in attendance do learn to fulfil better and more effectively the religious purpose to which they have dedicated themselves.

I have reached the conclusion that the appellant is entitled to the exemption claimed.

While in view of the difference of opinion in the Courts below I have endeavoured to express my reasons in my own words, I wish also to rest my judgment on the reasons of Mackay J.A. with which I am in full agreement.

I would allow the appeal and direct that judgment be entered for the appellant for the declaration claimed with costs throughout.

*Appeal allowed with costs,* KERWIN C.J. *and* JUDSON J. *dissenting.*

*Solicitors for the defendant, respondent: Seymour, Lampard, Goldring & Young, St. Catharines.*

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ALEXIS NIHON COMPAGNIE LIMITÉE (*Defendant*) ..... APPELLANT;

1959
*Jun. 8, 9
Nov. 30

AND

ARTHEM DUPUIS (*Plaintiff*) .....RESPONDENT.

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

*Contracts—Agency—Subsequent clause added to contract making basic change in relationship—Seller and buyer—Oral testimony—Art. 1234 of the Civil Code.*

By a written contract, establishing an agency relationship between the plaintiff and the defendant company, the latter was to receive a commission on the sale of lumber supplied by the plaintiff. Subsequently a clause was added to the contract whereby the defendant agreed to pay the plaintiff for the lumber covered by the contract and its additions "f.o.b. St. Paulin" the prices set out in a schedule. From that

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Abbott JJ.

1959

ALEXIS NIHON CO. LTD. v. DUPUIS

time on, the defendant treated the transactions as sales. The plaintiff sued to recover the difference between the market price obtained by the defendant less the commission and the price paid to him according to the schedule, and asked for the cancellation of the contract. The trial judge maintained in part the action and held, *inter alia*, that the addition to the contract had not changed the agency relationship but had only established a floor price. This judgment was affirmed by the Court of Appeal.

*Held:* The action should be dismissed.

The addition to the contract changed the relationship of the parties from one of agency to one of sale, and the plaintiff had received all that he was legally entitled to receive. The conduct of the plaintiff, after the addition had been made, showed that he was aware that the contract had been basically altered. Oral testimony to the effect that the schedule merely fixed a floor price was not admissible.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Lalonde J. Appeal allowed.

*R. H. E. Walker, Q.C.*, for the defendant, appellant.

*G. D. McKay, Q.C.*, for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Le demandeur-intimé a institué contre la défenderesse-appelante une action devant la Cour supérieure siégeant à Montréal, dans laquelle il réclame la résiliation d'un contrat intervenu entre les parties, l'annulation de nombreuses quittances qu'il aurait consenties, ainsi que la somme de $6,383.78. Cette action a été maintenue partiellement jusqu'à concurrence de $5,420.41 par l'Honorable Juge Lalonde de la Cour supérieure qui a, en outre, déclaré nuls et non avenus, comme étant entachés de fraude et de dol, tous les règlements, reçus, quittances, donnés par le demandeur à la défenderesse, mais n'a pas résilié le contrat. La Cour du banc de la reine[1], M. le Juge Montgomery dissident, a confirmé cette décision.

Le 5 novembre 1949, l'intimé a autorisé par contrat écrit la compagnie appelante à vendre sur le marché toute sa production de bois franc (merisier seulement), au prix courant du marché lors de la vente, sur une base de retenue de 15 pour cent sur le montant total de chaque vente, et d'un escompte de 2 pour cent si les paiements étaient effectués dans les dix jours. Les parties ont convenu de la

[1] [1958] Que. Q.B. *789*.

façon dont le bois serait scié, où il serait empilé et de quelle manière on procéderait au mesurage et à l'inspection. En ce qui concerne le paiement, la compagnie appelante s'est obligée de payer à l'intimé Dupuis, dans les dix jours suivant l'arrivée des chars à destination, le montant du prix de la vente faite par l'appelante à ses propres clients, moins la retenue ci-dessus mentionnée.

Après la signature de ce contrat, plusieurs livraisons de bois ont été effectuées par l'intimé. Dans la suite, à maintes reprises depuis le 5 novembre 1949, l'appelante a fait des avances à l'intimé, entre autres, le 11 novembre 1949, le 23 décembre de la même année, le 16 janvier, le 7 février et le 15 mai 1950.

Chaque fois que l'une de ces avances était consentie par l'appelante à l'intimé, une "addition" au contrat original était faite et signée par les parties, et comme conséquence de ces additions, et particulièrement de celle du 16 janvier 1950, l'appelante prétend qu'elle est devenue l'acheteur du bois que lui livrait l'intimé, et qu'en conséquence, elle a assumé elle-même les risques des fluctuations du marché du bois. Il s'ensuivrait, toujours d'après l'appelante, que ce ne serait plus le premier contrat qui trouverait son application en ce qui concerne le prix à être payé, mais que les parties devaient être gouvernées par les termes mêmes de ces additions qui devaient dans l'avenir déterminer leurs relations juridiques.

Il est admis que le contrat original établissait une relation d'agence entre les parties, et que l'appelante devait vendre le bois de Dupuis l'intimé, au prix courant du marché lors de la vente, en remettre le produit à l'intimé et retenir, pour elle, la commission mentionnée précédemment.

Dans ces additions faites au contrat du 5 novembre 1949, nécessitées apparemment par le fait que la compagnie appelante faisait des avances à l'intimé supérieures à la quantité de bois livré, il est stipulé que l'appelante devenait propriétaire du bois expédié, afin qu'il lui soit permis de transporter cette marchandise aux banques, pour obtenir des emprunts sous l'empire de la s. 88 de la *Loi des Banques*. Mais l'addition du 16 janvier 1950, qui est la troisième à être faite, comporte à mon sens une portée beaucoup plus

1959

ALEXIS NIHON CO. LTD. v. DUPUIS

Taschereau J.

considérable que les autres. Cette addition renferme la clause habituelle des autres additions, et une autre qui se lit ainsi:

> Comme suite au contrat susmentionné et aux additions audit contrat, il est par la présente consenti que Alexis Nihon Cie Ltée *paiera à Arthem Dupuis* pour le bois couvert par le contrat et ses additions, *les prix suivants f.a.b. chars St-Paulin,* Qué., moins 15% de retenue et 2% d'escompte pour paiement dans les dix jours.

Les prix indiqués dans cette entente intervenue entre les parties sont les suivants:

| | 5/4 | 6/4 | 8/4 | 10/4 | 12/4 |
|---|---|---|---|---|---|
| F.A.S. ..... | 160.00 | 165.00 | 175.00 | 180.00 | 190.00 |
| SELECT ..... | 135.00 | 140.00 | 145.00 | 150.00 | 160.00 |
| NO. 1 COMMUN .... | 95.00 | 105.00 | 110.00 | 115.00 | 120.00 |

Le prix du 4/4 a déjà été établi par entente précédente.

Cette convention, par conséquent, ne fixe pas seulement le prix du bois à être livré après la date où elle a été signée, soit le 16 janvier 1950, mais également le prix de celui livré avant et qui n'a pas encore été payé, car on y trouve les mots suivants: "paiera à Arthem Dupuis pour le bois couvert par le contrat et ses additions".

Le juge de première instance a conclu que cette addition au contrat faite le 16 janvier 1950, n'a pas changé la nature des liens juridiques qui pouvaient exister entre les parties, c'est-à-dire une relation de principal et d'agent, mais n'a fait qu'établir un "plancher" au prix du bois que livrait le demandeur-intimé. Il a également conclu que le contrat d'agence à commission continuait de subsister et que l'appelante devait remettre à l'intimé le montant total du prix reçu de ses propres acheteurs, toujours en retenant la commission de 15 pour cent plus 2 pour cent d'escompte. Il a été d'opinion que pour rendre compte à l'intimé, l'appelante s'est basée frauduleusement sur les prix mentionnés au contrat du 16 janvier 1950, au lieu de se baser sur les montants réellement perçus des débiteurs. Parce que l'appelante n'a payé que le montant mentionné au contrat du 16 janvier 1950, au lieu de rendre compte du prix auquel le bois a été réellement vendu, il en vient à la conclusion qu'il y a eu fraude de la part de l'appelante.

Mais ce raisonnement du juge au procès ne peut révéler la fraude de l'appelante que si l'addition du 16 janvier 1950 a réellement fixé un "plancher", obligeant tout de même

l'appelante à payer à l'intimé tous les montants que les débiteurs pourraient verser à l'appelante, au dessus de ce plancher établi.

Il est bon de noter que, par le jugement qu'il a rendu, M. le Juge Lalonde n'annule pas la convention ou l'addition faite au contrat original le 16 janvier 1950, qui continuait en conséquence à lier les parties. Le juge au procès base particulièrement son jugement sur le fait que par les termes mêmes de cette addition, le demandeur aurait dû recevoir tous les montants supérieurs à ce plancher que les débiteurs de l'appelante payaient. C'est précisément parce que l'appelante n'a pas donné effet à cette interprétation faite par M. le Juge Lalonde et qu'un montant moindre a été remis, que l'on prétend que l'appelante s'est rendue coupable de manœuvres frauduleuses en laissant croire à l'intimé que ses prix mentionnés à l'"addition" étaient véritablement les prix perçus par l'appelante.

M. le Juge Casey, qui a écrit le jugement majoritaire de la Cour du banc de la reine[1], exprime à peu près la même opinion. Il soutient que ce document du 16 janvier 1950 n'établit pas de changement dans les relations juridiques des parties, mais comme M. le Juge Lalonde, il croit que son effet a été d'établir un "plancher" pour le prix du bois, et que l'intimé avait droit de percevoir l'excédent du prix, fixé au plancher, s'il en existait un.

Je suis d'opinion que les termes de ce document du 16 janvier 1950 ne présentent pas d'ambiguïté. Ce dernier est en effet bien différent du premier contrat qui en était un d'agence, tandis que le second a fait disparaître cette relation juridique. Les termes employés d'où découle pour les parties une nouvelle relation d'acheteur à vendeur sont complets et non équivoques. Ils altèrent fondamentalement ce qui caractérisait la première convention. En effet, ils stipulent qu'"*Alexis Nihon Cie Ltée paiera à Arthem Dupuis pour le bois couvert par le contrat et ses additions, les prix suivants f.a.b. chars St-Paulin, moins 15% de retenue et 2% d'escompte pour paiement dans les dix jours.*" Le mot "paiera" détermine nécessairement un prix fixé à l'avance f.a.b. chars St-Paulin. Si le prix à être payé est f.a.b. chars St-Paulin, il ne peut pas être le prix obtenu à

[1] [1958] Que. Q.B. *789*.

1959

ALEXIS NIHON CO. LTD. v. DUPUIS

Taschereau J.

Montréal par l'appelante pour le bois qu'elle vend à ses clients. Il s'agit d'un prix déterminé et non d'un prix susceptible de fluctuations.

Si, comme je le crois, les relations entre les parties ont été changées radicalement à partir du 16 janvier, et si l'intimé est devenu le vendeur et l'appelante l'acheteuse, le premier a en conséquence reçu tout ce qu'il pouvait exiger légalement. En effet, à la date du 16 janvier 1950, il avait reçu un excédent sur les quantités de bois livré, et depuis cette date, il a été payé suivant les termes de la nouvelle entente. L'appelante n'avait pas l'obligation de lui dévoiler, comme antérieurement, les prix auxquels elle vendait son bois à Montréal ou ailleurs. C'était là *"res inter alios acta"*. L'intimé devait se contenter des prix stipulés f.a.b. St-Paulin, et il les a perçus.

L'erreur des tribunaux inférieurs a été de ne pas considérer l'addition au contrat principal comme une altération fondamentale à la première entente, et de voir dans ses termes simplement l'établissement d'un prix de "plancher". Avec ce départ que je crois erroné, on avait raison de dire que l'appelante devait dévoiler à l'intimé les prix qu'elle recevait pour le bois, et payer en conséquence. Mais, à mon sens, tel n'est pas le cas qui se présente.

L'intimé a prétendu, malgré l'objection du procureur de l'appelante, ajouter par une preuve testimoniale des clauses qui ne se trouvent pas au contrat. Ces clauses auraient pour effet d'établir que, malgré "l'addition" de janvier 1950, les termes du premier contrat subsistaient, et que les prix nouvellement fixés n'établissaient qu'un "plancher", un minimum, qui ne privait pas l'intimé de percevoir l'excédent s'il y en avait.

Je crois que cette preuve qu'on a tenté de faire est inadmissible vu les termes précis de l'art. 1234 C.C. qui stipule que dans aucun cas la preuve testimoniale ne peut être admise pour contredire ou changer les termes d'un écrit valablement fait. Dans le cas présent, l'écrit du 16 janvier 1950 est un écrit valablement fait, qui est complet par lui-même. Quand les termes d'un contrat sont clairs et non ambigus, aucune preuve testimoniale ne peut être reçue

pour interpréter le document, ou pour déterminer ce que les parties avaient l'intention de dire mais que, malheureusement, elles n'ont pas consigné dans cet écrit.

Même si cette preuve était admissible, ce que je ne crois pas, je suis d'opinion que la preuve tentée par l'intimé pour modifier les termes du contrat écrit est insuffisante. Au cours de l'examen de ce dossier, je me suis demandé, à maintes reprises, pourquoi l'appelante qui, le 16 janvier, était créancière de l'intimé, aurait ainsi établi ce plancher, que d'ailleurs "l'addition" ne révèle pas. Elle empirait évidemment, par cet acte, sa situation en consentant à payer à l'intimé un prix supérieur à celui qu'elle pouvait elle-même recevoir, et s'exposait gravement à ne pas pouvoir percevoir le surplus d'avances au montant de $5,188.41 consenties jusqu'à la date du 16 janvier 1950. Prévoyant sans doute une hausse dans les prix du marché du bois, elle a voulu se protéger aux fins de percevoir ce remboursement des avances qu'elle avait consenties.

Quand l'intimé a signé les quittances et états de compte en janvier, février, mars, avril, mai, juin et juillet 1950, et quand il a accepté en juillet 1950 le chèque endossé "en règlement final", je suis persuadé, malgré ses dénégations, qu'il savait bien qu'il avait cessé d'être le principal à un contrat d'agence, pour devenir simplement le vendeur de son bois à un prix déterminé d'avance f.a.b. St-Paulin.

C'est un nommé McMaster, ancien employé congédié par l'appelante, qui s'est rendu à St-Paulin à deux reprises pour rencontrer l'intimé et qui, en outre, l'a invité à sa maison sur la rue Atwater, à Montréal, pour l'informer qu'il était payé au prix du "plancher", et que le bois avait été vendu à un prix supérieur. C'est ce M. McMaster qui, suivant son propre témoignage, a quitté l'emploi de l'appelante "in anger" et qui a convenu avec l'intimé de recevoir 50 pour cent des bénéfices éventuels du procès à être intenté. Comme M. le Juge Montgomery, je crois que ce témoignage de McMaster doit être reçu avec une extrême réserve, et j'ajoute s'il ne doit pas être totalement ignoré. N'est-ce pas là, comme conséquence de ces conversations avec McMaster, personnage financièrement intéressé à l'issue du procès, qu'il faut chercher la cause déterminante de la réclamation de l'intimé.

1959

ALEXIS NIHON CO. LTD. v. DUPUIS

Taschereau J.

Malgré qu'il fût mis au courant par McMaster, l'intimé a signé quand même les onze règlements bi-mensuels où apparaissent les prix déterminés à l'addition de janvier 1950, et il endosse, le 21 juillet de la même année, le chèque en règlement final. Je crois que l'intimé est mal venu de se présenter devant les tribunaux pour dire qu'on lui a représenté que l'état de choses original n'avait pas été changé. Les nombreuses signatures qu'il donne, les règlements qu'il consent, tous conformes à "l'addition" de janvier 1950, contredisent les prétentions qu'il a voulu soutenir devant la Cour. Je suis porté à penser que l'intimé, qui est un homme d'affaires, a plus d'intelligence qu'il ne semble vouloir en manifester. La conclusion qui s'impose est que l'écrit du 16 janvier 1950 est un amendement fondamental au contrat original; qu'il a établi depuis cette date des relations d'acheteur et de vendeur entre les parties et que rien n'indique qu'à l'addition de janvier 1950 un prix minimum a été fixé; que l'intimé a reçu tous les montants auxquels il pouvait prétendre et qu'il n'a pas le droit d'exiger les prix pour lesquels le bois a été vendu à des tiers par l'appelante.

Pour ces raisons, et pour celles données par M. le Juge Montgomery, je suis d'opinion que l'appel doit être maintenu et l'action rejetée avec dépens de toutes les Cours.

*Appeal allowed with costs.*

*Attorneys for the defendant, appellant: Walker, Chauvin, Walker, Allison & Beaulieu, Montreal.*

*Attorney for the plaintiff, respondent: H. Baker, Montreal.*

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1959

*Oct. 15
Nov. 30

JACK GOLDHAR .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

*Criminal law—Leave to appeal to Supreme Court of Canada—Conspiracy to traffic in drugs—Sentence of 12 years—New Criminal Code coming into force during period of offence—Leave to appeal from sentence sought—Whether jurisdiction to entertain appeal—Criminal Code,*

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.

1959

GOLDHAR v. THE QUEEN

*1953-54(Can.), c. 51, ss. 408(1)(d), 597(1)(b)—Criminal Code, R.S.C. 1927, c. 36, ss. 573, 1023—The Supreme Court Act, R.S.C. 1952, c. 259, s. 41.*

The appellant was convicted of conspiracy to traffic in drugs and sentenced to 12 years imprisonment, pursuant to s. 408(1)(*d*) of the new *Criminal Code*, which came into force during the period of time within which the offence was committed. His appeal against the conviction was dismissed by the Court of Appeal and leave to appeal to this Court from that judgment was refused. His subsequent appeal against the sentence was also dismissed by the Court of Appeal, and from that judgment he applied to this Court for leave to appeal against the sentence on the question of law as to whether s. 408(1)(*d*) was applicable, since, if it was not, the maximum sentence for a conspiracy not specifically named in the former Code, as found in s. 573, was 7 years. The Crown submitted that this Court was without jurisdiction to grant leave. The appellant alleged an alteration of the prior state of the law.

*Held* (Cartwright J. dissenting): This Court has no jurisdiction to entertain an appeal against a sentence imposed for the commission of an indictable offence.

*Per* Taschereau, Fauteux, Abbott and Ritchie JJ.: The question whether this Court had any jurisdiction to entertain such an appeal has always been negatively answered prior to the coming into force of the new Code. *Goldhamer v. The King*, [1924] S.C.R. 290 and *Parthenais v. The King* (1945) (unreported). An intent of Parliament to depart from this state of the law could not be found either under the provisions of the new Code or under s. 41 of the *Supreme Court Act*.

As to the new Code. It is clear that no change has been made as to the appellate provisions related to appeals to the Court of Appeal in indictable offences. The distinction between an appeal against a conviction and an appeal against a sentence still obtains. Both appeals are still separate appeals as to substance and procedure and lead to two distinct judgments. As to appeals to the Supreme Court of Canada, the true meaning of the expression "whose conviction is affirmed by the Court of Appeal" in s. 597(1)(*b*) must be ascertained by reference to the appellate provisions related to an appeal to the Court of Appeal. On these provisions, the "conviction" which the latter Court may affirm is a conviction within the narrow meaning of *Goldhamer v. The King*. "The judgment appealed from", referred to in s. 597(1)(*b*), is the judgment against which an appeal is given under s. 597(1); and, as nowhere but in the opening words of the section is an appeal given, that judgment must be a judgment capable of coming within the language of the opening words. Although the words "in affirmance of the conviction", which were in s. 1024 of the former Code, do not appear in s. 597(1), they are clearly and necessarily implied in s. 597. No significance could be attached to the fact that s. 1024 provided for an appeal at large while under s. 597 the appeal is restricted to pure questions of law. Because it may be said in certain cases that an applicant comes within the description of a person to whom a right of appeal is given in the opening words of s. 597, it does not follow that his application does so or in other words, that the right given is a right to appeal against a conviction in the wider sense.

1959

GOLDHAR v. THE QUEEN

As to s. 41 of the *Supreme Court Act*. The inconsistencies flowing from the interpretations put by the appellant on s. 41, clearly indicate that it was never intended by Parliament that the right of appeal given under this section would extend to indictable offences, as distinguished from non indictable offences. This is supported by the fact that, under the Code, the appeals to this Court with respect to indictable offences are dealt with in the appellate provisions related to appeal to this Court under the Code. It is further supported by the clear contradiction which would exist between the special appellate provisions under the Code and the general appellate provisions under s. 41.

*Per* Cartwright J., *dissenting*: The application falls within the literal meaning of the words in s. 597; and the terms of ss. 583, 592 and 593 do not appear to require the Court to construe s. 597 in the limited sense contended for by the respondent. The case of *Goldhamer v. The King* was distinguishable. One of the primary purposes of Parliament in enacting s. 597 in its present form would be *pro tanto* thwarted if it were held that this Court was without jurisdiction to deal with a pure point of law as to whether a sentence imposed was or was not authorized by statute. No sufficient reason has been advanced for interpreting s. 597 so as to refuse a jurisdiction which appears to be conferred by the words of that section construed in their ordinary and literal meaning.

Another line of reasoning leads to the same conclusion. Reading s. 597 of the Code and s. 41 of the *Supreme Court Act* together and as explanatory of each other, as should be done since they are *in pari materia*, the word "conviction" in both sections should be read "with a signification including the sentence", giving thereby effect to the apparent intention of Parliament that the jurisdiction of this Court in criminal matters should be strictly limited to points of law and yet wide enough to assure uniformity in the interpretation of the criminal law throughout the country.

APPLICATION for leave to appeal from a judgment of the Court of Appeal for Ontario, affirming a sentence. Application refused, Cartwright J. dissenting.

*M. Robb, Q.C.*, for the appellant.

*J. D. Hilton, Q.C.*, for the respondent.

The judgment of Taschereau, Fauteux, Abbott and Ritchie JJ. was delivered by

FAUTEUX J.:—This is a motion for leave to appeal to this Court against a sentence, imposed by the trial judge and subsequently confirmed by a judgment of the Court of Appeal for Ontario, on a conviction for an indictable offence.

Goldhar was indicted for having, in the city of Toronto and elsewhere in the province of Ontario, between the 15th of March and the 6th of August, 1955, conspired with

others to commit the indictable offence of having in their possession a drug for the purposes of trafficking. On this charge, he was found guilty by a jury, on the 4th of May, 1956, and thereupon sentenced to twelve years imprisonment, pursuant to s. 408(1)(*d*) of the *Criminal Code*, 2-3 Elizabeth II, hereafter referred to as the new Code.

During the period of time, within which the offence charged was committed, i.e. on the first day of April 1955, the new Code came into force; and this fact gives rise to the question of law on which leave to appeal is now sought. As formulated, on behalf of the applicant, the question is whether s. 408(1)(*d*) of the new Code is applicable to the conspiracy committed, since, if it is not, the maximum sentence for a conspiracy not specifically named in the *Criminal Code*, R.S.C. 1927, c. 36, is found under s. 573 of the said Statute, namely seven (7) years.

The point of law raised is undoubtedly one of substance and may possibly, depending particularly of the evidence in the record, affect the judgment rendered by the Court of Appeal, if leave is granted. However, the primary and major question to be considered and determined is whether this Court has any jurisdiction to entertain an appeal against a sentence imposed for the commission of an indictable offence.

That such a question has always been negatively answered, prior to the coming into force of the new Code, is not open to question.

In *Goldhamer v. His Majesty the King*[1], the appellant, having been found guilty of a criminal offence, was sentenced to pay a fine of four hundred dollars or to be imprisoned during three months in default of payment. After the fine had been paid, the Attorney-General appealed against the sentence, under s. 1013 Cr. C.; and by a majority judgment, the Court of Appeal, in addition to the fine, condemned the appellant to be imprisoned for a period of six months. On a further appeal to this Court, it was decided that there was no jurisdiction in the Supreme Court of Canada to entertain an appeal in the matter of

[1] [1924] S.C.R. 290, 42 C.C.C. 354, 3 D.L.R. 1009.

1959

GOLDHAR v. THE QUEEN

Fauteux J.

sentence, the right of appeal being restricted to an appeal against the affirmance of a conviction. At the time of the decision of this Court, the relevant part of s. 1024, under which the appeal purported to be based, read as follows:

> 1024.—Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen, may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney-General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

It is pointed out, in the reasons for judgment of this Court, that the word "conviction" in s. 1024 cannot perhaps be said to be capable of only one necessarily exclusive meaning, but can be capable of being employed with the signification including the sentence. The majority, however, felt compelled to ascribe to the word the less technical sense which excludes the sentence as distinguished from the conviction. The sole reason for this interpretation and the decision consequential thereto is exclusively founded on the clear distinction made in s. 1013, for the purposes of appeal in indictable matters, between an appeal against a conviction and an appeal against a sentence. The appellant in that case did not question the appropriateness of the measure of the sentence but challenged, as a matter of law, the right of the provincial Court of Appeal to interfere with a sentence which had already been satisfied when the appeal to that Court was taken by the Attorney-General. The nature of the ground, however, is entirely foreign to the *ratio decidendi*. It is the right of appeal itself which was found not to have been given by Parliament, in the matter of sentence.

Some twenty years after this decision, again the question arose in the case of *Parthenais v. The King*[1]. Parthenais had entered an appeal in this Court against a majority judgment of the Court of Appeal which had increased the sentence imposed upon him on a plea of guilty to the charge

[1] Not reported.

of an indictable offence. At that time, the matter was governed by what was then s. 1023 Cr. C., the relevant part of which read as follows:

> 1023. Any person convicted of any indictable offence whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction on any question of law on which there has been dissent in the Court of Appeal.

The point of law, upon which there was a dissent, was whether the Attorney-General,—who took a more serious view of the facts of the case than did the Crown prosecutor, in first instance,—could appeal to the Court of Appeal against a sentence imposed upon a plea of guilty which had been entered by the accused on the condition that the sentence, pre-agreed between his counsel and counsel for the Crown, would be passed by the trial judge. The distinction between an appeal against a conviction and an appeal against a sentence, which had brought about the decision of this Court in *Goldhamer, supra,* was still present in the appellate provisions related to appeals to the provincial Courts. This Court followed the same course and, on the 2nd of October, 1945, quashed the appeal for want of jurisdiction to entertain an appeal against a sentence.

Such was the state of the law when the new Code was enacted in 1954. The question is therefore whether an intent of Parliament to make such a substantial departure from this state of the law, as would represent the creation of a new right of appeal to this Court, can be found, as is suggested, either under the relevant provisions of the new Code or under s. 41 of the *Supreme Court Act.* In approaching the question, one must be mindful that a legislature is not presumed to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication. This presumption against the implicit alteration of the law is not, I think, of lesser moment where the new law, under which the alteration is claimed, is of a nature such as that of the one here considered, to wit, a revision of a Code.

The new Code. With respect to the appellate provisions related to appeals to the Court of Appeal in indictable offences, it is clear that no change has been made, in that,

1959

GOLDHAR v. THE QUEEN

Fauteux J.

the distinction between an appeal against a conviction and an appeal against a sentence still obtains. Both appeals are still separate appeals as to substance and procedure, and lead to two distinct judgments. With respect to the appellate provisions related to appeals to the Supreme Court of Canada, the section of the new Code, relied on by counsel for the applicant as a basis for his application and under which the alteration of the prior state of the law is claimed, is s. 597(1)(*b*), which reads as follows:

> 597. (1) A person who is convicted of an indictable offence whose conviction is affirmed by the Court of Appeal may appeal to the Supreme Court of Canada
>
> (*a*) .....
>
> .....
>
> (*b*) on any question of law, if leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow.

The opening words of that section make it equally clear that the right of appeal to this Court is given to one who is (i) a person who is convicted of an indictable offence and (ii) whose conviction is affirmed by the Court of Appeal. The true meaning of the expression, in (ii), "whose conviction is affirmed by the Court of Appeal" must, of necessity, be ascertained by reference to the appellate provisions related to an appeal to the Court of Appeal. And again, on these provisions, the "conviction", which the latter Court may affirm, is a conviction within the narrow meaning ascribed by this Court in *Goldhamer, supra.* If, contrary to that decision, the word was here given the wider sense which includes the sentence, it would follow that one "whose sentence is *affirmed* by the Court of Appeal" would have a right of appeal to this Court, while one, whose sentence is not affirmed but increased by the Court of Appeal, would not.

Adverting now to the provisions of (*a*) and (*b*) of s. 597(1). These provisions are related to the right of appeal given under the opening words. In (*a*), they restrict the right of appeal to questions of law. And, in (*b*), they condition the exercise of the right to the obtention of a leave and prescribe the delay within which, after "the judgment appealed from is pronounced", such leave must be granted.

"The judgment appealed from", referred to in (*b*), is the judgment against which an appeal is given under s. 597(1); and, as nowhere, but in the opening words thereof, is an appeal given, "the judgment appealed from" must be a judgment capable of coming within the language of the opening words. On this language and for the reasons just mentioned, such a judgment can only be a judgment in affirmance of a conviction and not related to the matter of sentence.

Having considered the following points advanced in support of the application, I must say, with deference, that I am unable to find that they are valid.

Reference is made and significance is attached to two points of difference emerging from a comparison of s. 1024, under which *Goldhamer* was decided, with s. 597(1) of the new Code. The first is that the words "in affirmance of the conviction", which were in the former section, do not appear in the latter. In my view and for the reasons just mentioned, these words are clearly and necessarily implied in s. 597. The second point is that s. 1024 provided for an appeal at large while under s. 597, the appeal is restricted to pure questions of law. The range or nature of the questions raised in support of an appeal is foreign to the *ratio decidendi* in *Goldhamer*. Furthermore, when the decision in that case was, twenty years later, followed in *Parthenais*, the appeal to this Court was then, under the relevant section, s. 1023, as it is to-day under s. 597(1), restricted to questions of law.

It is then sought to ascribe to the word "judgment" in the phrase "the judgment appealed from is pronounced", the usual meaning given to the word in a law dictionary. This, I think, one is precluded to do for, in the context of s. 597, and in the light of the other sections of the Code to which this particular section is inextricably related, a judgment as to conviction and a judgment as to sentence are, for the purposes of appeal, two separate judgments, each having a distinct technical meaning under the Code.

It is also suggested that the applicant having been convicted of an indictable offence and his conviction having been affirmed by the Court of Appeal,—as, in fact, it was finally, prior to the launching of his appeal to that Court, against the sentence,—his application falls within the literal

1959

GOLDHAR
v.
THE QUEEN

Fauteux J.

meaning of s. 597(1)(*b*). While, because of these circumstances, it may be said that the *applicant* comes within the description of a person to whom a right of appeal is given in the opening words of the section, it does not follow that the *application* he makes does so, or that, in other words, the right given to such a person is a right of appeal against a conviction in the wider sense, as distinguished from a conviction in the narrow technical sense given in *Goldhamer*. The premise upon which this suggestion is predicated has no relevancy to the nature of the right of appeal which is given under the section. It may also be added that, if the interpretation contended for were accepted, in the result, Parliament would have given a right of appeal against sentence to a person coming within the language of the opening words of the section but would have refused a similar right to a person who, having appealed to the Court of Appeal only against his sentence, and not against his conviction, could never possibly come within that language; for the Court of Appeal cannot affirm an unappealed conviction.

Finally, it is said that in enacting s. 597, in its present form, one must find an apparent intention of Parliament to ensure uniformity in the interpretation of criminal law throughout Canada and that such a purpose would be, *pro tanto,* thwarted, if we were to hold that we are without jurisdiction to deal with a pure point of law as to whether a sentence imposed is or is not authorized by a statute. With respect to sentence, as distinguished from conviction, I am quite unable, for the reasons above indicated, to find such an intention of Parliament in s. 597. It also appears that such an intent is negatived by the other appellate provisions related to appeals to this Court. Under these appellate provisions, the right of appeal, given to the Attorney-General, namely in s. 598, does not include the right to appeal in the matter of sentence. For the implementation of this alleged intent and purpose of Parliament, it is no less essential that a right, similar to the one contended for on behalf of the applicant, be given to the Attorney-General; but it has not been given.

For these reasons, I am clearly of the view that nowhere in the relevant provisions of the new Code, did Parliament indicate, either in express terms or by clear implication, any intent to alter the prior state of the law, under which there is no appeal to this Court in the matter of sentence.

Section 41 of the *Supreme Court Act*. The relevant parts of that section read as follows:

41. (1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

(2) Leave to appeal under this section may be granted during the period fixed by section 64 or within thirty days thereafter or within such further extended time as the Supreme Court or a judge may either before or after the expiry of the said thirty days fix or allow.

(3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

To support applicant's contention that s. 41 confers jurisdiction to this Court to entertain appeals in matters of sentence, imposed in respect of indictable offences, the provisions of subsection (3) are assumed to be subordinated to those of subsection (1)—in that, the latter states the principle and the former, the exception—; and, on that assumption, the following interpretation is given.

If matters of sentence are held to come within the language of subsection (3), then, by force of the latter, they are excepted from the operation of subsection (1); and, for this reason alone, this Court has no jurisdiction.

If, on the contrary, matters of sentence are held not to come within the language of subsection (3), then, not being excepted from the operation of subsection (1), there is jurisdiction in this Court.

In both alternatives, however, this interpretation leads to inconsistencies.

In the first alternative, while a judgment *affirming a sentence* would be excepted from the operation of subsection (1) by force of subsection (3), there are no words in the latter capable of excepting a judgment *increasing the*

1959

GOLDHAR
v.
THE QUEEN

Fauteux J.

*sentence.* And, in the result, this Court would have jurisdiction to entertain an appeal when the sentence has been increased, but would be without jurisdiction when it has been affirmed; and this, even if in either case the question raised in support of the appeal be whether the sentence is authorized or not by statute.

In the second alternative where, on the interpretation of subsection (3), this Court would have jurisdiction in the matter of sentence, the following inconsistencies would ensue. Contrary to what is the situation with respect to every authorized appeal to this Court in criminal matters, the appeal against sentence under s. 41 would not be restricted to pure questions of law but would extend to questions of mixed law and facts and to pure questions of fact. In addition, the delay within which leave to appeal must be granted, being determined by subsection (2), would be, in the matter, far in excess of the delay prescribed for the proper administration of justice in criminal matters, for the obtention of leave to appeal to this Court against a conviction or an acquittal.

I cannot think that Parliament ever intended or even contemplated these inconsistencies flowing from either one of these interpretations. And this, in my view, clearly indicates that it was never intended by Parliament that the right of appeal given under s. 41 would extend to indictable offences, as distinguished from non indictable offences.

This view is supported by the fact that, under the *Criminal Code,* the appeals to this Court with respect to indictable offences are, contrary to what is the case with respect to non indictable offences, dealt with in the appellate provisions related to appeals to this Court under the Code.

It is further supported by the clear contradiction which would exist, on the view that Parliament intended to include indictable offences in s. 41, between the special appellate provisions under the Code and the general appellate provisions under s. 41 of the *Supreme Court Act.*

Parliament is presumed to be consistent with itself and the language of every Act must be construed as far as possible in accordance with the terms of every other statute

which it does not in express terms modify in a way avoiding contradictions. It has been indicated above that, if s. 597 was interpreted as giving a right of appeal as to sentences, inconsistencies would result and that, on the contrary interpretation, there would not be any, the state of the law remaining what it was prior to the enactment of the new Code. And it has also been pointed out that inconsistencies would flow from the suggested interpretation of s. 41. In these views, one cannot find, either under the Code or under s. 41 of the *Supreme Court Act*, the explicit language required to indicate an intent of Parliament to alter the prior state of the law as to appeals to this Court in the matter of sentence imposed in respect of indictable offences.

With great deference, I find it impossible to reconcile the two Acts by interpreting the word "conviction" in both subsections 41(3) and 597(1)(*b*) as including sentence in indictable offences, for each one of the subsections cannot be so interpreted without leading to inconsistencies.

Under the former Code, appeals against sentence have always been left to the final determination of the provincial Courts and there is nothing, under the new Code or s. 41 of the *Supreme Court Act*, indicating a change of policy in the matter, with respect to indictable offences.

This Court is without jurisdiction to entertain the present application which I would dismiss.

This being a matter of jurisdiction, all the Members of the Court have been consulted and I am requested by the Court to say that all, excepting our brother Cartwright, are in agreement with these reasons.

CARTWRIGHT J. (*dissenting*):—This is an application for leave to appeal to this Court from a judgment of the Court of Appeal for Ontario, pronounced on May 29, 1959, dismissing the applicant's appeal against the sentence imposed upon him by His Honour Judge Macdonell on May 4, 1956. The appeal to the Court of Appeal was brought pursuant to an order of that Court made on April 29, 1959, extending the time for applying for leave to appeal and granting leave to appeal against the sentence mentioned.

1959

GOLDHAR v. THE QUEEN

Cartwright J.

On April 27, 1956, the accused was convicted before His Honour Judge Macdonell at the sittings of the Court of General Sessions of the Peace for the County of York on the charge that:

> Jacob Rosenblat, Jack Goldhar (the applicant), Leonuell Joseph Craig and Hannelore Rosenblum, at the City of Toronto, in the County of York, and elsewhere in the Province of Ontario, between the 15th day of March and the 6th day of August, in the year 1955, unlawfully did conspire together, the one with the other or others of them and persons unknown, to commit the indictable offence of having in their possession a drug, to wit, diacetylmorphine, for the purpose of trafficking, an indictable offence under the Opium and Narcotic Drug Act, contrary to the Criminal Code.

On May 4, 1956, His Honour Judge Macdonell sentenced the applicant to twelve years' imprisonment in Kingston Penitentiary.

An appeal against this conviction (but not against the sentence imposed) was taken to the Court of Appeal for Ontario[1] and was dismissed on February 13, 1957; leave to appeal to this Court from that judgment was refused[2] on May 1, 1957.

The sentence of twelve years was imposed pursuant to s. 408(1)(*d*) of the *Criminal Code,* as enacted by 2-3 Elizabeth II, c. 51, which came into force on April 1, 1955, and is referred to in these reasons as "the new code". Section 408 reads in part as follows:

> 408(1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely,
>
> * * *
>
> (*d*) every one who conspires with any one to commit an indictable offence not provided for in paragraph (*a*), (*b*) or (*c*) is guilty of an indictable offence and is liable to the same punishment as that to which an accused who is guilty of that offence would, upon conviction, be liable.

The maximum term of imprisonment for the indictable offence of having possession of a drug for the purpose of trafficking is fourteen years, as provided by s. 4(3) of the *Opium and Narcotic Drug Act* which section came into force on June 10, 1954.

Under the *Criminal Code,* R.S.C. 1927, c. 36, hereinafter referred to as "the old code", the maximum term of imprisonment which could have been imposed upon the

[1] [1957] O.W.N. 138, 117 C.C.C. 404.
[2] [1957] S.C.R. IX.

applicant for the offence of which he was convicted would have been seven years, as provided by s. 573 of the old Code which reads as follows:

573. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

The question of law on which leave to appeal to this Court is sought is stated in the notice of motion as follows:

Whether Section 408(1)(*d*) of The Criminal Code 1953-1954, Ch. 51 is applicable to the conspiracy committed, since if it is not the maximum sentence for a conspiracy not specifically named in The Criminal Code, R.S.C. 1927, Ch. 36, is found under Section 573 of the said Statute, namely seven (7) years.

On the merits, it is sufficient, for purposes of this motion, to say that the ground of appeal sought to be raised is, in my opinion, one of substance and difficulty; its importance is obvious; if the applicant's contention is upheld he will have been sentenced to five years' imprisonment in excess of the maximum term permitted by law.

Counsel for the respondent submits that we are without jurisdiction to grant leave to appeal from a judgment of the Court of Appeal dismissing an appeal against the sentence passed by the trial Court.

Counsel for the applicant bases his application on s. 597(1)(*b*) of the new Code which reads:

597. (1) A person who is convicted of an indictable offence whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

* * *

(*b*) on any question of law, if leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow.

It will be observed that this application falls within the literal meaning of the words quoted. The applicant is a person who has been convicted of an indictable offence whose conviction has been affirmed by the Court of Appeal and he seeks leave to appeal to this Court on a question of law. It is important to observe that the present section does not say "may appeal *against the affirmance of such conviction*" as did its predecessor. It is contended for the

1959

GOLDHAR
v.
THE QUEEN

Cartwright J.

respondent, however, that other provisions of the Code, the history of the legislation and the jurisprudence dealing with it require us to construe s. 597 as giving a convicted person a conditional right of appeal against his conviction only and not against his sentence. It is pointed out that s. 583 which confers upon a person convicted of an indictable offence the right of appeal to the Court of Appeal distinguishes between (a) an appeal against conviction and (b) an appeal against sentence, and that this distinction is maintained in sections 592 and 593 the former of which sets out the powers of the Court of Appeal on an appeal against conviction and the latter the powers on an appeal against sentence.

The respondent also relies on the decision of this Court in *Goldhamer v. The King*[1]. In that case the appellant had been found guilty of an indictable offence and sentenced by the trial court to pay a fine of $400 and in default of payment thereof to be imprisoned for six months; he immediately paid the fine; the Attorney-General of Quebec appealed to the Court of King's Bench under s. 1013 of the *Criminal Code* and that Court increased the sentence by adding thereto a term of imprisonment for six months; Bernier J. dissented but gave no reasons for his dissent. The appellant thereupon appealed to this Court. The question of jurisdiction was raised by the Court in the course of the argument. Judgment was reserved and the appeal was in due course dismissed. Duff J., as he then was, Mignault J. and Malouin J. were all of opinion that there was no right of appeal and dismissed the appeal on that ground. Idington J. was doubtful as to the Court's jurisdiction but thought that, in any event, the appeal should be dismissed on the merits. He said in part at p. 292:

> I cannot therefore confidently assert and hold that there is no appeal possible under such circumstances as involved herein.

Maclean J. simply concurred in the dismissal of the appeal. The ratio of the majority is found in the reasons of Duff J. at p. 293:

> As my brother Idington points out, the word "conviction" cannot, perhaps, be said to be capable of only one necessarily exclusive meaning, and it may be capable of being employed with a signification including

[1] [1924] S.C.R. 290, 42 C.C.C 354, 3 D.L.R. 1009.

the sentence. Section 1013 does, however, I think, distinguish very clearly between the conviction and the sentence for the purposes of appeal, and the Act of 13-14 Geo. V., by which the present section was brought into force, made no change in section 1024. Accordingly, I think the word "conviction' in the last mentioned section should be read in its less technical sense, and consequently that there is no right of appeal to the Supreme Court of Canada from the judgment given by a court of appeal on an appeal under subsection (2) of section 1013.

and in the reasons of Mignault J. (with whom Malouin J. agreed) at pages 293 and 294:

Our jurisdiction is governed by article 1024 of the Criminal Code, which states, with a proviso which need not be mentioned here, that any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under article 1013, may appeal to the Supreme Court of Canada against the affirmance of such conviction.

As now amended, article 1013 gives a right of appeal against a conviction, and against a sentence pronounced by the trial court against a person convicted on indictment. Article 1024 was not amended by the 1923 statute and under it the right of appeal is restricted to an appeal against the affirmance of the conviction. Reading it with article 1013, as amended, the appeal from the sentence under paragraph 2 of article 1013 cannot be brought before this Court.

When *Goldhamer* was decided the sections referred to in the passages quoted, so far as relevant, read as follows:

1013 (1) A person convicted on indictment may appeal to the court of appeal against his conviction—

(*a*) on any ground of appeal which involves a question of law alone; and

(*b*) with leave of the court of appeal, or upon the certificate of the trial court that it is a fit case for appeal, on any ground of appeal which involves a question of fact alone or a question of mixed law and fact; and

(*c*) with leave of the court of appeal, on any other ground which appears to the court of appeal to be a sufficient ground of appeal.

(2) A person convicted on indictment, or the Attorney General, or the counsel for the Crown at the trial, may with leave of a judge of the court of appeal, appeal to that court against the sentence passed by the trial court, unless that sentence is one fixed by law.

* * *

1024. Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the court of appeal is unanimous in affirming the conviction, nor unless

1959

GOLDHAR
v.
THE QUEEN

Cartwright J.

notice of appeal in writing has been served on the Attorney General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

(2) The Supreme Court of Canada shall make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect.

The section now in force which corresponds with s. 1013 quoted above is s. 583 of the new Code reading as follows:

583. A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal

(*a*) against his conviction

(i) on any ground of appeal that involves a question of law alone,

(ii) on any ground of appeal that involves a question of fact alone or a question of mixed law and fact, with leave of the court of appeal or upon the certificate of the trial judge that the case is a proper case for appeal, or

(iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or

(*b*) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.

For the purposes of the problem before us the differences in wording between this section and s. 1013 are not significant.

When, however, s. 597 of the new Code is compared with s. 1024 under which *Goldhamer* was decided it will be observed that there are the following points of difference; (i) as pointed out above, the words in s. 1024 "against the affirmance of such conviction" have disappeared; (ii) while under s. 1024 the appeal to this Court was at large, provided there was a dissent in the Court below, the rights of appeal given by s. 597 are restricted to questions of law; (iii) under s. 1024 the time for appealing ran from "such affirmance" but under s. 597 it runs from the day when "the judgment appealed from is pronounced"; the usual meaning of the word "judgment" in criminal matters is, in my opinion, correctly stated in the Dictionary of English Law by Earl Jowitt (1959) at p. 1025:

In criminal proceedings, the judgment is the sentence of the court on the verdict of the jury, or on the prisoner pleading guilty to the indictment. Where the jury acquits the prisoner, the judgment is that

he be discharged; if he pleads guilty or is convicted, the judgment declares the punishment which he has to suffer, e.g., death, imprisonment, fine, etc.

These three differences appear to me to be sufficiently substantial to prevent the decision in *Goldhamer* being regarded as decisive of the question before us.

I have already indicated my view that this application falls within the literal wording of s. 597; and the terms of ss. 583, 592 and 593 do not appear to me to require us to construe s. 597 in the limited sense contended for on behalf of the respondent.

If the meaning of the words used were ambiguous it would be proper to consider the apparent intention of Parliament in enacting s. 597 in its present form, as appearing from the history of the legislation. One of the primary purposes appears to me to have been to confer upon this Court a jurisdiction, to determine points of law arising in cases of indictable offences, wide enough to ensure uniformity in the interpretation of the criminal law throughout Canada. That purpose would be *pro tanto* thwarted if we were to hold we are without jurisdiction to deal with a pure point of law as to whether a sentence imposed is or is not authorized by statute.

In my opinion no sufficient reason has been advanced for interpreting s. 597 so as to refuse a jurisdiction which appears to me to be conferred upon the Court by the words of that section construed in their ordinary and literal meaning.

There is another line of reasoning which leads me to the same conclusion. Section 41 of the *Supreme Court Act* is *in pari materia* with s. 597 of the new Code. Both sections deal with the jurisdiction of this Court to grant leave to appeal from decisions of provincial Courts.

In *Rex v. Loxdale*[1], Lord Mansfield said:

> Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and *construed together*, as one system, and as explanatory of each other.

[1] (1758), 1 Burr. 445 at 448, 97 E.R. 394.

1959

GOLDHAR v. THE QUEEN

Cartwright J.

Section 597 of the Code has already been quoted. Subsections (1) and (3) of s. 41 of the *Supreme Court Act* read as follows:

41 (1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

* * *

(3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

The words of subs. (1) unless they are cut down by the opening phrase, "Subject to subsection (3)", are obviously wide enough to confer jurisdiction to grant leave to appeal from the judgment of the Court of Appeal affirming the sentence of 12 years' imprisonment passed upon the applicant; it is a judgment, and indeed a final judgment, of the highest court of final resort in the province in which judgment can be had in the particular case, for "judgment" is defined in s. 2(*d*) as follows:

(*d*) "judgment", when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof;

If the words in subs. (3) "the judgment of any court . . . affirming a conviction . . . of an indictable offence" are to be interpreted as having the limited meaning "affirming a verdict or finding of guilt excluding the sentence imposed" and not, to use the words of Duff J., quoted above, "with a signification including the sentence", it would follow that the jurisdiction to grant leave to appeal from sentence is not excluded by the words of subs. (3) from the wide power given by subs. (1). From this in turn it would follow that under subs. (1) this Court would have jurisdiction to give leave to appeal from a sentence and such an appeal would not be restricted to questions of law. It appears to me extremely unlikely that Parliament intended this result; it

can be avoided by construing the words "the judgment of any court . . . affirming a conviction . . . of an indictable offence" so as to include the affirmation of the sentence.

When s. 597 of the Code and s. 41 of the *Supreme Court Act* are read together it is my opinion that the word "conviction" in both sections should be read "with a signification including the sentence" which construction gives effect to the apparent intention of Parliament that our jurisdiction in criminal matters should be strictly limited to points of law and yet wide enough to assure uniformity in the interpretation of the criminal law throughout Canada.

It may be observed in passing that cases in which a sentence can be questioned on a pure point of law are likely to be few and far between.

Having concluded that we have jurisdiction, I would, for the reasons mentioned earlier, grant leave to appeal on the ground set out in the notice of motion.

*Application dismissed,* CARTWRIGHT J. *dissenting.*

*Solicitor for the appellant: M. Robb, Toronto.*

*Solicitor for the respondent: J. D. Hilton, Toronto.*

1959
*Nov. 10
Nov. 30

LAW, UNION & ROCK INSURANCE COMPANY LIMITED (*Defendant*) — APPELLANT;

AND

MOORE'S TAXI LIMITED (*Plaintiff*) — RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Insurance—Comprehensive—Taxi company claiming from insurer for negligence of driver—Breach of duty to retarded child passenger—Negligence—Immediate or proximate cause of accident—Chain of causation—Complementary policies—Claims arising out of ownership or operation of motor vehicle.*

A taxi driver, who had the duty of conveying home retarded children and delivering them there safely from a special school, let one child out of the taxi opposite his home to cross the street alone. The child was hit by a truck and seriously injured. Damages were awarded to the child and his parents against the taxi company. The latter being insured under a comprehensive policy with the defendant, covering damages, *inter alia,* because of bodily injury, but excluding claims arising out of the ownership, maintenance, use or operation of any motor vehicle obliged by law to carry a licence, sued the defendant under this policy. The trial judge dismissed the action, but this judgment was reversed by the Court of Appeal. The insurer appealed to this Court and contended, *inter alia,* that the words "arising out of" in the exclusion clause, should be construed as meaning "originating from, incident to or having connection with" the use of the vehicle, and in any case that the proximate cause of the accident was the driver's stopping on the wrong side of the street.

*Held:* The appeal should be dismissed and the action maintained.

The obligation to conduct the child to the door of its home on foot formed part of the contract of carriage, but had nothing to do with the motor vehicle. The words in the exclusion clause could only be construed as referring to claims based upon circumstances in which it is possible to trace a continuous chain of causation unbroken by the interposition of a new act of negligence and stretching between the negligent use and operation of a vehicle and the injuries sustained. Here, the vehicle was stationary and the chain of causation originating with its use was severed by the intervening negligence of the taxi driver, who failed to escort the child. That failure gave rise to the defendant's liability.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], reversing a judgment of Williams C.J. Appeal dismissed.

*G. C. Ball,* for the defendant, appellant.

*C. V. McArthur, Q.C.,* and *R. B. McArthur,* for the plaintiff, respondent.

*PRESENT: Cartwright, Abbott, Martland, Judson and Ritchie JJ.

[1] (1959), 20 D.L.R. (2d) 149.

The judgment of the Court was delivered by

RITCHIE J.:—At the time of the happening of the events hereinafter related the respondent taxi company was "the Insured" under a comprehensive liability policy issued by the appellant whereby the appellant agreed

> . . . to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed by law on the Insured . . . for damages . . . because of bodily injury . . . sustained by any person and occurring during the Policy Period.

By the next following provision of this policy it is stipulated under the heading "EXCLUSIONS" that

> The Company shall not be liable under this Insurance for claims arising out of . . . the ownership, maintenance, use or operation by or on behalf of the Insured of any motor vehicle, trailer or semi-trailer which is obliged by law to carry a license or of any aircraft or watercraft;

It is to be noted also that there was attached to the policy a "SCHEDULE OF HAZARDS AND PREMIUMS", and that one of the operations listed as covered by the policy was "Taxi Service" for which a substantial premium was charged.

It is the question whether or not the claim hereinafter described comes within the terms of the foregoing exclusion so as to exempt the appellant from liability, which lies at the heart of this appeal.

In the course of its business as an operator of taxis in the city of Winnipeg, the respondent had entered into an agreement with the Association for Retarded Children (hereinafter referred to as the "Association") by the terms of which it agreed to transport retarded children to and from school and in particular to take them directly to their homes from school and not to let any child out on the side of the street opposite to its home.

On May 18, 1955, one of the respondent's taxi drivers was transporting a child named Finbow in one of the respondent's taxis from the school to his home, and there is no doubt that it was part of the duty which he owed to this child to see that he was delivered there safely. Unfortunately on the occasion in question, the taxi driver stopped on the side of the street opposite to the child's home and let the child out of the taxi to cross the street alone, in the

1959

LAW, UNION & ROCK INS. CO. LTD. v. MOORE'S TAXI LTD.

Ritchie J.

course of doing which the child was hit by a truck and sustained very serious injuries. The child (by his next friend) and his parents obtained a judgment against the respondent and the respondent in turn brought this action against the appellant under its comprehensive liability policy. The appellant, by way of defence, invoked the provisions of the exclusion set forth above, alleging that the claim arose out of the ownership, use and operation of the respondent's motor vehicle and was, to use the language of the pleadings, "thereby excluded by the clear language of the insuring agreements". The learned trial judge, Chief Justice Williams, dismissed the action on this ground, and the respondent having appealed to the Court of Appeal of Manitoba[1], the appeal was allowed and judgment given for the respondent in the amount of $13,297.31. It is from this decision that the appellant now appeals.

For the purposes of this action the parties agreed to accept the findings of fact of the trial judge (Freedman J.) in the action brought by the infant and his parents against the respondent and others (*Finbow et al. v. Domino et al.*[2], and the following passages from the decision in that case are significant:

> I would not attach too much significance to stopping on the opposite side of the street if the driver had thereafter himself taken the child across the street. But as he did not do so the act of stopping where he did must be looked upon as the first in a series of acts or omissions which continued to the very moment when the boy was injured and which in the aggregate constituted negligence of a very grave degree.
>
> * * *
>
> The items of negligence in combination constitute a formidable indictment against the taxi driver. He stopped on the opposite side of the street from the boy's home, contrary to the company's express agreement to do otherwise. He allowed the child to emerge from the taxi through the left or traffic side. Then he went back into the cab leaving the boy outside—a rash thing even if the child were normal, but an especially dangerous thing in the case of a retarded child. Thereafter, as the potential tragedy unfolded before him, he failed to rectify his prior errors by prompt and vigilant steps to safeguard the boy. Instead he sat behind the wheel. His failure to take such steps as the circumstances required and as his duty dictated was inexcusable. It constituted a further act of negligence which continued until the accident occurred.

The reasoning of Chief Justice Williams in his decision at the trial of this action appears to be predicated on the proposition that the respondent's liability was imposed

[1] (1959), 20 D.L.R. (2d) 149. [2] (1958), 65 Man. R. 240.

upon it by reason of a breach of its duty as a carrier of passengers by motor vehicle. Having cited authority for the proposition that "in every hiring of a taxicab there is an implied contract that the passenger will be carried safely to his destination", see *Misenchuk v. Thompson*[1], the learned trial judge goes on to say: "I am in no doubt that the real cause of the accident was the failure to carry the child to its destination", and he concludes that

> The operation or use of the taxicab for purposes of transportation was not at an end and could not be until the passenger was delivered to his destination.

With the greatest possible respect, this reasoning appears to me to leave out of account the obligation to conduct the child to the door of its home on foot which formed a part of the contract of carriage and had nothing to do with the motor vehicle. This phase of the matter is made abundantly clear in the letter which was written on behalf of the Association to the respondent on October 6, 1954, and in which it was said:

> Another point I would like adjusted, that of letting a child out of a car by him or herself, and on the opposite side of the street from their house. This, I hope, is not practised too much as it could lead to very grave results. The child not recognizing its own house, could very soon wander and become lost and involved in an accident while trying to cross a street. *It is, therefore, necessary for the driver to see the child out of the car and to the door.* (The italics are mine.)

In my opinion the agreed facts upon which this action is based do not disclose evidence of such negligence in the use and operation of the respondent's vehicle as to make this the source of the liability imposed upon it for the boy's injury although there can be no doubt that the action of the driver in *ceasing* to use and operate the motor vehicle before it reached his home constituted a breach of the respondent's contract with the Association and of its duty to the boy himself. It was after the boy had left the stationary vehicle and was standing unharmed on the sidewalk facing the potential peril of crossing the street alone that the taxi driver became seized with an entirely different kind of duty which had nothing to do with the use or operation of the motor vehicle but rather involved his getting out of it and conducting the boy in safety to his home, and

[1] [1947] 2 W.W.R. 849, 55 Man. R. 389 at 399.

1959

LAW, UNION & ROCK INS. CO. LTD. v. MOORE'S TAXI LTD.

Ritchie J.

it is by reason of the breach of this duty that the law imposes liability on the respondent. I agree with the learned Chief Justice of Manitoba, speaking on behalf of the Court of Appeal of that province in the course of the decision from which this appeal is asserted, in saying that:

> In my opinion the liability of the plaintiff arose from the neglect of the driver of the taxi to escort the child to his home. That there was a duty to do so is not disputed. This was a duty separate and distinct from the "use and operation" of the motor vehicle. The car had ceased to operate and was not in use. To incur liability in the use and operation of the motor vehicle implies some negligence in such use or operation. That was not what gave rise to the liability in this case.

I am also in agreement with Tritschler J.A. when he says in the course of concurring with Adamson C.J.M.:

> The comprehensive policy issued by defendant is complementary to the standard motor vehicle liability policy and the coverage of the former commences where the coverage of the latter ceases. In my opinion the plaintiff could not succeed against the insurer under the standard motor vehicle liability policy for the same reason that it can in this case succeed against the defendant.

The meaning to be attached to the words "arising out of" as they occur in the exclusion here in question has, of course, been the subject of much discussion in this case. Adamson C.J.M. has said that "The words are clear and must bear their own meaning. They refer to the immediate or proximate cause." On the other hand, the appellant contends that the words have a wider connotation and should be construed as meaning "originating from, incident to or having connection with the use of the vehicle", but that even if they bear the more restricted meaning the circumstances of the present case are such that the composite negligence of the taxi driver is not severable and that the proximate cause of the accident can, therefore, be said to have been the use and operation of the vehicle in stopping on the wrong side of the street. It is sufficient to say that the words "claims arising out of . . . the ownership, use or operation . . . of any motor vehicle" as used in this exclusion can only be construed as referring to claims based upon circumstances in which it is possible to trace a continuous chain of causation unbroken by the interposition of a new

act of negligence and stretching between the negligent use and operation of a motor vehicle on the one hand and the injuries sustained by the claimant on the other. In the present case the motor vehicle was stationary at the time of the accident and the chain of causation originating with its use was severed by the intervening negligence of the taxi driver whose failure to escort the boy across the street was the factor giving rise to the respondent's liability.

There is a clear distinction between this case and the cases of *Stevenson v. Reliance Petroleum Limited*[1] and *Irving Oil Company Limited v. Canadian General Insurance Company*[2]. In those cases the negligence had to do with the delivery of petroleum products from tank trucks by means of a mechanism that was a part of the truck itself and, therefore, the entire delivery operation was effected in the course of using the motor vehicles in question. In both those cases the ultimate damage was occasioned by the presence on the premises in question of petroleum products which had been deposited there through the negligent use of such a mechanism. In the present case, as has been said, the presence of the retarded child alone on the highway was not a circumstance arising out of the ownership, maintenance, use or operation of the respondent's vehicle but out of the taxi driver's failure to escort him to his home.

For the above reasons I would dismiss this appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the defendant, appellant: Thompson, Dilts, Jones, Hall & Dewar, Winnipeg.*

*Solicitors for the plaintiff, respondent: McArthur, Appleby, McArthur & Gillies, Winnipeg.*

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[1] [1956] S.C.R. 936, 5 D.L.R. (2d) 673.
[2] [1958] S.C.R. 590, 14 D.L.R. (2d) 337.

1959

*Oct. 27, 28, 29, 30 Nov. 30

THE CORPORATION OF THE COUNTY OF LAMBTON .... APPELLANT;

AND

CANADIAN COMSTOCK COMPANY LIMITED, THE BERNADO MARBLE, TERRAZZO AND TILE COMPANY LIMITED, WILLIAMSON ROOFING AND SHEET METAL LIMITED, AND HOSPITAL AND KITCHEN EQUIPMENT COMPANY LIMITED ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Mechanics' liens—Time for filing—Whether from date of substantial completion or entire completion—Waiver of lien—Estoppel—The Mechanics' Lien Act, R.S.O. 1950, c. 227, as amended by 1952, c. 54.*

A general contractor, T, entered into an agreement with the appellant municipality for the erection of a building, and awarded sub-contracts to the respondents. On December 21, 1955, the architect wrote to T that as all work had been substantially completed he wished to be in a position to certify substantial completion of the whole job by December 31, so that the hold-back period could be calculated from that date. T was instructed to obtain from the sub-contractors a notice that their work was completed or a waiver of lien. T wrote to the sub-contractors who acknowledged on January 4, 1956, that their work had been completed, but before these acknowledgments were received by T, the architect sent to the municipality a progress estimate showing 100 per cent. completion. By February 29, 1956, T had received the balance of the contract price, including the 15 per cent. holdback. The sub-contractors were not paid in full and filed liens. None of the liens was filed within 37 days of January 4, and the evidence showed that each sub-contractor had done work after that date. But all the liens were filed within 37 days of completion of the work. The municipality contended that the sub-contracts had been completed by January 4 and that the sub-contractors were estopped from denying this. The trial judge dismissed the action on the ground of estoppel, but this judgment was reversed by the Court of Appeal. The municipality appealed to this Court.

*Held:* The appeal should be dismissed.

None of the sub-contracts was completed when the acknowledgements were given, and all the sub-contractors did some work after January 4 without which they could not have successfully sued for the balance of their contract price, and this was not work done after completion and in pursuance of the warranty clause in their contracts. The fact that the work was trivial when compared with the size of the contract made no difference if it was done in good faith to complete the contract. Time only begins to run from the events mentioned in the subsections of s. 21 of the Act, regardless of triviality and of lapse of time

*PRESENT: Cartwright, Fauteux, Abbott, Judson and Ritchie JJ.

from the substantial performance of the contract. There is no basis for the application of any different rule to a lump sum contract under s. 21(1). The only certainty is the point of time when the sub-contractor is able to sue for his contract price in full and he cannot do this until he has performed all that he is bound to do under his contract. This is the meaning that the Court of Appeal in conformity with the authorities, has correctly attributed to the word "completion" under the section. The doctrine of substantial performance has no relevancy to the present problem. The fact that a contractor, who has substantially completed his work, may sue for the contract price, subject to deductions for minor defects or omissions, does not and cannot determine when time begins to run under the Act. Completion means what it says.

The acknowledgments given in this case did not amount to an "express agreement to the contrary" as required by s. 5(1). There was nothing in them to indicate that those who signed them were renouncing the application of the Act and the remedies provided by it. An acknowledgment from which it is inferred by the other side that time under the Act is running against the claimant when the facts of the case and the Act provide that it is not running, can only have legal effect if it is a waiver of lien under the Act. Estoppel cannot do what the section says only a signed express agreement can do.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Shaunessy J. Appeal dismissed.

*W. B. Williston, Q.C., J. W. Brooke* and *R. N. Robertson,* for the appellant.

*M. Lerner, Q.C.,* and *M. A. Bitz,* for Canadian Comstock Co.

*W. B. Henderson, Q.C.,* for Bernardo Marble, Terrazzo and Tile Co.

*W. B. Henderson, Q.C.,* and *T. W. I. Gibson,* for Williamson Roofing and Sheet Metal Ltd.

*J. S. Mallon, Q.C.,* for Hospital and Kitchen Equipment Co.

The judgment of the Court was delivered by

JUDSON J.:—The judgment of the Court of Appeal[1] awards to the four respondents liens against the Home for the Aged, a public building recently built by the appellant, the Corporation of the County of Lambton. In 1954 the county entered into a contract with Town and Country Construction Limited for the construction of this building

[1](1957), 10 D.L.R. (2d) 583.

1959

COUNTY OF LAMBTON v. CDN. COMSTOCK CO. et al.

Judson J.

for the sum of $665,008. The respondents are sub-contractors who were paid 85 per cent. of their claims. The 15 per cent. holdback, amounting to $77,000, was paid by the county to the general contractor on February 29, 1956, but none of this money reached these sub-contractors and they filed claims for liens.

With the exception of one part of the claim of Canadian Comstock Company Limited, where the right to lien was undisputed, and the claim of Hospital and Kitchen Equipment Company Limited, the claims were disallowed at trial. On appeal to the Court of Appeal, the disallowed claims were allowed in full and the county now appeals from this judgment.

Two main submissions were made on this appeal. The first was that because these respondents had acknowledged in writing that they had completed their work, they were estopped from denying that the time for filing their claims for liens commenced to run from the date of these acknowledgments. The second was that these sub-contractors had in any event completed their contracts on or before January 4, 1956, within the meaning of s. 21(1) of *The Mechanics' Lien Act* and that they were out of time because they failed to file their claims within thirty-seven days of this date.

On December 21, 1955, the architect wrote to the general contractor stating that all work had been substantially completed and that he wished to be in a position to certify substantial completion of the whole job by December 31. He then said: "To allow this notice of substantial completion, we should have one of two things—a notice from the sub-trades that they have completed their work and/or a waiver of lien." On December 23, 1955, the general contractor wrote to each sub-contractor stating that the architect had asked for a notice certifying that his work was completed. Waiver of lien as an alternative was not mentioned. The four respondents each answered this request and acknowledged that they had completed their contracts, two of them in absolute terms and two of them referring to minor matters to be attended to within a few days. The general contractor sent these letters to the architect on February 2, 1956.

On December 29, 1955, the architect sent progress estimate no. 12 to the County Treasurer. This showed 100 per cent. completion. In January the general contractor, having received the necessary funds from the county, disbursed the balance of the monies owing to these respondents less the 15 per cent. holdback. This payment was therefore made on the basis of 100 per cent. completion of the sub-contracts. On February 6 and February 17, 1956, two sub-contractors other than these respondents filed claims for liens, and on February 29, 1956, the county paid to the general contractor the balance of the monies owing under the contract amounting to $77,000, retaining only sufficient funds to settle the claims of the two sub-contractors who had registered liens. The respondents subsequently registered liens and they now claim that they had not completed their work within the meaning of s. 21(1) of *The Mechanics' Lien Act* when they gave their written acknowledgments and that they are not estopped by these acknowledgments from asserting this fact.

The learned trial judge found as a fact that on December 31, 1955, three of these four sub-contractors had substantially completed their contracts and that they had acknowledged full completion in writing not later than January 4, 1956. He rejected the submission of counsel for the defendant municipality that substantial completion of a sub-contract was enough to start the time running for filing a lien under s. 21(1) of the Act. Nevertheless he did hold that time began to run from January 4, 1956. It is therefore apparent that he decided the case on the basis of estoppel when he rejected the claims of Comstock, Bernardo and Williamson, with the exception of one part of the Comstock claim, which was undisputed. The ratio of his judgment is emphasized by his separate treatment of the claim of Hospital and Kitchen Equipment Company Limited. Although this sub-contractor had given the same acknowledgment as the others, he held that both parties knew that this sub-contract had not in fact been completed, since a compressor for one of the refrigerators had not been installed. This work was not done until March 22, 1956, and the claim for lien of this sub-contractor was held to be in time. On appeal the claims of the three unsuccessful

1959

COUNTY OF LAMBTON v. CDN. COMSTOCK CO. et al.

Judson J.

claimants were allowed, the Court of Appeal being of the opinion that there was no estoppel and that time did not begin to run under s. 21(1) of the Act until completion—not substantial completion—of the sub-contracts.

The contract of Canadian Comstock Company Limited was for the plumbing, heating, ventilating and electrical work and totalled $199,000. In addition, two other contracts were made by this company for the installation of a hydro-pneumatic pump and a fire pump. I agree with counsel for the appellant that these were additional, separate and distinct contracts and that they were not extras. The appellant admits that Comstock had a lien for these contracts but this fact has no bearing upon the determination of this litigation. Work on these additional contracts does not extend the time. Comstock's lien, if any, for the balance of its payment under the $199,000 main contract must stand on its own feet. Work done and materials supplied under separate contracts for the same owner or contractor cannot be run together in a general account so as to extend the time for filing the lien: *Fulton Hardware Co. v. Mitchell*[1]. Although Comstock, on December 27, 1955, certified completion of the original contract "excepting such minor details as balancing the heating system which will be carried out within the next few days", the fact is that this sub-contractor did much work in January, February and March, 1956. This work is all outlined in the reasons of the Court of Appeal. Some of it was trivial, some of it was not. Some of it was by way of completion of the contract; some of it was to remedy defects in work already done; some of it was in connection with the hydro-pneumatic pump and the fire pump; some of it was done on the specific instructions of the architect. None of it was done surreptitiously or for a colourable purpose and all of it was done to the knowledge of the architect. The Court of Appeal has held that this respondent had not completed its work on January 4, that the architect knew this and that the claim for lien had not been lost. There is ample evidence to support this finding. The plea of substantial completion as the point at which time begins to run under the statute against a contractor or sub-contractor was rejected.

[1] [1923] 4 D.L.R. 1205, 54 O.L.R. 472.

Williamson Roofing and Sheet Metal Limited acknowledged completion of its work by letter dated January 4, 1956. This contractor had supplied the architect with a bond that the roofing was completed on July 22, 1955, but it was still under obligation to make water-tight and do flashing on stacks subsequently installed on the roof by other trades. It was called back by the main contractor to do this flashing on March 5, 1956. This was minor work but it was undoubtedly part of its contract. The work was done on March 6 and the lien filed on March 13.

Bernardo Marble Terrazzo and Tile Company Limited is in much the same position. This company gave an acknowledgment of completion on January 4, 1956, but on January 26, 1956, it was called back by the main contractor to do some grinding that should have been done and had been overlooked on a terrazzo floor in one of the washrooms. This work was of a minor character and was done on February 8 and the lien filed on March 15.

Hospital and Kitchen Equipment Company Limited came back at the request of the architect. He informed this company on February 27, 1956, that a refrigerator would not work and that there were certain minor defects in some of the equipment. The refrigerator was the main complaint and it appears that the compressor unit had not been installed. It had been shipped in November, 1955, but had not been installed for some reason or other by the local electrician employed by this sub-contractor. This was done on March 22, 1956. Further complaints about the operation of the equipment were made on April 2 and May 15, 1956. The company made the necessary alterations and adjustments and filed its lien on May 24, 1956.

After a full review of the facts the Court of Appeal found that none of the contracts in question were completed at the time when the acknowledgments were given and that each of these sub-contractors did work after January 4, 1956, without which they could not have successfully sued for the balance of their contract price and that this was not work done after completion and in pursuance of the warranty clause in their contracts. I agree with this conclusion. The fact that in three of the cases—Hospital & Kitchen Equipment, Williamson and Bernardo—the work was trivial when

1959

COUNTY OF LAMBTON v. CDN. COMSTOCK CO. et al.

Judson J.

compared with the size of the contract makes no difference if it was done in good faith to complete the contract. *Russell v. Ont. Foundation & Engineering Co.*[1], overruling *Summers v. Beard*[2], and *Neil v. Carroll*[3]. I can well understand that in the case of these three sub-contractors the work was so trivial that it was overlooked when the acknowledgments were given. These omissions were, however, brought to the attention of these sub-contractors by the owner, its architect or the main contractor and were remedied. Comstock's case that it had not completed its contract is much more clearly defined—so much so that I have difficulty in understanding how it could possibly give this acknowledgment, except for the purpose of urging on payment of the balance of its account. This company's sub-contract was by far the largest of the four and amounted to $199,000. It had many odds and ends to complete and at least 20 items are listed in the reasons for judgment of the Court of Appeal.

I agree with counsel for the appellant that when one measures the work remaining to be done on January 4, 1956, against the size of their contracts, all of these four sub-contractors had substantially completed their contracts when they gave these acknowledgments. He submits that this is the completion which starts time running under s. 21(1) of *The Mechanics' Lien Act*, R.S.O. 1950, which reads:

> 21(1). A claim for lien by a contractor or sub-contractor in cases not otherwise provided for, may be registered before or during the performance of the contract or of the subcontract or within 37 days after the completion or abandonment of the contract or of the subcontract as the case may be.

He sought to draw a distinction between this subsection and subss. (2) and (4), which deal with liens for materials and services. Time runs in these cases from the furnishing of the last material (subs. (2)) or the completion of the service (subs. (4)). These are readily identifiable events and the course of judicial decision in Ontario summed up in the *Russell* case demonstrates a literal adherence to the wording of the subsections in the determination of these matters.

[1] (1926), 58 O.L.R. 260, 1 D.L.R. 760.
[2] (1894), 24 O.R. 641.
[3] (1881), *ibid.* 642.

Time only begins to run from the events mentioned in the subsections, regardless of triviality and regardless of lapse of time from the substantial performance of the contract. I can see no basis for the application of any different rule to a lump sum contract under s. 21(1), and there are very sound reasons for refusing to depart from this principle. How does a tribunal decide when there has been substantial completion so as to start time running against a sub-contractor? How would a sub-contractor be able to recognize his position if this doctrine were applied? The only certainty in the situation is the point of time when the sub-contractor is able to sue for his contract price in full and he cannot do this until he has performed all that he is bound to do under his contract. This is the meaning that the Court of Appeal, in conformity with a long line of judicial decision, has attributed to the word "completion" under s. 21(1), and in my opinion it was correct in so doing. Indeed, unless whatever certainty the legislation has is to be lost there is no other alternative.

We were pressed with the authority *Day v. Crown Grain*[1], to the effect that time begins to run when the contractor can sue "as for a completed contract", the submission being that this could be something short of completion. When the facts of the case are examined I do not think that this case lays down any rule different from that which has always been followed, namely, that time does not begin to run until there has been such performance of the contract as would entitle the contractor to maintain an action for the whole amount due thereunder.

The doctrine of substantial performance, as illustrated by such cases as *Dakin v. Lee*[2] and *Hoenig v. Isaacs*[3], has no relevancy to the present problem. The fact that a contractor, who has substantially completed his work, may sue for the contract price, subject to deductions for minor defects or omissions, if there are any, does not and cannot determine when time begins to run against him under *The Mechanics' Lien Act*. Completion means what it says. I do not think that time begins to run under s. 21(1) until it can

[1] (1907), 39 S.C.R. 258. [2] [1916] 1 K.B. 566.
[3] [1952] 2 All E.R. 176

1959

COUNTY OF LAMBTON v. CDN. COMSTOCK CO. et al.

Judson J.

be said that the contractor or sub-contractor has done all that he promised to do and is entitled to maintain his action for the full amount.

Having found as a fact, in agreement with the finding of the learned trial judge, that these sub-contracts had not been completed when the acknowledgments were given, the Court of Appeal next rejected the defence of estoppel because the county did not rely on the representations and alter its position to its prejudice. I agree with the Court of Appeal that progress estimate no. 12 given by the architect to the county, certifying 100 per cent. completion and asking for all the money less the fifteen per cent. holdback, was issued before these acknowledgments were received. I agree also with the finding of the Court of Appeal that to the knowledge of the architect all three appellants did work under the provisions of their sub-contracts after January 4, 1956. Therefore, although these acknowledgments were obviously given by the sub-contractors for the purpose of inducing payment of the balance of their monies, it is equally clear that their representations, even if they were made to the county through its main contractor and architect, did not in fact induce the payment of the holdback. What did induce payment was the assumption of the architect that time was running against these sub-contractors from a date not later than January 4, 1956.

What the county is really seeking to do is to turn the acknowledgment into an agreement that the work had been completed, regardless of the actual and known state of facts and to set this up as a waiver of lien under the Act.

I can readily find that by the giving of these acknowledgments, these sub-contractors hoped to get their money faster and that they knew that they would be used by the county for the purpose of computing the time when it would be safe to pay out the holdback. But the Act provides (s. 5(1)) that "Unless he signs an express agreement to the contrary" a person who does certain things shall have a lien. The acknowledgments given in this case do not, in my opinion, amount to an "express agreement to the contrary"

as required by the Act. There is nothing in them to indicate that those who signed them were renouncing the application of the Act and the remedies provided by it.

Counsel for the appellant says that he seeks only to prevent these respondents from asserting in these proceedings a fact contrary to that contained in their own acknowledgments. Then he says time begins to run against them and that this is not the waiver of lien referred to in para. 5(1) of the Act. They still have their lien but they must assert it within a certain time for time begins to run against them from the date of their acknowledgments. This argument does not overcome s. 5(1) of the Act. An acknowledgment from which it is inferred by the other side that time under the Act is running against the claimant when the facts of the case and the Act provide that it is not running, can only have legal effect if it is a waiver of lien under the Act. I would not make any inroad on the principle laid down in *Anderson v. Fort William Commercial Chambers Limited*[1], that estoppel cannot do what the section says only a signed express agreement can do.

I am therefore of the opinion that the judgment of the Court of Appeal on this branch of the case was well founded both on fact and law and that the argument based on estoppel fails.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Bullbrook & Cullen, Sarnia.*

*Solicitors for Canadian Comstock Co.: Lerner, Lerner & Bitz, London.*

*Solicitor for Bernardo Marble, Terrazzo & Tile Co.: R. E. Fairs, London.*

*Solicitor for Williamson Roofing & Sheet Metal Co.: W. B. Henderson, London.*

*Solicitors for Hospital & Kitchen Equipment Co.: Taylor, Jamieson, Mallon, Fowler & Oliver, Sarnia.*

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[1] (1915), 34 O.L.R. 567, 25 D.L.R. 319.

1959
*Nov. 17, 18
Nov. 30

EASTERN METALS CORPORATION LIMITED (*Defendant*) ..... APPELLANT;

AND

JOSEPH PROTEAU (*Plaintiff*) .....RESPONDENT.

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

*Motor vehicles—Car hitting truckload extending 9 feet beyond rear of truck—Fatal injuries—Poor visibility—Inadequate lighting—The Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 27—Allegation of contributory negligence—Burden of proof.*

A truck driver transporting, some 48 minutes after sunset, in a very poor visibility, iron rails extending 9 feet beyond the rear of his truck, without having 5 tail lights on as required by s. 27 of the *Motor Vehicles Act* one hour after sunset, the only lighting at the rear being provided by a lamp fixed to the chassis of the truck which was veiled in an intermittent fashion by a red flag attached to the end of the rails, must be held solely responsible for the damages resulting when a car comes up behind at a reasonable speed and collides with the rails.

APPEALS from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Desmarais J. Appeal dismissed.

*L. Tremblay, Q.C.*, for the defendant, appellant.

*C. Fortin*, for the plaintiff, respondent.

The judgment of Taschereau, Abbott, Judson and Ritchie JJ. was delivered by

TASCHEREAU J.:—Le 7 décembre 1953, Armand Roy et son épouse Alphéda Roy ont été les victimes d'un accident de la route et sont décédés le même soir. Roy était au volant de sa propre voiture, une Plymouth 1953, dans laquelle avaient pris place son épouse, sa belle-sœur madame Proteau, et son enfant Réjeanne âgée de 4 ans. Il suivait la route qui conduit d'East Angus à Weedon, dans les Cantons de l'Est, et était précédé d'un camion lourdement chargé de rails de chemin de fer. Les deux voitures filaient du côté droit de la route.

*PRESENT: Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.

[1] [1958] Que. Q.B. 727.

Ce camion était la propriété de l'appelante "Eastern Metals Corporation Limited", et était conduit par l'employé de cette dernière, Alphonse Duval, qui alors était dans l'exercice de ses fonctions. Soudainement, vers 4.45 p.m. de cette journée du 7 décembre 1953, la voiture de Roy frappa l'arrière de ce camion avec le triste résultat que Roy et son épouse perdirent la vie, tandis que madame Proteau et la jeune enfant ne subirent aucune lésion.

Joseph Proteau, intimé, ès-qualité dans la présente cause, fut nommé tuteur aux huit enfants mineurs des parents décédés, et institua la présente action, dans laquelle il réclama de l'appelante la somme de $81,330. M. le Juge Gaston Desmarais, de la Cour supérieure, siégeant à Sherbrooke, a maintenu cette action jusqu'à concurrence de $32,780, et la Cour du banc de la reine a confirmé ce jugement. M. le Juge Casey, cependant, a enregistré sa dissidence, étant d'opinion qu'il y avait faute contributive de la part des deux conducteurs.

Ce genre d'accident n'est pas rare sur les routes de la province, et sa multiplication devrait engager pour leur propre sécurité les conducteurs de véhicules-automobiles qui suivent ces gros camions souvent trop chargés, à faire usage de la plus extrême prudence. Souvent voit-on de futiles réclamations faites par des conductures imprudents qui, par négligence ou inhabileté, viennent frapper l'arrière de véhicules commerciaux ou d'autres véhicules circulant sur la route. De nombreuses décisions ont été rendues par les tribunaux mais, évidemment, chaque cause doit être jugée suivant les faits qui se présentent.

Dans le cas qui nous occupe, la preuve n'est pas révélatrice de tous les incidents qui ont sans doute entouré cette tragédie. En effet, nous n'avons le témoignage ni de monsieur ni de madame Roy, tous deux décédés. Quant à madame Proteau, passagère assise seule sur le banc arrière de la voiture Plymouth, elle dormait, et ce n'est qu'au moment du choc qu'elle s'éveilla. Elle ne peut donc jeter aucune lumière sur les circonstances qui ont immédiatement précédé cet accident. La fillette Réjeanne, trop jeune, n'a pas témoigné devant les tribunaux. Seul Duval, conducteur du camion, était sur les lieux au moment où les véhicules sont venus en contact. Il arrêta immédiatement son camion,

1959

EASTERN METALS CORPN. LTD. v. PROTEAU

Taschereau J.

s'empressa de se rendre vers la voiture de Roy, et rencontra madame Proteau qui elle aussi était sortie de la voiture dans laquelle elle était passagère. Les passants arrêtèrent et la Sûreté fut dépêchée sur les lieux.

La preuve révèle, et c'est ainsi que l'a apprécié le juge au procès, que l'accident s'est produit vers 4.45 p.m. A l'endroit où il est arrivé, le chemin est légèrement accidenté, mais présente une ligne droite sur une distance d'environ un demi-mille. Il est certain qu'il bruinait à des intervalles irréguliers, que le temps était sombre et qu'à cette saison, à cause de la noirceur hâtive, la visibilité était substantiellement réduite.

Le camion de l'appelante portait une charge de plusieurs milliers de livres, qui consistait en une vingtaine de rails de chemin de fer, qui excédaient de neuf pieds la partie arrière du véhicule. Le panneau postérieur du coffre était baissé de façon à permettre aux rails de reposer horizontalement sur le camion.

A l'arrière du camion, il n'y avait qu'une seule lumière rouge, placée au centre à l'extrémité du chassis, qui fonctionnait au moment de l'accident. Elle se trouvait sous le panneau renversé, et également sous les rails qui dépassaient, et qui nécessairement oscillaient sous l'effet des accidents de la route. Normalement, il y a à l'arrière de ce camion trois lumières, dont deux ne fonctionnaient pas. De plus, il n'y avait pas d'autres réflecteurs, et même la lumière qui devait éclairer la licence était hors d'usage. Un petit drapeau rouge de 24 x 10 pouces était placé au centre, à l'extrémité des rails, et était susceptible, d'après le témoignage de Duval, conducteur du camion, d'obstruer la vue à certains moments de la seule lumière qui était allumée. A cause du mauvais état de la route, et de la visibilité réduite, Duval conduisait son camion à une vitesse de dix à douze milles à l'heure, et il a lui-même juré qu'il faisait assez noir pour allumer ses phares d'avant, ce qu'il avait fait depuis quelque temps. Roy également avait allumé les siens, et filait à peine plus vite que le camion qui le précédait. Le choc léger qui s'est produit démontre que sa vitesse ne pouvait pas être excessive, mais qu'au contraire, elle devait être très modérée.

L'article 27 de la *Loi des Véhicules Automobiles* décrète:

Tout véhicule automobile doit dans un chemin public, être muni de deux lanternes à feu blanc à l'avant et d'une lanterne à feu rouge à l'arrière.

Lorsque le véhicule automobile est sur un chemin public, entre une heure après le coucher du soleil et une heure avant son lever, les lanternes sur ce véhicule, qu'il soit arrêté ou en mouvement, doivent chacune produire une lumière éclairant à une distance d'au moins cent pieds en avant et visible à une distance d'au moins cent pieds en arrière, et la lanterne à l'arrière doit avoir une capacité d'au moins quatre chandelles, et doit projeter une lumière rouge horizontalement et une lumière blanche verticalement, de façon que la lumière blanche éclaire la plaque à l'arrière également sur toute sa surface, et suffisamment pour lire le numéro sur cette plaque à une distance d'au moins cent pieds.

*En outre des lanternes prescrites* par les paragraphes ci-dessus, tout autobus, véhicule de commerce et véhicule de livraison, mesurant plus de quatre-vingts pouces de largeur, circulant dans un chemin public entre une heure après le coucher du soleil et une heure avant son lever, devra porter à l'avant une lanterne à feu vert et à l'arrière une lanterne à feu rouge et un réflecteur rouge disposés pas plus de six pouces du côté extrême gauche du véhicule, de manière à bien délimiter la partie de la route occupée de ce côté par le véhicule, le signal lumineux des dits lanternes et réflecteurs devant être visible à une distance d'au moins cinq cents pieds.

En outre des lanternes prescrites par lesdits paragraphes, tout autobus, véhicule de commerce et véhicule de livraison mesurant plus de quatre-vingts pouces de largeur ou plus de trente pieds de longueur, circulant dans un chemin public entre une heure après le coucher du soleil et une heure avant son lever, devra porter à l'avant trois lanternes à feu vert et à l'arrière trois lanternes à feu rouge alignées horizontalement et espacées de pas moins de six pouces les unes des autres et de pas plus de douze pouces, le signal lumineux des dites lanternes devant être visible à une distance d'au moins cinq cents pieds. Ces lanternes devront être posées au centre et aussi près du sommet du véhicule que sa structure permanente la permettra.

Ce que cette loi ordonne, c'est que la voiture de l'appelante qui avait plus de 80 pouces de largeur, devait porter à l'arrière cinq lumières, mais cette obligation n'était imposée qu'une heure après le coucher du soleil. Or, il est établi que le soleil n'était couché que depuis quarante-huit minutes avant l'accident. Cette disposition impérative de la loi ne dispense pas cependant les conducteurs de véhicules automobiles de prendre les précautions voulues que commandent les règles les plus élémentaires de la prudence. Il s'agit là d'un minimum que la loi exige et rend celui qui la viole passible d'une amende. La loi n'établit pas un "standard" de prudence auquel il faut se limiter quand une prudence additionnelle est nécessitée par les circonstances.

1959

EASTERN METALS CORPN. LTD. v. PROTEAU

Taschereau J.

Ce soir-là, il faisait presque nuit, la visibilité était très réduite à cause de l'inclémence de la température, tous les automobilistes avaient allumé leurs phares, et il était certainement imprudent de circuler sans avoir pris cette précaution élémentaire. D'ailleurs, il est clair que l'appelante n'a pas allumé ses cinq lumières situées à l'arrière du camion, et la raison, nous dit Duval, c'est qu'une seule fonctionnait.

Comme le disait M. le Juge Galipeault, maintenant juge en chef de la Cour du banc de la reine, dans *Shawinigan Water & Power Co. v. Laprise*[1]:

> La défenderesse, à mon sens, si elle ne violait pas la lettre de l'art. 27, par. 2, de la loi des véhicules automobiles, (S.R.Q. 1925, ch. 35) édictant que tout véhicule automobile sur le chemin public, doit, une heure après le coucher du soleil, être muni de lumière, et il se peut qu'au moment de l'accident le soleil ne fût pas couché depuis une heure encore, en a certes violé l'esprit.
>
> La loi qui impose l'obligation, une heure après le coucher du soleil, aux conducteurs de véhicules moteurs de faire briller leurs phares, ne dit pas qu'ils ne seront pas tenus de recourir au même soin, si auparavant, pour la sûreté du public, il y a lieu d'utiliser les lumières.

Subséquemment, dans la cause de *Brousseau v. Lamontagne*[2], la Cour d'Appel a décidé dans le même sens, et le jugé est le suivant:

> The Court of Appeal, by a majority judgment, declares that, although the Motor Vehicles Act (R.S.Q. 1941, ch. 142, art. 27) requires a motor vehicle, when operated on a public highway, to carry the lights therein prescribed only between one hour after sunset and one hour before sunrise, there is an obligation at common law for every driver to conduct himself in such a manner as to avoid dangers to others and that when the visibility is difficult prudence requires that lights be shown notwithstanding the lack of a statutory obligation to do so. Defendant driving at a high speed or being inattentive, both parties were at fault.

Tel est aujourd'hui l'état de la jurisprudence dans la province de Québec.

Je crois donc que, sur ce point, il y a eu négligence de la part de l'appelante. De plus, je crois que l'un des plus grands dangers de la circulation est de tolérer que les camions commerciaux puissent ainsi transporter de lourdes charges, excédant de beaucoup la longueur des véhicules, sans que des précautions exceptionnelles ne soient prises. Comment un conducteur peut-il se douter, dans l'obscurité, que des matériaux excèdent de 9 ou 10 pieds le véhicule qui le

[1] [1942] Que. K.B. 212 at 213. [2] [1952] Que. Q.B. 76.

précède? Dans le cas qui nous occupe, seul un obscur pavillon, qui voilait probablement la seule lumière à l'arrière du camion, était supposé indiquer le danger qui a causé la mort de monsieur et madame Roy. Je ne puis en conséquence admettre la prétention de l'appelante qu'elle n'a pas commis de fautes qui engendrent sa responsabilité civile.

Dans l'alternative, l'appelante a soumis à la Cour que si elle doit supporter une part de la responsabilité civile, la victime doit également, dans une certaine proportion, être tenue responsable de sa propre négligence. C'est d'ailleurs la conclusion à laquelle est arrivé M. le Juge Casey, dissident à la Cour du banc de la reine. Avec respect je crois que cette prétention doit être rejetée.

En effet, les seules fautes que je crois prouvées, que je retiens, et qui ont déterminé cet accident, sont celles commises par l'appelante et que j'ai mentionnées précédemment. Avec la preuve qui a été offerte, je crois qu'aucune faute ne peut être imputée à Roy. Affirmer qu'il n'a pas porté l'attention voulue, que ses lumières ou ses freins étaient défectueux, qu'il a été inhabile dans la conduite de sa voiture, ce serait entrer dans le domaine des hypothèses, des conjectures et des possibilités. Il est interdit aux tribunaux de spéculer dans de pareils domaines pour attribuer des responsabilités délictuelles ou quasi-délictuelles. Ce sont les probabilités et non les possibilités qui doivent guider les juges.

Comme j'ai eu l'occasion de le dire déjà, et particulièrement dans la cause de *Rousseau v. Bennett*[1]:

> L'honorable Juge de première instance a jugé suivant la balance des probabilités, ce qui est la preuve requise en matière civile, et je crois que le jugement de la Cour d'Appel est erronné en droit quand cette dernière conclut qu'il n'y a pas de présomption tellement forte qu'elle exclut toute autre possibilité. Ce n'est pas ce que la loi requiert. Il y a une distinction fondamentale qu'il faut faire entre le droit criminel et le droit civil. En matière criminelle, la Couronne doit toujours prouver la culpabilité de l'accusé au delà d'un doute raisonnable. En matière civile, la balance des probabilités est le facteur décisif. Comme le disait M. le Juge Duff dans la cause de *Clark v. Le Roi* (1921, 61 Can. S.C.R. 608 at 616):
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> > 'Broadly speaking, in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with whom the decision rests. It is, generally speaking,

[1] [1956] S.C.R. 89.

1959

EASTERN METALS CORPN. LTD. v. PROTEAU

Taschereau J.

sufficient if he has produced such a preponderance of evidence as to show that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts.'

Les tribunaux doivent souvent agir en pesant les probabilités. Pratiquement rien ne peut être mathématiquement prouvé. (*Jérôme v. Prudential Insurance Co. of America*, (1939, 6 Ins. L.R. 59 at 60), *Richard Evans & Co. Ltd. v. Astley*, (1911, A.C. 674 at 678), *New York Life Insurance Co. v. Schlitt*, (1945, S.C.R. 289 at 300), *Doe D. Devine v. Wilson*, (10 Moore P.C. 502 at 532)).

Quand un défendeur qui a été négligent veut établir la faute contributive de celui qui réclame, c'est lui qui a l'obligation de faire cette preuve. Ici, il n'a pas réussi à établir aucune faute de la part de Roy. Toutes les probabilités indiquent que, comme conséquence du défaut de lumières et de cet excédent de rails qui dépassaient le camion, Roy est venu le frapper, ne se doutant pas de la présence de ces obstacles qui obstruaient sa route et qui étaient presque invisibles à l'heure de l'accident.

Le montant des dommages déterminé par le juge au procès n'est pas contesté. Je m'accorde avec les conclusions auxquelles sont arrivées la Cour supérieure et la Cour du banc de la reine, et je rejetterais le présent appel avec dépens.

FAUTEUX J.:—D'accord avec mon collègue, M. le Juge Taschereau, je maintiendrais les conclusions auxquelles en sont arrivées la Cour supérieure et la Cour du banc de la reine.

Au regard des règles de la simple prudence, il était, dans les circonstances où s'est produit cet accident, excessivement dangereux de conduire ce camion sur la voie publique sans clairement signaler aux conducteurs des voitures venant à l'arrière, l'obstacle résultant de la projection des rails sur une longueur de neuf pieds au delà la boîte du camion en lequel ils étaient transportés. L'obscurité, la température et la différence entre la vitesse de dix milles à l'heure adoptée par Duval, le conducteur du camion, et la vitesse supérieure que pouvaient raisonnablement adopter les conducteurs de véhicules automobiles de promenade venant à l'arrière, étaient autant de circonstances exigeant que ce danger fût conjuré par un signalement adéquat. Les petits drapeaux attachés à l'extrémité des rails et l'unique lumière à feu rouge à l'arrière du camion, fixée au centre du châssis,

ne pouvaient, en l'espèce, constituer un tel avertissement. Dans la mesure où ce feu rouge pouvait être visible,—et ce, de façon intermittente en raison du petit drapeau placé vis-à-vis cette lumière mais à l'extrémité de la charge,—ce feu rouge pouvait peut-être signaler l'extrémité de la boîte du camion, mais non l'extrémité de l'obstacle résultant de la projection des rails. En somme, ce signalement, outre d'être insuffisant, pouvait être trompeur. La faute de Duval, préposé de l'appelante, ne peut faire aucun doute.

Mais, dit l'appelante, assumant cette faute de Duval, rien dans la preuve ne permet d'inférer une relation de causalité entre cette faute et l'accident; car, poursuit-on, d'autres hypothèses, tel un manque d'attention de la part de Roy, le conducteur du véhicule de promenade, peuvent expliquer le fait de l'accident. Pour des raisons diverses indiquées par M. le Juge Taschereau, aucun des passagers de la voiture de Roy n'a pu témoigner des circonstances immédiatement contemporaines à la collision; Duval en est le seul témoin. Mais si le demandeur poursuivant en dommages doit prouver la faute du défendeur et établir entre cette faute et le fait dommageable, une relation de causalité, il ne s'ensuit pas qu'il ait à se disculper de fautes hypothétiques que la loi ne présume pas. En l'espèce, si, comme en ont jugé toutes les Cours, la conduite de Duval était fautive, c'est précisément parce que, dans les circonstances, cette conduite avait comme conséquence normale, sinon inévitable, de réaliser l'accident qui s'est produit. Entre cette conduite de Duval et le fait de l'accident, les Cours inférieures ont jugé qu'il y avait un lien de causalité. C'était là une déduction qui pouvait raisonnablement être tirée de la preuve au dossier.

Je renverrais l'appel avec dépens.

*Appeal dismissed with costs.*

*Attorneys for the defendant, appellant: Tremblay, Monk & Forget, Montreal.*

*Attorneys for the plaintiff, respondent: Desruisseaux & Fortin, Sherbrooke.*

1959
*Oct. 21, 22
Nov. 30

WM. F. MORRISSEY LIMITED AND CHRISTINA BLANCHE ARMSTRONG ..... APPELLANTS;

AND

THE ONTARIO RACING COMMISSION ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Courts—Powers of Ontario Racing Commission—Owner ordered to change names of horses for racing on Ontario tracks—Whether contrary to Live Stock Pedigree Act, R.S.C. 1952, c. 168 and s. 95 of B.N.A. Act—The Racing Commission Act, R.S.O. 1950, c. 329, as amended—Whether Commission must act judicially.*

The owner of certain race horses obtained a writ of prohibition ordering the respondent commission to take no further action to suspend or prohibit these horses from racing in Ontario because of their registered names. The writ was set aside by the Court of Appeal. The owner appealed to this Court and contended that by virtue of the *Live Stock Pedigree Act* and s. 95 of the *B.N.A. Act*, the commission had no authority over the registered names of thoroughbred horses, and in the alternative, that the *Racing Commission Act* did not confer such authority upon the commission, and finally that the order of the commission was made arbitrarily and constituted a denial of natural justice.

*Held*: The appeal should be dismissed.

The *Live Stock Pedigree Act*, which provides for the incorporation of associations for the purpose of keeping a record of pure bred domestic live stock of a distinct breed, has not conferred upon the Canadian Thoroughbred Horse Society the power to legislate regarding the naming of thoroughbred horses in Canada. The statute does not delegate to the Society such powers. Therefore, the action which the commission proposed to take did not involve any conflict with the statute.

The wide scope of administrative powers entrusted to the commission by the *Racing Commission Act* was sufficient to enable it to do what it said it would do. The commission has power to govern, direct, control and regulate horse racing in Ontario. It is for the commission to determine what conduct it considers to be contrary to the public interest in deciding as to whether a licence issued by it should be revoked. The commission could have revoked the licence if it had decided to do so.

Without deciding whether or not the commission was required in this case to act judicially, the commission in fact held a hearing at which the owner had the opportunity to be heard and to submit his contentions. His explanations were not believed by the commission. It

*PRESENT: Taschereau, Cartwright, Martland Judson and Ritchie JJ.

is not the function of this Court to review the decision of the commission. The task is to decide whether the commission had the legal authority to do what it proposed to do. It had that necessary power and in deciding whether or not it should exercise it, the commission acted judicially.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside a writ of prohibition. Appeal dismissed.

*A. Maloney, Q.C., W. E. MacDonald, Q.C.,* and *P. Hess,* for the appellants.

*R. N. Starr, Q.C.,* for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The appellant Wm. F. Morrissey Limited, a company incorporated under the laws of Ontario, was, at all material times, the owner of six race horses respectively named by it Hot Ice, Stole The Ring, Irenes Orphan, Rabbit Mouth, Red Nose Clown and Into The Grape. These horses, along with others owned by the appellant company, were leased by it to the appellant Christina Blanche Armstrong, who was the secretary-treasurer and a director of the appellant company. She held a licence from the Ontario Racing Commission to enter and run horses at race meets under its jurisdiction. The horses were raced in her name with all winnings to be paid to the appellant company.

The respondent (hereinafter referred to as "the Commission") is a body corporate, incorporated under *The Racing Commission Act,* R.S.O. 1950, c. 329, as amended, whose object, as defined by that statute, is to govern, direct, control and regulate horse racing in Ontario in any or all of its forms. The Commission has power to license owners, trainers, drivers, jockeys, etc. and "to suspend or revoke any licence for conduct which the Commission considers to be contrary to the public interest".

Section 15 of this Act provides that

> Rules for the conduct of horse racing may be promulgated by the Commission under this Act and any order or ruling issued or made by the Commission under this Act shall be deemed to be of an administrative and not of a legislative nature.

[1] (1958), 12 D.L.R. (2d) 772.

1959

WM. MORRISSEY LTD. *et al.* *v.* ONT. RACING COMMISSION

Martland J.

Pursuant to this authority rules have been promulgated by the Commission and include the following:

381. No horse shall be allowed to enter or start in any race unless it is duly registered with and approved by the Registry Office of the Jockey Club (New York) and its registration papers filed with the Commission.

382. If a horse's name is changed, its new name shall be registered with the Jockey Club (New York) and its old, as well as its new name, shall be given in every entry list until it has run three races, and both names must be printed in the official programme for those three races.

* * *

474. Canadian bred horses, to be eligible to enter and start in Canadian bred races, or to receive Canadian bred weight allowances in other races, shall have their Canadian registration papers on file with the Commission, and the trainer of such horses shall be responsible for filing such papers.

A meeting of the Commission was held on May 22, 1957. The minutes of this meeting contain the following material:

It having been brought to the attention of the Commission that the names of horses running in the name of Miss C. Blanche Armstrong were in poor taste,

IT WAS MOVED that the names of some of the horses referred to were not acceptable to the Commission and that a meeting of the Commission be called for May 27 next, at 2:00 p.m. in the Directors' Room of the Ontario Jockey Club at Old Woodbine race track to further discuss the matter with Miss Armstrong and Mr. William Morrissey, from whom the horses are leased.

A letter was sent from the Commission to the appellant Armstrong, requesting her and Mr. Morrissey to attend at a meeting of the Commission on May 27. This meeting was held and the following items appear in the minutes of that meeting:

The Minutes of the meeting held on May 22, 1957, were read to the meeting and APPROVED.

Miss C. B. Armstrong and Mr. William F. Morrissey attended at the Commission's request and they are requested by the Commission to change the names of the following horses owned by Mr. Morrissey and raced by Miss Armstrong:

*STOLE THE RING*: *HOT ICE*: *RED NOSE CLOWN*: *IRENES ORPHAN*: *RABBIT MOUTH*: *INTO THE GRAPE*:

Mr. Morrissey and Miss Armstrong were informed that they would be expected to have these names changed by July 12, 1957, but if for any valid reason any name could not be changed by that time, a short extension might be granted by the Commission beyond that time.

In the affidavit of Mr. William Morrissey, who was the president and the principal shareholder of the appellant company, it is stated that at this meeting the Chairman and the Vice-Chairman of the Commission accused him of having named the six race horses previously mentioned with names calculated to bring ridicule and embarrassment to a man well known in the horse racing industry. This Morrissey denied. He stated that a heated argument followed during which he was asked to explain how he chose the names in question. He says that he gave a full explanation and that the Chairman stated that he did not believe Morrissey. He further states that the Chairman of the Commission told the appellant Armstrong that, unless the names of the six race horses were changed on the records of the New York Jockey Club by July 12, 1957, an official ruling of the Commission would be given prohibiting the entry of the said six race horses in any races in Ontario.

There is no explanation as to how the names were chosen in the material which is before us.

On the same day Morrissey proceeded to write to the Jockey Club (New York), with which the horses were registered, requesting permission to change the names. Later he changed his mind and applied in the Supreme Court of Ontario for a writ of certiorari and for a writ of prohibition to order the Commission to take no further action to suspend or prohibit from racing in the Province of Ontario, because of the registered names they bear, the six horses in question. An order in this form was granted.

The Court of Appeal of Ontario[1] allowed an appeal from this order and set it aside. The present appeal is from that judgment.

Three grounds of appeal were argued:

1. That, by virtue of *The Live Stock Pedigree Act* and s. 95 of the *British North America Act*, the Commission had no authority over the registered names of thoroughbred horses.

2. In the alternative, *The Racing Commission Act* did not confer such authority upon the Commission.

[1] (1958), 12 D.L.R. (2d) 772.

1959

WM. MORRISSEY LTD. *et al.* *v.* ONT. RACING COMMISSION

Martland J.

3. The order of the Commission was made arbitrarily and constituted a denial to the appellants of natural justice.

*The Live Stock Pedigree Act*, R.S.C. 1952, c. 168, provides for the incorporation of associations for the purpose of keeping a record of pure bred domestic live stock of a distinct breed. Incorporated associations are empowered and required to enact by-laws which, among other things, relate to rules of eligibility for the registration of animals, the issuance of certificates of registration and for certificates of transfer of ownership of registered animals.

Associations are empowered to affiliate with each other for keeping live stock records and the affiliation is known as the Canadian National Live Stock Records. The Minister of Agriculture may approve, under seal, a certificate of registration issued by an association which is affiliated with other associations. Such a certificate contains information regarding a registered animal, including its name.

The Canadian Thoroughbred Horse Society was incorporated as an association under this Act. The object for which it was formed was to keep a record of the pedigrees of pure bred horses and to collect, publish and preserve reliable and valuable data concerning this breed. It entered into articles of affiliation with other associations in the manner provided in the Act.

I do not agree with the contention of the appellants that this Act has conferred upon this society the power to legislate regarding the naming of thoroughbred horses in Canada. The society was incorporated for the purpose of keeping a record of thoroughbred horses in Canada and has power to enact by-laws to establish rules of eligibility for registration of animals by the society, but the statute does not delegate to it powers of legislation regarding the naming of thoroughbred horses. The certificates of registration issued by the Canadian National Live Stock Records set forth the name of a registered animal, along with other pertinent data concerning it, but it is clear that the function of the society and of the Canadian National Live Stock Records is essentially one of registration.

In my opinion, therefore, the action which the Commission intimated to the appellants it proposed to take if the names of the six race horses were not changed did not involve any conflict with the provisions of *The Live Stock Pedigree Act*.

With respect to the second point of argument, I agree with the Court of Appeal that the wide scope of administrative powers entrusted to the Commission by virtue of *The Racing Commission Act* was sufficient to enable it to do what it had said it would do in the event that the names of the race horses were not changed. The Commission has power to govern, direct, control and regulate horse racing in Ontario. It is for the Commission itself to determine what conduct it considers to be contrary to the public interest in deciding as to whether a licence issued by it should be revoked. The Commission did not indicate the exact steps which it proposed to take in the event that the names of the horses were not changed, but it is clear that it could have taken the step of revoking the licence held by the appellant Armstrong if it had decided so to do.

The last argument was that there had been a denial of natural justice to the appellants.

It is not necessary in these proceedings to determine whether or not *The Racing Commission Act* requires the Commission to act judicially in considering whether or not to exercise the powers which, in this case, it proposed to use if the names of the horses were not changed. In the present case it did, in fact, hold a hearing at which the appellants had the opportunity to be heard and to submit their contentions. The nature of the complaint against them was clearly stated to the appellants. Morrissey denied to the Commission that he had given the horses names calculated to bring ridicule and embarrassment to a man well known in the racing industry. He gave to the Commission his explanation of the reasons for choosing the names which he had selected and the Chairman of the Commission advised him that he was not believed.

It is not the function of this Court to review the decision of the Commission. The task is to decide whether the Commission had the legal authority to do what it proposed to do.

1959

WM. MORRISSEY LTD. *et al.* v. ONT. RACING COMMISSION

Martland J.

In my view it had the necessary power and, in deciding whether or not it should exercise that power, it did act judicially.

For these reasons I am of the opinion that this appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitor for the appellants: W. E. MacDonald, Toronto.*

*Solicitors for the respondent: Sinclair, Goodenough, Higginbottom & McDonnell, Toronto.*

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ROBERT KOLSTAD .....APPELLANT;

1959

*Nov. 4
Dec. 21

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Criminal law—Bribery—Reward given to government employee in connection with dealings with Government—Disposition of bribe money—Criminal Code, 1953-54 (Can.), c. 51, ss. 102(1)(b), 581(d), 584(1)(b), 595, 630(1), (2).*

The accused was acquitted at a non-jury trial of the indictable offence of bribery under s. 102(1)(*b*) of the *Criminal Code*. Subsequently, the trial judge issued an order directing the return to the accused of the $400 bribe money, filed as exhibit in support of the charge. On appeal by the Crown, the Court of Appeal reversed the judgment of acquittal, directed that a verdict of guilty be entered and that the bribe money remain in Court until further order. The accused appealed to this Court against the conviction and the order.

*Held*: The appeal should be dismissed.

*Per* Curiam: The appeal against the conviction failed. The accused had dealings of some kind with the Government and the fact that a trap was set had no bearing on the commission of the offence.

*Per* Kerwin C.J. and Abbott and Martland JJ.: Section 630(2) of the Code, under which the order of the trial judge for the return of the money was made, had no application. The trial judge had acquitted the accused and had not found that an indictable offence had been committed by someone else. Nor was his jurisdiction assisted by

*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Martland JJ

Rule 909(2) of the Rules of the Supreme Court of Alberta respecting criminal appeals, since he did not make a special order as to the custody or conditional release of any exhibit.

The submission that the Court of Appeal had no jurisdiction because no question of law was involved as required by s. 584 of the Code, must fail. The trial judge purported to act under s. 630(2), and in view of ss. 581(1)(*d*) and 595, the Crown could, by virtue of the extended meaning of "sentence", appeal under s. 584(1)(*b*) with leave. It should be taken that such leave was granted, as the Court of Appeal proceeded to deal with the matter.

Even if there were jurisdiction in this Court to hear an appeal from an order carrying those reasons—that the money should remain in Court until further order—into effect, and whether it be a separate order or part of one setting aside the acquittal and finding the accused guilty, there was no substance in the appeal.

*Per* Taschereau and Fauteux JJ.: This Court was without jurisdiction to deal with the order in relation to the bribe money. The question involved was not one coming within the ambit of any of the *Criminal Code* appellate provisions related to appeals to this Court in indictable offences. *Goldhar v. The Queen,* [1960] S.C.R. 60.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Primrose J. acquitting the accused. Appeal dismissed.

*N. D. Maclean, Q.C.,* for the appellant.

*H. J. Wilson, Q.C.,* and *J. W. Anderson,* for the respondent.

The judgment of Kerwin C.J. and of Abbott and Martland JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal against a judgment of the Appellate Division of the Province of Alberta[1] setting aside the acquittal of the present appellant on a charge that on or about April 16th, A.D. 1958 at Edmonton he gave to an employee of the Government of Alberta a reward as consideration for an act in connection with dealings with the said Government of Alberta, contrary to the provisions of the *Criminal Code* of Canada. The applicable provision of the Code is s. 102(1)(*b*) reading as follows:

102. (1) Every one commits an offence who

.....

(*b*) having dealings of any kind with the government, pays a commission or reward to or confers an advantage or benefit of any kind upon an employee or official of the government with which he deals, or to any member of his family, or to any one for the benefit

[1] 123 C.C.C. 170, 30 C.R. 176.

1959

KOLSTAD v. THE QUEEN

Kerwin C.J.

of the employee or official, with respect to those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof of which lies upon him;

I agree with the reasons of Hugh J. MacDonald J.A., speaking on behalf of the Appellate Division, that the appellant did have dealings of some kind with the Government and that the fact that a trap was set has no bearing on the commission of the offence and I have nothing to add. So far, therefore, as the Appellate Division allowed the appeal from the trial judge and directed a verdict of guilty to be entered, the appeal fails. We have not been furnished with a copy of any formal order made by the Appellate Division but we were advised that on or about May 6, 1959, in pursuance of its direction the accused appeared before it and was fined $500 and that this amount has been paid.

The Crown had also appealed to the Appellate Division from an order of the judge of first instance made subsequent to the acquittal directing that there be paid out to the appellant the sum of $400 which the latter had given to two employees of the Government of the Province of Alberta. The four bills comprising that sum had been made exhibits at the trial. The argument of the present appellant that subs. (2) of s. 630 of the Code applied found favour with the trial judge. That subsection reads as follows:

630. (2) Where an accused is tried for an indictable offence but is not convicted, and the court finds that an indictable offence has been committed, the court may order that any property obtained by the commission of the offence shall be restored to the person entitled to it, if at the time of the trial the property is before the court or has been detained, so that it can be immediately restored to that person under the order.

The Appellate Division considered that this subsection had no application and with that I agree. The trial judge had acquitted the accused and had not found that an indictable offence had been committed by someone else. Counsel for the accused at the trial had suggested to the judge that the two witnesses who had been paid had committed a fraud, but when counsel for the Crown was arguing the trial judge asked him:

Do you mean to say that if the police improperly take money from a person as I in fact found in this case, following the acquittal of that person charged he is not entitled to get his money back?

And later, this occurred:

THE COURT: It is an exhibit in court. This money was taken by the police and put in court as an exhibit. Now, do I lose my power to deal with it?

MR. SHORTREED: You don't lose your power to deal with it, you never had any when you found that no crime had been committed.

THE COURT: Oh, I think I have. I will order return of the money following the expiry of the time for appeal.

In view of this it cannot be maintained that the Court had found an indictable offence had been committed and the trial judge therefore had no jurisdiction under s. 630(2) of the Code to make the order he did. Nor is his jurisdiction assisted by one of the Rules of the Supreme Court of Alberta respecting criminal appeals to which counsel for the appellant referred. In his factum he sets out subs. (2) of Rule 910, Order LVI, but by an amendment made some time ago the Rule is really subs. (2) of 909 although in the same terms. It is as follows:

909. (2) The judge or magistrate who presided at the trial of any person, or any judge of the Court in which he was tried, may at any time after the trial make a special order as to the custody or conditional release of any such documents, exhibits, or other things as the special circumstances or special nature thereof may make desirable and proper, and upon such terms as he may impose.

The trial judge did not make a special order as to the custody or conditional release of any exhibit.

The appellant takes the position that s. 584 of the Code giving the Attorney General the right to appeal against a judgment, or verdict of acquittal on any ground of appeal that involves a question of law alone, applies both to the judgment of acquittal and the order of payment out, whether the order be considered part of the judgment, or supplementary to it; that in neither case was a question of law involved, and that, therefore, the Appellate Division had no jurisdiction. However s. 581(*d*) and s. 595 of the Code provide:

581. In this Part,

.....

(*d*) "sentence" includes an order made under section 628, 629 or 630 and a direction made under section 638; and;

1959

KOLSTAD v. THE QUEEN

Kerwin C.J.

595. (1) Where an order for compensation or for the restitution of property is made by the trial court under section 628, 629 or 630, the operation of the order is suspended

(*a*) until the expiration of the period prescribed by rules of court for the giving of notice of appeal or of notice of application for leave to appeal, unless the accused waives an appeal, and

(*b*) until the appeal or application for leave to appeal has been determined, where an appeal is taken or application for leave to appeal is made.

(2) The court of appeal may order annul or vary an order made by the trial court with respect to compensation or the restitution of property within the limits prescribed by the provision under which the order was made by the trial court, whether or not the conviction is quashed.

While I have already stated that I agree with the Appellate Division that s. 630(2) is not applicable, the trial judge purported to act under it. Therefore, by virtue of the extended meaning of "sentence", the Attorney General could appeal to the Court of Appeal under s. 584(1)(*b*), with leave of the Appellate Division or a judge thereof. It should be taken that such permission was granted, as the Appellate Division proceeded to deal with the matter. Their reasons stated that the money should remain in Court until further order.

Even if there were jurisdiction in this Court to hear an appeal from an order carrying those reasons into effect, and whether it be a separate order or part of one setting aside the acquittal and finding the appellant guilty, there is no substance in the appeal and it should be dismissed.

TASCHEREAU J.:—I agree with the Chief Justice that the Appellate Division of the Province of Alberta was right in allowing the appeal from the trial judge and directing a verdict of guilty to be entered.

On the second branch of the case concerning the order of the trial judge directing that there be paid out to the appellant the sum of $400, which order was reversed by the Appellate Division, I agree with Mr. Justice Fauteux that this Court has no jurisdiction on this matter.

The appeal should be dismissed.

FAUTEUX J.:—Charged with an indictable offence under s. 102(1)(*b*), the appellant was, on September 24, 1958, acquitted by Primrose J., sitting without a jury, in the Trial Division of the Supreme Court of Alberta. The charge being:

> That he, on or about the 16th day of April A.D. 1958, at Edmonton, in said judicial district, did give to an employee of the Government of Alberta, a reward as consideration for an act in connection with dealings with the said Government of Alberta, contrary to the provisions of the Criminal Code of Canada.

On October 3, 1958, he applied before the trial Judge for an order directing the return to him of a sum of $400, filed as exhibit in support of the charge, as being the reward given by him to an employee of the Government. This application was granted and the order was issued.

Both the acquittal and the order were appealed by the Crown to the Appellate Division of the Supreme Court of Alberta. This appeal was allowed and the Court directed that a verdict of guilty of the offence charged be entered, and directed the bribe money to remain in Court until further order.

The appellant now appeals to this Court against this judgment which set aside his acquittal, as well as the order of the trial Judge.

For the reasons given by the Chief Justice, I agree that the appeal against the conviction fails.

With respect to the order made by the Court of Appeal in relation to the bribe money, I am of opinion that this Court is without jurisdiction; for the question involved is not one coming within the ambit of any of the *Criminal Code* appellate provisions related to appeals to this Court in indictable offences. *Goldhar v. Her Majesty the Queen*[1].

I would dismiss the appeal.

*Appeal dismissed.*

*Solicitor for the appellant: N. D. Maclean, Edmonton.*

*Solicitor for the respondent: The Attorney-General for the Province of Alberta.*

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[1] [1960] S.C.R. 60.

1959
*Dec. 11
Dec. 21

PROGRESS FURNITURE MANUFACTURERS LIMITED (*Plaintiff*) — APPELLANT;

AND

EASTERN FURNITURE LIMITED (*Defendant*) ..... — RESPONDENT.

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

*Peremption—Nothing done after filing of joint case in Court of Appeal—Motions to have suits perempted—Limitation period—Code of Civil Procedure, arts. 279, 280a, 1223(2), 1239.*

A certificate of last proceedings, dated September 8, 1958, showed that the last proceeding in these two cases was the filing of the joint case before the Court of Appeal on August 22, 1956. The Court of Appeal declared the peremption on the motions made on September 8, 1958, by the defendant. The plaintiff appealed to this Court.

*Held*: The appeals should be dismissed.

The first submission made by the plaintiff to the effect that the time limitation had been suspended since the delay had been agreed to by the attorney for the defendant, could not be entertained. The plaintiff had the burden of proving such agreement, and had not done so.

The second submission that the motions were premature since art. 1223(2) of the *Code of Civil Procedure* gives the party a 15-day period to file a memorandum and since the computation of the delay did not commence to run before the end of the day of September 8, the 7th being an excepted Sunday, also failed. Article 280*a* of the *Code of Civil Procedure* states that the period of peremption runs from the first day on which a party could take another useful proceeding. Even if this submission were accepted, the motions were not premature because 15 clear days had passed since the day when the plaintiff was to produce its memorandum. In the matter of peremption, a Sunday or holiday must be counted when it is the last day of the period granted.

The third submission was that the three extra days, which the plaintiff had, after the factums were to be produced, to inscribe before the Court of Appeal, should have been added before the time limit ran out. That submission also failed on the wording of art. 1223(2). To benefit from this provision, the plaintiff had to file a factum and this was not done.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], granting two motions for peremption of suits. Appeals dismissed.

*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Abbott JJ.

[1] [1959] Que. Q.B. 840.

*P. Bourque,* for the plaintiff, appellant.

*J. Leduc,* for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Il s'agit de deux motions pour faire déclarer périmées deux instances jugées par la Cour supérieure siégeant à Montréal et inscrites en appel à la Cour du banc de la reine.

Tant sur la demande principale que sur la demande reconventionnelle, les certificats du député-greffier des appels constatent que le dernier errement a été la production du dossier conjoint en date du 22 août 1956.

Le 10 décembre 1958, la Cour du banc de la reine[1], saisie de ces motions, les a maintenues toutes les deux et a déclaré les deux instances périmées avec dépens, le tout suivant les dispositions des articles 279 et 1239 C.P.C.

L'appelante dans les deux causes soulève trois moyens pour combattre ces deux motions. Elle soutient, en premier lieu, et elle appuie sa prétention sur des affidavits de ses procureurs, à l'effet qu'après le 22 août 1956, date où l'appendice conjoint a été produit, une entente serait intervenue avec les procureurs de l'intimée prolongeant les délais légaux pour la production des procédures subséquentes, et qu'en conséquence les délais de péremption ont été suspendus. Le fardeau d'établir l'existence de cette entente, et dont la suspension découlerait, reposait clairement sur l'appelante, mais comme la défenderesse, par l'affidavit de ses procureurs, nie cette assertion, il s'ensuit qu'elle n'est pas établie et que ce moyen doit être écarté.

En second lieu, l'appelante invoque l'article 1223(2) C.P.C. qui est à l'effet qu'elle avait quinze jours pour produire au greffe son mémoire, après la production de l'appendice conjoint, et que la computation des délais de péremption ne commençait à courir que le soir du 8 septembre vu que le 7 était un dimanche. Il s'ensuivrait que les certificats du député-greffier des appels seraient irréguliers et les motions prématurées.

Je ne puis accueillir cette prétention parce qu'en vertu de l'article 280(*a*) C.P.C., qui est un amendement adopté par la Législature en 1941 (5 Geo. VI, c. 68, art. 2), le délai

[1] [1959] Que. Q.B. 840.

1959

PROGRESS FURNITURE MFGRS. LTD. v. EASTERN FURNITURE LTD.

Taschereau J.

de péremption se compte depuis *le premier jour* où le poursuivant pouvait, après la production de la dernière procédure utile, faire une autre procédure utile. Le délai ayant commencé à courir le 23 août 1956, il s'ensuivrait que les motions en date du 8 septembre 1958 n'étaient pas prématurées. Vide: *Anctil v. Deschênes*[1].

Ces motions auraient pu être faites légalement à cette date du 23 août, car c'était à partir de ce jour là que l'appelante devait, après la production de la dernière procédure utile, en faire une autre qui aurait interrompu la péremption, ce qu'elle n'a pas jugé à propos de faire.

Dans l'alternative, même si on doit accepter la prétention de l'appelante, voulant que les délais n'ont commencé à courir que le soir du 8 septembre ou le matin du 9, parce que le 7 était un jour férié, les motions ne seraient pas davantage prématurées. Il s'était en effet écoulé quinze jours francs depuis la date où l'appelante devait produire son mémoire, soit depuis le 22 août au soir au 7 septembre. En matière de péremption, un jour férié doit être compté dans la computation des délais, lorsqu'il tombe le dernier jour de cette computation. La règle de procédure (C.P.C. 9) voulant que si un délai expire un dimanche ou un jour férié, il est continué au jour juridique suivant, ne s'applique pas en matière de péremption. Cette dernière a le caractère de la prescription, et la prescription peut arriver à son terme un jour férié. *Dechêne v. La Cité de Montréal*[2]; *La Banque de Montréal v. Rancourt et al.*[3]; *Anctil v. Deschênes*[1].

Une autre prétention de l'appelante est qu'elle avait trois jours après la date où les factums devaient être produits pour inscrire la cause devant la Cour du banc de la reine, et qu'en conséquence, il fallait computer ces trois jours additionnels avant que la péremption ne puisse être acquise. L'argument est ingénieux mais illégal. En effet, l'article 1223 C.P.C. (2) (iii) en dispose facilement et il se lit ainsi:

> A défaut par l'une ou par l'autre des parties de produire son mémoire ou factum dans le délai voulu, l'appel doit être déclaré déserté avec dépens contre l'appelant, si c'est lui qui est en défaut, ou être entendu ex parte si c'est l'intimé qui est en défaut.

[1] [1951] Que. K.B. 261, [1951] Que. P.R. 221.
[2] [1892] 1 Que. K.B. 206; affirmed [1894] A.C. 640.
[3] (1929), 34 Que. P.R. 378.

Il fallait donc que l'appelante eût produit son mémoire pour bénéficier de cette disposition de la loi. Comme cette formalité n'a pas été remplie, il était interdit à l'appelante de signifier et produire une inscription qui lui aurait permis de procéder ex parte.

Enfin, l'appelante invoque une irrégularité qui appert au certificat du député-greffier des appels sur la demande principale. Ce certificat en effet constate que le dossier conjoint a été produit le 22 août 1956, et il porte lui-même la date du 8 septembre 1956. Si on compare ce certificat avec celui de la demande reconventionnelle en date du 8 septembre 1958, et avec les autres pièces de procédure au dossier, y compris les certificats officiels du député-greffier de la Cour du banc de la reine qui constatent la date où ils ont été obtenus, il faut nécessairement, avec la Cour du banc de la reine, conclure qu'il s'agit en l'espèce d'une erreur cléricale qui ne vicie pas la procédure qui a été faite.

Pour ces raisons, je suis d'opinion que les deux appels doivent être rejetés avec dépens.

*Appeals dismissed with costs.*

*Attorneys for the plaintiff, appellant: Rappaport & Whelan, Montreal.*

*Attorneys for the defendant, respondent: Lacoste & Lacoste, Montreal.*

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ROY McMONAGLE (*Plaintiff*) .....APPELLANT;

AND

LA SOCIETE DE REHABILITATION INCORPOREE AND ERNEST FREDETTE (*Defendants*) ..... RESPONDENTS.

1959
*Nov. 26
Dec. 21

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

*Motor vehicles—Collision on straight highway—Conflict between evidence of parties and evidence of objective witnesses—Burden of proof to establish sudden emergency causing accident.*

*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Martland JJ.

1959

McMONAGLE v. SOCIÉTÉ DE RÉHABILITATION INC.

A car driven by the plaintiff and one driven by the defendant F collided on a straight stretch of road. After the collision, the plaintiff's car was resting on the right shoulder of the road, and the car driven by F was on the wrong side, directly across the path of the plaintiff's. The driver F claimed that the accident happened as the result of a sudden emergency created by the plaintiff who was attempting to overtake a truck. The trial judge maintained the action, but this judgment was reversed by the Court of Appeal relying on a statement made by the plaintiff that he might have been trying to overtake a truck.

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

In view of the contradictory evidence given by the parties, the Court should look at the more objective witnesses to obtain a picture of what happened. The driver of the truck in question and a police constable had both testified that it was the car driven by the defendant F which was swerving out of control.

The defendants had the burden of proving that there existed a sudden emergency which caused F to swerve, and this they failed to do.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Cliche J. Appeal allowed.

*P. de Grandpré, Q.C.*, for the plaintiff, appellant.

*G. Emery*, for the defendants, respondents.

The judgment of the Court was delivered by

TASCHEREAU J.:—Le demandeur-appelant réclame des défendeurs-intimés la somme de $5,000. Il allègue dans son action que le 12 octobre 1949, il a été la victime d'un accident d'automobile dont les défendeurs doivent être tenus conjointement et solidairement responsables. La Société de Réhabilitation est propriétaire de la voiture qui l'aurait frappé. Elle était conduite par l'autre défendeur, Ernest Fredette, son employé, alors dans l'exercice de ses fonctions. M. le Juge Cliche a maintenu cette réclamation pour un montant de $2,882.40 avec intérêts et dépens, mais la Cour du banc de la reine[1] en est arrivée à une conclusion différente et a maintenu l'appel et rejeté l'action.

L'appelant conduisait sa voiture, dans laquelle il était seul, dans une direction nord-sud sur la route de Windsor-Mills à Sherbrooke, et l'intimé Fredette, accompagné du Révérend Perreault qui fut tué au cours de l'accident, se dirigeait en sens inverse. Ce jour là il pleuvait, mais personne ne se plaint de la visibilité. La route, sur une longueur

[1] [1956] Que. Q.B. *631*.

de 1,200 pieds, était droite et non accidentée, mais à chaque extrémité de cette distance se trouvait une courbe. L'accident se serait produit à moitié chemin de ces deux courbes alors que les deux voitures filaient à environ 40 milles à l'heure, sur une route asphaltée d'une largeur de 22 pieds.

Le véhicule du demandeur-appelant, se dirigeant vers Sherbrooke, était précédé d'un camion conduit par Henri Paul Bourgeois, et à côté de qui avait pris place un nommé Vadnais. La preuve révèle que le véhicule des intimés, qui venait en sens inverse du camion, était la seule voiture sur la route que le conducteur du camion pouvait voir. Bourgeois, corroboré par Vadnais, dit dans son témoignage qu'à deux ou trois cents pieds en avant de lui la voiture des intimés "a glissé sur l'asphalte et s'en venait de biais". Elle a recontré le camion toujours en gardant cette même position, et quelques instants après, Bourgeois a entendu le choc de la collision avec la voiture de l'appelant, qui venait en arrière de lui. Au même moment, Bourgeois a regardé en arrière par la fenêtre de son camion, et a vu ce qui venait de se passer.

La preuve révèle en outre que la voiture de l'appelant roulait du côté droit de la route, et c'est évidemment la voiture des intimés qui, après avoir rencontré le camion, a continué à filer "de biais" sur la route et s'est dirigée du côté gauche pour ensuite frapper la voiture de l'appelant. L'officier de la Sûreté provinciale qui s'est rendu sur les lieux assure que le véhicule de l'appelant, après l'accident, reposait sur le côté droit de la route, près du fossé, et que celui des intimés était "de travers dans le chemin". Sa roue de droite avant touchait la ligne centrale de la route, et l'arrière était près de l'accotement, du côté où se trouvait l'auto de l'appelant.

C'est le côté gauche avant de la voiture de l'appelant qui fut brisé, et le côté droit avant de celle des intimés. Ce sont là les faits que le juge au procès a retenus, et il a raisonnablement conclu que l'accident était arrivé du côté droit de la route, c'est-à-dire du côté sur lequel filait la voiture de l'appelant, et que c'est le conducteur de la voiture des intimés qui, après avoir rencontré le camion, et après qu'il l'eût dépassé, est venu frapper l'autre véhicule.

1959

McMONAGLE v. SOCIÉTÉ DE RÉHABILITATION INC.

Taschereau J.

La Cour du banc de la reine a cependant conclu de façon différente, et elle appuie son jugement sur les considérants suivants:

Considérant que la cause déterminante de cet accident réside dans le fait que l'intimé, de son propre aveu, a tenté de doubler, dans une côte, un camion, alors que la voiture de l'appelante venant en sens inverse, procédait à la descente de cette côte;

Considérant qu'en agissant ainsi l'intimé a transgressé la loi et a méconnu les règles les plus élémentaires de la prudence;

Et dans ses raisons écrites, que les autres membres du tribunal ont approuvées, M. le Juge Bissonnette cite l'extrait suivant du témoignage de l'appelant à l'enquête du coroner:

Did you declare at the Coroner's Inquest that there was a truck on the scene of the accident prior to the accident, when you were examined at the Coroner's Inquest?

I believe I did at that time.

Is it not a fact at that time you told the Coroner that the truck was proceeding in the opposite direction, in front of the car in which Simon Perreault was in?

Do I just have to answer or not?

Did you or did you not?

Yes.

Did you also declare, Mr. McMonagle, that the first time you noticed the car with which you collided, was when swerving *from behind that truck?*

Yes.

You declared that at the Coroner's Inquest?

That's right.

Et il conclut ainsi:

Ces aveux de l'intimé corroborent nettement la version donnée par l'appelant Fredette, de sorte que toute la preuve ne se concilie qu'avec une seule conclusion à l'effet que c'est le geste imprudent de l'intimé qui a été la cause déterminante et unique de l'accident.

Voyant sa route interceptée dans une côte qu'il descendait, l'appelant, devant l'imminence du danger, n'avait alors que la ressource de ses freins. Vu sa très faible allure, on ne peut lui imputer faute.

Il y a ici, je crois, erreur sur la topographie des lieux. En effet, de l'avis de tous les témoins entendus sur ce point, l'accident s'est produit sur un terrain plat, et s'il se présentait à l'une des extrémités de cette route droite sur une distance de 1,200 pieds, une pente légère, ce n'est pas là que s'est produit l'accident, mais bien à 600 pieds plus loin. C'est d'ailleurs ce que nous disent l'appelant McMonagle, l'intimé Fredette lui-même, et Bergeron l'officier de circulation.

De plus, je ne crois pas que ce témoignage de McMonagle, donné à l'enquête du coroner, corrobore la version de Fredette; je crois plutôt que les deux sont contradictoires. C'est une partie isolée du témoignage de McMonagle qui a été retenue, et qu'il faut nécessairement concilier avec tout ce qu'il a dit au procès et hors de Cour. Dans son témoignage reçu hors de Cour, du consentement des parties, McMonagle explique qu'après avoir témoigné à l'enquête du coroner, il est retourné sur les lieux de l'accident, et il s'est rendu compte qu'il n'était pas exact que le char de Fredette ait tenté de dépasser un autre camion, et même qu'il n'y avait pas d'autre camion en avant de Fredette. Voici comment il s'exprime:

Q. You presumed, after the accident, that that truck was there?—A. After going back, after the accident, I would say 'yes'.

Q. How long after the accident did you go back over there?—A. That was two weeks after the inquest; at least two weeks, maybe longer; maybe longer than that.

Q. *When you spoke of that truck which the other car would have tried to pass, was that only presumption on your part?*—A. *That is what I presumed at the time.*

Q. At the time—in the few seconds that preceded the accident—were you presuming there was a truck, or were you seeing it?—A. I think I said that when I went back over the scene of the accident. I mentioned that before. The way you're putting the question—

Q. What I would like to know is whether, at the time, in the seconds that preceded the accident, whether you personally saw that there was a truck going in the same direction as the car with which you had an accident?—A. *Right today, I would say 'no', I didn't see any car.* I said that before. I didn't see any; After going back over the scene of the accident. Isn't that clear?

Q. So that I understand that on the scene of the accident, the other car didn't try, according to you, to pass a truck?—A. That's right.

Et ailleurs, il explique de la façon suivante comment l'accident est arrivé:

Q. You mean that when you first saw the other car, it was on the same side of the road as you were?—A. He was on my left.

Q. On his right?—A. His right.

Q. Each on his side?—A. Yes.

Q. What happened, afterwards?—A. Well, when I saw the car, he was swerving just like a car on an icy road; the back was swinging; you know how they go. And, I saw, I figured there was a lot—that he had control of it; he came up the crest of the hill, *into the turn at that far end,* it was like a kind of double—like a 'U' or half-circle, almost. I saw it; I gave him plenty of rooom; I figured he had plenty of room, if he kept control of it which, it looked as if he had. I kept edging as far as I could on my right side, and very suddenly, just like a shot of a gun

1959

McMONAGLE v. SOCIÉTÉ DE RÉHABILITATION INC.

Taschereau J.

almost, the car swerved directly across in front of me. At the time of impact, my car was off the pavement, the right hand side—the right wheels were off the pavement.

On voit donc qu'à l'enquête du coroner, McMonagle prétend qu'un camion précédait Fredette, et dans son témoignage hors de Cour il dit qu'il n'y en avait pas, mais nulle part peut-on tirer de ce témoignage qu'il admet avoir lui-même voulu dépasser un camion qui se trouvait en avant de lui, et que ce geste imprudent a été la cause déterminante et unique de l'accident. Mais, à tout événement, ces témoignages ne sont pas satisfaisants, car il est bien clair dans la preuve que le camion précédait la voiture de l'appelant.

Je ne vois pas que ces deux témoignages de McMonagle corroborent de quelque façon que ce soit le témoignage de l'intimé qui conte une histoire entièrement différente. Selon lui, la collision aurait eu lieu après que l'appelant eut dépassé le camion qui le précédait, et voici ce qu'il dit à ce sujet à l'enquête du coroner:

Q. A quel endroit de la route avez-vous frappé l'auto, le chauffeur qui s'en venait; sur quel côté?—R. Je l'ai frappé à ma gauche.

Q. De son côté à lui?—R. Oui.

Q. Etes-vous certain que le char qui s'en venait a eu le temps de dépasser la camion avant que vous l'ayez frappé?—R. Oui.

Q. Est-ce que le char qui s'en venait était de son côté?—R. Pas directement quand on l'a frappé, il venait pour prendre sa place. Il avait eu le temps de dépasser; il n'avait pas pris sa place directement, entièrement.

Entendu hors de Cour, au procès, il donne une version différente à la question suivante:

Q. Est-ce que vous nous dites que l'accident est arrivé en avant ou en arrière du camion dont vous nous avez parlé tantôt?

Il répond:

R. Cela, je ne le sais pas, monsieur, je ne peux pas l'assermenter, je ne sais pas si c'est arrivé en avant ou en arrière.

Le juge au procès a donc eu raison de dire dans son jugement:

Considérant que le défendeur Fredette ne peut pas se rappeler si l'accident est survenu avant ou après qu'il eut rencontré le camion de Bourgeois et que son témoignage à l'enquête quant à la tentative qu'aurait faite le demandeur de dépasser sur la gauche le camion de Bourgeois *n'a en conséquence que très peu de valeur.*

Evidemment, il y a confusion, et je crois, devant ces contradictions, que c'est vers des témoins plus calmes, plus objectifs et moins surexcités par l'imminence d'une collision, qu'il faut se tourner pour voir l'image véritable de ce qui s'est produit. Je n'entretiens aucun doute que l'accident est arrivé à l'arrière du camion, à la droite de la route où se trouvait l'appelant, qui conduisait à une vitesse raisonnable, presque sur l'accotement du côté où la loi exige qu'il se tienne. Bourgeois et Valdais témoigent positivement en ce sens, et ils sont corroborés par l'officier de la circulation, qui était sur les lieux quelque 15 minutes plus tard et qui jure positivement que le véhicule de l'appelant circulait sur la droite de la route, car il en a vérifié les traces. Voici son témoignage:

Q. Et ces traces-là indiquent-elles de quel côté le véhicule de McMonagle voyageait?—R. Il voyageait de son côté droit de la route, complètement en dehors de sa ligne blanche, à sa droite de la route.

Q. Ces traces-là, vous les avez relevées sur l'accotement?—R. Sur l'accotement, oui.

Q. Et elles s'étendaient en arrière du véhicule arrêté de McMonagle sur une assez bonne distance?—R. Oui, sur une assez bonne distance.

Les témoignages de Bourgeois, Valdais et Bergeron contredisent donc complètement la prétention des intimés à l'effet que, parce que l'appelant aurait tenté de dépasser le camion qui le précédait, l'appelant aurait créé une situation d'urgence, un "sudden emergency", et que dans l'agonie de la collision, Fredette a tourné vers la gauche, afin de l'éviter. Les intimés avaient le fardeau de prouver cette "agonie de la collision", ce dernier effort qu'ils auraient tenté pour éviter l'accident. Ils en avaient le fardeau, et ils ont totalement failli de l'établir. Tous les témoins entendus sur cet aspect de la cause le contredisent. Je crois donc que cet accident est uniquement imputable à la conduite inhabile de Fredette qui, sur un pavé glissant, a perdu le contrôle de sa voiture et est venu sur le mauvais côté de la route frapper celle de l'appelant, qui procédait à sa droite derrière le camion de Bourgeois.

Cette Cour n'est pas généralement dans l'obligation d'analyser toute la preuve dans une cause de ce genre. Mais, comme il existe un conflit entre la Cour supérieure et la

1959

McMONAGLE v. SOCIÉTÉ DE RÉHABILITATION INC.

Cour du banc de la reine sur les faits, il a été impératif de le faire, afin que nous puissions tirer nos propres conclusions des témoignages dont plusieurs ont été rendus hors de Cour.

Pour ces raisons, je suis d'avis que l'appel doit être maintenu, et le jugement du juge au procès rétabli avec dépens devant cette Cour et devant la Cour du banc de la reine.

*Appeal allowed with costs.*

*Attorneys for the plaintiff, appellant: Tansey, de Grandpré & de Grandpré, Montreal.*

*Attorneys for the defendants, respondents: Letourneau, Quinlan, Forest, Deschênes & Emery, Montreal.*

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1959

*Feb. 2, 3, 4, 5 Dec. 14

FROBISHER LIMITED (*Plaintiff*) .....APPELLANT;

AND

CANADIAN PIPELINES & PETROLEUMS LIMITED, LAWRENCE C. MORRISROE, E. GEORGE MESCHI, A. OAK, A. AMREN, S. DAIGLE, JOCK MacKINNON AND D. J. SHERIDAN (*Defendants*) ....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Real property—Mines and Minerals—Option to purchase mineral claims—Second option given to different company—Specific performance of first option sought—Whether option created equitable interest in land—Failure of optionee to comply with statutory requirement to hold licence—Pleadings—Amendments at trial—Regulations 8(1), 9(1), 124 of the Mineral Resources Act, R.S.S. 1953, c. 47.*

On June 25, 1955, the plaintiff, through its agent H, took an option to purchase certain mining claims from four prospectors. The option provided that it should remain open to June 30, and set out the terms of purchase involving the transfer of the claims on or as close as possible to June 30 whereupon a certain sum would be paid; a further sum to be paid in stated instalments and the formation of a new company in which the vendors would receive 10 per cent. of the authorized stock. On June 29, the prospectors gave an option to purchase the same claims to the defendant P Co., which not only took with notice of the first option but actively induced the breach of it. The plaintiff sued P Co. and the four prospectors for specific performance and an injunction against any dealings with the claims by the defendants.

Towards the end of the trial, the defendants moved to amend by pleading regulations 8 and 9 of the Regulations made under the *Mineral Resources Act,* providing that no mining company shall be granted a licence unless it is registered under the Companies Act and that no person or company, not a holder of a licence, shall prospect for minerals, stake out or record any location or "acquire by transfer,

*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

assignment or otherwise howsoever, any mineral claim or any right or interest therein". The trial judge refused leave to amend and gave judgment for the plaintiff. The majority in the Court of Appeal ruled that the amendment should have been allowed and ordered a new trial restricted to the issue raised by the amendment. In all other respects the appeal was dismissed.

The plaintiff appealed to this Court and two of the prospectors cross-appealed. The plaintiff admitted before this Court that its agent H had no licence until July 27, 1955; that the plaintiff did not register under the *Companies Act* until March 9, 1956, and that it acquired its Miner's licence on March 12, 1956. Counsel all agreed that this admission should be regarded as evidence given before this Court under s. 67 of the *Supreme Court Act*.

*Held* (Locke and Martland JJ. dissenting): The appeal and the cross-appeals should be dismissed. The action must also be dismissed.

*Per* Curiam: The Court of Appeal exercised its discretion rightly in permitting the defendants to amend their defence so as to plead regulations 8(1) and 9(1).

*Per* Locke, Abbott, Martland and Judson JJ.: There was no necessity to decide as to the validity of regulation 124, providing compensation for the wrongful registration of a caveat, since it was clearly shown that no damage arose from the registration of the caveat and that the filing of it was completely justified under the circumstances.

*Per* Cartwright, Abbott and Judson JJ.: No valid distinction could be drawn between the position of the plaintiff during the period from June 25 to June 30 and what would have been its position if the first payment had been made. The option created an equitable interest in the claims and was rendered void because it was given and taken against the express prohibition contained in regulation 9(1). *London and South Western Railway v. Gomm*, 20 Ch. D. 562, followed.

The plaintiff's case was not assisted by the fact that the claims were to be transferred not the plaintiff but to a company to be incorporated. Its legal position was the same whether the transfer was made direct to the new company or to the plaintiff and from the latter to the new company.

The analogy which the plaintiff sought to draw with the cases dealing with the rule against perpetuities did not lead to the suggested result that the contract could still be enforced as a personal obligation. The case at bar was not concerned with that rule. Whether or not the contract, on the true construction of regulation 9, was forbidden, depended upon the rights which it conferred. By the contract, specific performance of which the plaintiff was seeking as construed by the trial judge, the plaintiff, during the currency of the option, acquired the exclusive right to enter upon, drill and explore the claims and the right to compel the conveyance of the claims upon completion of the option payments. The plaintiff, therefore, acquired a right or interest in the claims.

*Per* Abbott and Judson JJ.: The position of the optionee under the agreement was the same throughout all its stages; the plaintiff obtained an irrevocable offer for certain stipulated periods on payment of certain stipulated sums. The payments, if completed, constituted the purchase price and all that then would remain to be done was to form the new company, transfer the claims and allot to the prospectors 10 per cent. of the stock.

1959

FROBISHER LTD. *v.* CDN. PIPE-LINES & PETROLEUMS LTD. *et al.*

An option to purchase land creates an equitable interest because it is specifically enforceable. There is a right to have the option held open and this is similar to the right that arises when a purchaser under a firm contract may call for a conveyance. In both cases there is an equitable interest but in the case of the option it is a contingent one, the contingency being the election to exercise the option. Judicial re-examination from time to time since the case of *London and South Western Railway v. Gomm, supra,* has resulted only in an affirmation of the rule that an option holder has an equitable interest.

An interest in these claims having been acquired, the agreement was void and of no effect because it was given and taken against the express prohibition contained in regulation 9.

Regulation 124, if valid, has no application when there is a *bona fide* dispute; registration of a caveat "wrongfully and without reasonable cause" means something in the nature of an officious intermeddling without any colour of right.

*Per* Locke J., *dissenting*: Assuming that on the authority of the *Gomm* case an option to purchase land vests in the optionee an equitable interest in the land in respect of which the option is granted when the land is to be transferred to the optionee, the case at bar was distinguishable in that the claims here were to be transferred not to the optionee but to a company to be incorporated. Consequently, the optionee in this case acquired no equitable interest in the claims. Its right was a personal right enforceable in a Court of equity by a decree of specific performance, and as such, was not affected by regulation 9.

*Per* Martland J., *dissenting*: The *Gomm* case was not to be considered as laying down, as a general proposition of law, that any option relating to land of necessity vests in the optionee, forthwith upon the granting of it, an interest in land. The word "option" was not a term of art; its meaning depended upon the context. Here, the option did not confer upon its exercise a right to the optionee to call for a conveyance of the title to the claims. Therefore, even on the reasoning of the *Gomm* case, the optionee did not acquire an equitable property interest in the claims.

An option for the purchase of land creates contractual rights and, accepting the reasoning in the *Gomm* case, its effect may be to create also a contingent limitation of land which may take effect in the future. If that limitation was rendered void by regulation 9, the contractual right remained. Consequently, the option in the case at bar was not rendered void by the regulation, and specific performance could be granted even though no interest in land was created.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], granting leave to amend the defence, ordering a new trial restricted to the issue raised by the amendment and otherwise affirming the judgment at trial. Appeal dismissed and action dismissed on admitted facts, Locke and Martland JJ. dissenting.

*C. F. H. Carson, Q.C., A. Findlay, Q.C.,* and *J. R. Houston,* for the plaintiff, appellant.

[1] (1959), 10 D.L.R. (2d) 338, 23 W.W.R. 241.

*J. J. Robinette, Q.C,* and *W. M. Elliott,* for the defendants, respondents, Pipelines & Petroleums Ltd., Morrisroe and Meschi.

*D. J. Murphy,* for the defendants, respondents, Oak and Amren.

LOCKE J. (*dissenting*):—This is an action for specific performance and the plaintiff is the appellant.

The agreement sought to be enforced was signed at Uranium City, Saskatchewan, and reads as follows:

Date—25th day of June, 1955.

We, the undersigned, the sole owners of mineral claims—EO—1 to 16 incl.

Missing Link 1 to 9 incl.

IO—1 to 12 incl.

In all 37 claims contiguous, Located on or near Stewart Island, Lake, Athabasca, Province of Saskatchewan, Canada—do hereby grant to James A. Harquail, Mining Engineer—Suite 2810, 25 King St. West, Toronto, Ontario—in consideration of the sum of $1.00 (one dollar), receipt of which is hereby acknowledged, an option effective to 12 noon—June 30, 1955—to purchase said mineral claims from the undersigned under the terms of the following deal:

On receiving transfers to above claims in good order—on, or as close as possible to June 30, 1955—said transfers to be turned over to Uranium City Bank of Commerce branch at which time sum of $25,000.00 (twenty-five thousand dollars) will be issued to MacKinnon and partners. (Vendors).

New company to be formed in which vendors will receive 10% (ten per cent) of authorized stock.

*$25,000.* Firm cash.

*Option Payments*

| | |
|---|---|
| 1st option—Nov. 1, 1955 | $ 25,000.00 |
| 2nd option—March 1, 1956 | 50,000.00 |
| 3rd option—Nov. 1, 1956 | 50,000.00 |
| 4th option—July 1, 1957 | 50,000.00 |
| | $200,000.00 |

The above agreement shall be binding on the executors, heirs, etc. of the people signing.

"A. Oak"

"Albin Amren"

"S. Daigle"

"Jock MacKinnon"

"A. D. Wilmot"

Witness to above four signatures.

Signed in the Settlement of Uranium City, Saskatchewan.

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Locke J.

On or prior to June 30, Harquail deposited the sum of $25,000 with the bank, to be paid to Oak, Amren, Daigle and MacKinnon (hereinafter referred to as the prospectors) upon their depositing transfers of the mineral claims as provided. They, however, did not comply with the option, having decided to repudiate any liability under it and having granted another option to the respondent company under the circumstances to be hereinafter mentioned.

Mineral claims in the Province of Saskatchewan are subject to the provisions of *The Mineral Resources Act* of that province, R.S.S. 1953, c. 47, and to the regulations made thereunder by the Lieutenant Governor in Council as authorized by s. 9. Under these regulations persons desiring to prospect and make entries on mineral claims must obtain a licence in the form prescribed. A licensee desiring to acquire a mineral claim situate in unsurveyed lands such as the area in question must stake the claim in the manner prescribed by the regulations, and within a stated period apply to have such location recorded as a mineral claim with the Mining Recorder of the district. Upon compliance with these requirements the Recorder may issue a certificate of record of the claim in Form B prescribed by the regulations, which simply certifies that the claim has been recorded in the name of the applicant and describes generally its location. A claim thus recorded may be transferred to another licensee. The entry is effective for one year and from year to year thereafter for a maximum period of ten years, provided that work to a prescribed value is done in each year. Upon the required work being done the licensee may obtain a certificate of improvements from the Recorder and, obtaining this, is entitled to a lease of the claim for 21 years, with a provision for renewals of such term at a rent prescribed.

The prospectors and Evelyn Oak, the wife of Alvar Oak, had staked the claims referred to in the option as EO-1-16 inclusive and recorded them with the Mining Recorder at Uranium City. Whether certificates of record in Form B had been issued in respect of these and the other claims is not clear from the evidence, but it is apparently undoubted that the parties who had staked the claims were entitled

to such certificates. It is also common ground that Oak had been authorized by his wife to sign the option upon the claims recorded in her name.

On June 28, 1955, the respondents Morrisroe and Meschi, both of whom were officers of the respondent company and were aware of the option granted by the prospectors to Harquail, entered into negotiations with the prospectors to obtain an option in favour of the respondent company. As a result, Oak and MacKinnon left Uranium City and proceeded with Morrisroe to Regina. MacKinnon had been given a power of attorney by the other prospectors to deal with the claims other than those of Mrs. Oak. On arrival at Regina on June 29 they were taken to the office of the solicitors for the respondent and there signed an option prepared by one of these solicitors upon the claims mentioned in the option to Harquail. Morrisroe appears to have concealed from his solicitor the fact that the prospectors had already given an option upon the properties to Harquail, Mr. Ehmann, the solicitor who dealt with the matter, contenting himself with asking Oak and MacKinnon if they and their associates owned the claims, a question which they answered in the affirmative. He thereupon prepared an option agreement dated June 29, 1955, between Oak and MacKinnon as optionors and the respondent company as optionee.

This document recited that the optionors were the owners and recorded holders of the mineral claims referred to (though in the case of the EO group of claims this was inaccurate) and that they had agreed to grant "the sole and exclusive option to purchase the said mining claims to the respondent company" in consideration of a cash payment of $25,000 and a further sum of $175,000 to be paid in stated instalments on November 1, 1955, March 1, 1956, November 1, 1956, and July 1, 1957. As a further consideration for the granting of the option it was provided that the optionee would "at such time as it may deem advisable" incorporate a public company for the development of the claims with a minimum authorised capital of four million shares. Of these shares the optionors were to receive 10 per cent. and of this percentage 10 per cent. were to be free shares and 90 held in escrow and released *pro rata* "as stock is released from escrow." It was provided

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Locke J.

that the optionors should forthwith execute transfers of the mining claims in blank and deposit such transfers with the Bank of Commerce in Uranium City, with any other title papers which they might have in their possession, including a copy of the option agreement, to be held by the bank in escrow to be delivered to the optionee or his nominee upon the prescribed payments being made and "in the event of this option not being exercised the said bank is to hold the said documents to the order of the optionors." During the currency of the option the optionee was given the right to enter upon the mining claims and to develop and work them in such manner as it might deem advisable. The optionee covenanted to do the required assessment work upon the claims and to record such work with the Mining Recorder until such time as the company had been formed, at which time such work should be performed by it. Upon default in payment of any of the amounts stipulated to be paid the option agreement was to terminate and any payments made thereunder be forfeited.

While, by the terms of the option agreement, transfers of the claims in blank were to be placed in escrow with the bank at Uranium City, for some reason which I am unable to understand, the solicitor, who said that in preparing the document he was acting on behalf of MacKinnon and Oak as well as the respondent company, obtained from Oak transfers of 18 claims which included the 12 claims being part of IO group 1 described in the option. It is not clear from the evidence in whose name these entries had been recorded or by whom the transfers were executed, and the transfers were not produced at the trial. According to Mr. Ehmann, he caused these transfers to be filed with the Mining Recorder, transferring these 18 claims to the respondent company on June 29. On the same date he prepared an agreement which was signed by Morrisroe on behalf of the respondent company, which recited that Alvar Oak "has entered into an agreement for sale to sell a certain group of claims known as the IO group" and that the respondent company undertook to transfer back to Oak Claims 14, 15, 16, 17 and 18. There had been in fact no agreement of sale entered into by Oak and it was not contemplated by the option that the claims should be

transferred to the respondent company then or apparently thereafter. Clearly, the parties intended that the claims would be transferred to the new company if the option payments were made, since otherwise the shares to be received by the prospectors would be worthless.

While the Mining Recorder at Regina was called and gave evidence of interviews which he had with Mr. Ehmann and Morrisroe on June 29 and 30, he made no mention of the recording of this transfer, the documents were not produced and there is no other evidence of the transfer of the claims than that given by the solicitor. The fact that such transfer was made was accepted by the learned trial judge and the matter dealt with in the manner hereinafter stated. On the morning of June 30 the respondent company filed a caveat with the Mining Recorder at Regina claiming to be interested in the mining claims under the option agreement referred to. On the same date Harquail filed a caveat based upon the option granted to him with the Mining Recorder at Uranium City. In view of the findings of fact made by the learned trial judge, the actual times at which these respective caveats were filed are not important. Transfers in blank of the entries made by Mrs. Oak and by Alvar Oak and MacKinnon were obtained by the respondent company and remained in their possession at the time of the trial. They were not deposited in escrow, as contemplated by the option, due apparently to the institution of this action.

Davis J. by whom the action was tried, found that the option agreement made between Harquail and the prospectors was a binding contract and directed that it should be specifically performed and carried into effect. It was directed that the respondent company cause the 12 mineral claims transferred to it to be recorded in the names of the prospectors jointly and, failing this being done, that the Mining Recorder do cancel the "title of the defendant Canadian Pipelines and Petroleums Limited to the said mineral claims" and record the same in the names of the prospectors and issue certificates of record in their names. The prospectors were directed to execute transfers of the said entries in blank and deposit the same in escrow in the Canadian Bank of Commerce at Uranium City in accordance with the terms of the agreement.

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Locke J.

A further term of the judgment continued an injunction made by Dorion J. on July 20, 1955, and continued by Graham J., the terms of which enjoined the respondents from disposing of or drilling or developing the said mineral claims.

A further term of the judgment read as follows:

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the date of the first option payment of $25,000.00 under the said Agreement be fixed at four months after the said certificates of Record and Transfers in blank of all the said mineral claims are deposited in escrow at the said Bank, as aforesaid, that the date of the second option payment of $50,000.00 be fixed at four months thereafter, or so long as is necessary to assure to the Plaintiff the privilege of drilling on the ice during the months of January and February, that the date of the third option payment of $50,000.00 be fixed at eight months thereafter, and that the date of the fourth and final option payment of $50,000.00 be fixed at eight months thereafter.

As to this it is to be noted that the option to Harquail did not contain any provision entitling him to enter upon the claims or do any work on them and, in the absence of such a term in the agreement, the optionee had no such right, in my opinion. The claim advanced in the statement of claim is upon the option agreement of June 25, 1955, as it reads: it is not alleged that there was a contemporaneous oral agreement that the optionee might enter and work the claims during the currency of the option and that by a mutual mistake such a term was omitted from the writing, nor is there any claim made to rectify the agreement on this or any other ground. The respondent company had expressly stipulated for such a privilege in the option of June 29, 1955.

The main grounds of defence to the action were that the agreement had been signed on a Sunday and so was unenforceable under the provisions of the *Lord's Day Act*, R.S.C. 1952, c. 171, and that the agreement was uncertain and, accordingly, an action for specific performance did not lie. The learned trial judge found as a fact that the respondents Morrisroe, Meschi and the company, which had obtained an option agreement for the same claims from the prospectors following July 25, 1955, had done so with full knowledge of the fact that they had entered into the agreement above quoted.

Towards the end of the trial the defendant company, Morrisroe and Meschi had applied for leave to amend their defence so as to plead regulations 8(1) and 9(1) above quoted, but this motion was refused.

After the hearing of the evidence had been completed in the matter, counsel for the plaintiff asked leave to amend the statement of claim by claiming damages under regulation 124 of the *Quartz Mining Regulations*, which provides that any person registering a *caveat* wrongfully and without reasonable cause against a mineral claim shall make compensation to any person who has sustained damage thereby, but this application was refused.

The defendants Daigle and MacKinnon had counterclaimed in the action against the defendant company for an order declaring that the option agreement entered into by them with that company on June 29, 1955, became void and was terminated on November 1, 1955, and the judgment at the trial declared such agreement to have been terminated.

The plaintiff, the defendant company and the prospectors appealed to the Court of Appeal[1]. The judgment of that Court dismissed the appeal of the defendant company, Morrisroe and Meschi as to the merits, but allowed it to the extent that the said defendants were permitted to amend their statement of defence to plead regulations 8(1) and 9(1) upon terms upon compliance with which a new trial restricted to the issue raised by the said amendment was directed. The appeal taken by the same defendants against the judgment in favour of Daigle and MacKinnon declaring the agreement of June 29, 1955, to have been terminated was allowed. The appeals taken by the present appellant and by Oak and Amren were dismissed.

On this appeal the defence that the agreement dated June 25, 1955, had been made on a Sunday was abandoned and the finding that the respondent company and its officers Morrisroe and Meschi were aware that the prospectors had entered into the agreement of June 25, 1955, when they obtained the option of June 29, 1955, was not questioned.

[1] (1959) 10 D.L.R. (2d) 338, 23 W.W.R. 241.

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Locke J.

In so far as the present appeal seeks to set aside the judgment appealed from on the ground that the amendment to plead the Mining Regulations should not have been permitted, it should fail, in my opinion. I consider that no sound reason has been advanced which would justify our interfering with the exercise of the discretion vested in the Court of Appeal.

In order that the issues in the action might be properly dealt with in this Court and the cost of a new trial avoided, counsel for the appellant admitted before us that Harquail did not acquire a miner's licence until July 27, 1955, that the appellant company was not registered under the provisions of the *Companies Act* of Saskatchewan until May 9, 1956, and that it did not acquire a miner's licence until March 12, 1956. Counsel for all parties agreed that these admissions should be treated as evidence given before this Court under s. 67 of the *Supreme Court Act*.

The defence which raises what is in my opinion the only question of difficulty in the present appeal is based upon a contention that the agreement sought to be enforced gave to Harquail and his principal, the appellant, an equitable interest or estate in the mineral claims, that the acquisition of any such rights by an individual or a company not holding a miner's licence is prohibited by Regulation 9(1) and that the agreement is accordingly invalid.

This contention is based upon the decision of the Court of Appeal in *London and South Western Ry. Co. v. Gomm.*[1] It is necessary to consider with some care the facts of that case to determine just what was decided.

By an indenture dated August 10, 1865, made between the London and South Western Railway Company and one Powell, the company conveyed to the latter a parcel of land no longer required for its purposes. Powell, on his part, covenanted with the company that he, his heirs and assigns, owner and owners for the time being of the hereditaments intended to be thereby conveyed and all other persons who might be interested therein, would at any time thereafter whenever requested by the company, its successors or assigns, by a six calendar months' previous notice in

[1] (1882), 20 Ch. D. 562.

writing, reconvey the said lands to the company, its successors or assigns, for a consideration of 100 pounds. Powell sold the lands to Gomm in 1865 and the latter was in possession in 1880 when the company gave notice of its desire to repurchase the property. It was shown that Gomm had full notice of the provisions of the deed of 1865 when purchasing the property.

Kay J., who tried the action, rejected the argument of the defendant that the covenant created an estate or interest in land in the railway company and was, therefore, unenforceable as being contrary to the rules against perpetuities. He held that Gomm was bound by the covenant in the deed on the authority of *Tulk v. Moxhay*.[1]

The appeal to the Court of Appeal was heard by a Court consisting of Sir George Jessel, M.R., Sir James Hannen and Lindley L. J. The passage from the judgment of the Master of the Rolls which is relied upon for the proposition that an option to purchase land creates an equitable interest or estate in the optionee reads:

> If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present Appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.

In that case the option gave to the railway company the right to require a conveyance to itself and its assigns upon the terms stated, and this was held to give to it an equitable interest in the land. The present agreement, as it reads and as it was understood by the prospectors as

[1] (1848), 2 Ph. 774, 41 E.R. 1143.

1959

FROBISHER LTD. v. CDN. PIPE-LINES & PETROLEUMS LTD. et al.

Locke J.

shown by their evidence, contemplated that the mineral claims should be conveyed not to Harquail or his principal but to a new company to be formed in which they would hold ten per cent. of the stock. Harquail, as is stated in his evidence, understood that the transfers of the mineral claims which were to be deposited in the bank would be in blank, the reason for this being, no doubt, that the new company was not then in existence and its name had not been determined. The name of the transferee would be inserted if the terms of the proposed option were complied with by the optionee and the completed transfers delivered to the new company. The judgment at the trial which directed the deposit of the transfers in blank so interpreted the agreement between the parties and that, in this respect, it properly construed the document is not questioned by anyone. The agreement did not provide and none of the parties to it contemplated that, upon making the payments specified in the option, Harquail or his principal would acquire any interest or estate in the claims. What they were to acquire was the majority share interest in the company which would be the owner of the claims. It was not, in my opinion, an option to purchase at all but an option upon the acceptance of which, by compliance with its terms, the optionee would become entitled to require delivery of the transfers to the new company. The fact that the agreement drawn by Harquail, a layman, reads "an option to purchase" does not relieve us of the duty of determining the true nature of the document.

In *Gomm's* case the covenant which was held not to bind the defendant required him to reconvey the land to the railway company on its demand, and this appears to have been the basis for the finding that it gave to the optionee an equitable estate or interest in it. The phrase reading "The right to call for a conveyance of the land is an equitable interest or equitable estate" in the judgment of Sir George Jessel must be construed in the light of the facts of the case, and thus as meaning a right to call for a conveyance of the legal title to the optionee. Sir James Hannen said in part (p. 586):

> it appears to me to be a startling proposition that the power to require a conveyance of land at a future time does not create any interest in that land.

and this, I consider, is to be construed in the like manner.

Here there is no such covenant.

It is altogether too easy a generality to say that an option vests in the optionee an equitable interest in the land in respect of which the option is granted. If it be assumed that *Gomm's* case was rightly decided, its application depends, of necessity, upon the nature of the right given to the optionee and that he may acquire upon its exercise.

I must confess my inability to understand how an option agreement which, when exercised, would not entitle the optionee to any estate, legal or equitable, in the mineral claims can be said to vest any equitable interest or estate in him prior to the exercise.

The argument based upon *Gomm's* case proceeds upon the assumption that the optionee, as of the time of the execution of the option, acquired, in the language of Regulation 9(1), "some right or interest" in the mineral claims. Since neither Harquail or the appellant had at that time a prospector's, developer's or miner's licence, the contention is that the transaction was prohibited by the regulation which, by virtue of the statute, has the force of law.

The interests of the prospectors in the claims upon which they had made entries which had been recorded are chattel interests, as declared by Regulation 38. Such a chattel interest is assignable at common law and Regulation 9(1), to the extent that it prohibits a transfer to a person not a licensee, is in derogation of common law rights. It is thus to be construed strictly (Maxwell, 10th ed., 292).

As I have pointed out, however, the option in question does not provide that the optionors will transfer the claims or any interest in them to the optionee, but rather, upon the exercise of the option, to a company to be formed. It is not to be assumed that that company would not obtain the required licence to enable it to accept a conveyance when the necessity arose. The regulation does not say that a person who has made and recorded an entry in a mineral claim may not lawfully agree with anyone to transfer such claim at some future date to a third person other than the optionee or to a company to be thereafter formed. We are asked to read into this regulation a prohibition which it does not

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Locke J.

contain, a course for which there is no warrant. In my opinion, the regulation as it reads does not affect the rights of the appellant under this agreement.

Unless regulation 9(1) is to be construed as rendering unenforceable a covenant to convey a mineral claim at some future time to a company to be thereafter incorporated, the decision in *Gomm's* case has no bearing on the matter to be decided. Whether that case should be followed in this country has not been considered by this Court. Apart from the fact that it was referred to with approval in *Davidson v. Norstrant*[1], in a dissenting judgment of Duff J. (as he then was), the case does not appear to have been mentioned in this Court. In that case, however, the option entitled the optionee to a conveyance to himself or his nominee of a half interest in the land, his rights in that respect being similar to those of the London and South Eastern Railway Company. The case was not referred to by the other members of the Court.

Apart from the difference in the nature of the rights given by the option, the facts in the present case differ from those in *Gomm's* case in another material particular. Here the ownership of the mineral claims has at all times remained in the prospectors. The 12 claims transferred by mistake to the respondent company have at all times been held by it as bare trustee for the prospectors. The respondent company was a necessary party to the action only for the purpose of obtaining a direction for a reconveyance of these claims to the prospectors, a declaration that the company had no interest in the claims, and to recover any damages caused by its interference with the appellant's contractual rights.

The facts of the present case are in this respect similar to those considered by the Court of Appeal in *South Eastern Railway v. Associated Portland Cement Manufacturers*[2].

In that case the railway company had obtained a conveyance of a strip of land from a landowner which reserved to himself, his heirs and assigns the right to make a tunnel at

[1] (1921), 61 S.C.R. 493 at 509, 57 D.L.R. 377 at 389.
[2] [1910] 1 Ch. 12.

his or their expense under the property conveyed. The defendants were the assignees of the landowner and, when they commenced the excavation of a tunnel, the railway company brought an action for an injunction, contending that as the time within which the tunnel might be constructed was unlimited the covenant offended against the rule against perpetuities. The railway company relied upon the judgment in *Gomm's* case and it was held by Swinfen Eady J. at the trial and by the unanimous judgment of the Court of Appeal that the case had no application. The defendants had succeeded to the rights of the landowner and, as expressed in the head note, it was held that as against the original covenantors, the railway company, the provision in the agreement as to the tunnel was a personal contract and was not obnoxious to the rule against perpetuities.

Swinfen Eady J., referring to *Gomm's* case, said in part (p. 25):

> Jessel M.R. . . . said that if it was a mere personal contract it would not be obnoxious to the rule against perpetuities, but, as Gomm had not himself entered into the covenant, it was essential for the plaintiff to prove that it ran with the land in order to succeed against the assignee.

The same difference in the facts was pointed out in the judgments of Cozens-Hardy M.R. and by Fletcher-Moulton L.J. Farwell L.J. referred to the judgment of the House of Lords in *Witham v. Vane,* the only report of which appears to be in Challis's Real Property, 3rd ed., p. 440, and said (p. 33):

> But the fact that there is some connection with or reference to land does not make a personal contract by A. less a personal contract binding on him, with all the remedies arising thereout, unless the Court can by construction turn it from a personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant.

In my opinion, the right of the optionee in the present case, as above stated, is a personal right enforceable in a Court of equity by a decree of specific performance. The covenant related to land, as did the covenant in *Witham v. Vane* and the *Associated Portland Cement* case, and was enforceable as between the contracting parties.

1959

FROBISHER LTD. v. CDN. PIPE-LINES & PETROLEUMS LTD. et al.

Locke J.

I would add that if *Gomm's* case applied in the present circumstances it would be necessary to consider the decision of the Court of Appeal in the case of *Manchester Ship Canal Co. v. Manchester Race Course Co.*[1], which is in direct conflict with it. The right of first refusal upon which the action was based in that case does not appear to differ from the right of an optionee who has the right to purchase, and the Court there held that such right was not an interest in land and rejected the argumet based upon *Gomm's* case. The latter case has, it is true, been followed in a number of cases by single judges in England who, apparently, considered themselves bound by it, but I think this does not add to its weight.

As to the defendant company, as found by the learned trial judge, the option agreement obtained by it was entered into with full knowledge of the option theretofore granted to Harquail, and the principle followed in *Lumley v. Wagner*[2], applies.

The fact that the appellants obtained an interim injunction restraining the respondents from entering upon and working the claims and that the formal judgment at the trial, as above pointed out, read in part:

> so long as is necessary to assure to the plaintiff the privilege of drilling on the ice during the months of January and February

cannot conceivably, in my opinion, affect our decision in this matter. The option required the prospectors to transfer the claims as they were at the date of the option to the company to be formed if the option was exercised and, clearly, during the currency of the option the optionee would be entitled in an action on the covenant to restrain the respondents from drilling on or removing material from the claims. However, equally clearly the optionee was not entitled to enter upon the claims and to conduct drilling operations since the agreement gave to it no such right and this term should be stricken from the judgment. It is, however, the duty of this Court to decide this matter upon its own view of the law, and the answer to the important question of law here to be decided cannot be

[1] [1901] 2 Ch. 37, 51.
[2] (1852), 1 De G.M. & G. 604, 42 E.R. 687.

determined by the opinion of the parties to the action as to the nature of those rights or the nature of the relief granted at the trial.

The defence that the agreement was uncertain and that an action for specific performance does not lie fails, in my opinion. I agree with the learned trial judge and with the majority of the learned judges of the Court of Appeal upon this aspect of the case.

The respondent company and Morrisroe and Meschi contend by way of cross-appeal that a new trial should have been granted in any event by reason of the refusal of the learned trial judge to permit the defendant Daigle to be cross-examined in respect of the issues as between the plaintiff and the company, on the ground that his interest as a defendant in the action was the same as that of the company. As to this, I agree with the view of the majority of the Court of Appeal that permission to cross-examine should not have been refused. I, however, also agree with them that, applying Rule 40 of the *Court of Appeal Rules,* a new trial should not be granted because no substantial wrong or miscarriage of justice was occasioned by the refusal to permit the cross-examination.

The application of the appellant for leave to amend its statement of claim to permit it to raise a claim for damages against the respondent company under regulation 124 above mentioned should, in my opinion, be refused. There is no evidence that the appellant suffered any damage by reason of the filing of the *caveat* and, without such proof, there can be no recovery under the regulation and the amendment would be of no advantage to the appellant. As to the claim advanced under that regulation by the respondents Oak and Amren, not only is there no proof of any damage to them by reason of the filing of the appellant's caveat, but filing it was neither wrongful nor without reasonable cause, within the meaning of the regulation: on the contrary, it was completely justified under the circumstances.

At the trial it was contended that regulation 124 was *ultra vires* the Executive Council of Saskatchewan, and Davis J. directed that the Attorney-General should be notified and permitted to be heard before the matter was decided. After argument in which counsel for the Attorney-General took part, the learned judge held the regulation to

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Locke J.

be *ultra vires*. The Attorney-General did not intervene formally in the litigation but was represented by counsel in the Court of Appeal and supported the regulation. The members of that Court did not consider it necessary to determine the matter. Before this Court the Attorney-General was again represented by counsel in support of the validity of the regulation, though he had not formally intervened in this Court. In the view of my conclusion that there can be in any event no recovery, either by the appellant or by the respondents Oak and Amren, it is unnecessary to decide the question as to the validity of the regulation. The matter does not come before us as a reference and, in my opinion, we should not express any opinion in the circumstances.

In the result, I would allow the appeal from that portion of the judgment of the Court of Appeal which directed on terms a new trial in respect of the issues raised as to non-compliance by Harquail and the appellant with regulations 8(1) and 9(1). I would direct that the judgment at the trial, however, be amended by striking out the words:

> or so long as it is necessary to assure to the plaintiff the privilege of drilling on the ice during the months of January and February

in that portion of the judgment above quoted. In all other respects, save as to costs, I would confirm the judgment of the Court of Appeal. The appellant should have its costs in this Court as well as in the Court of Appeal. The cross-appeal should be dismissed with costs.

CARTWRIGHT J.:—The relevant facts and the contentions of the parties are set out in the reasons of other members of the Court.

I am in agreement with what I understand to be the opinion of all the other members of this Court that the Court of Appeal[1] exercised its discretion rightly in permitting the respondents to amend their statements of defence so as to plead regulations 8(1) and 9(1) of the Regulations under *The Mineral Resources Act*, and the only point with which I find it necessary to deal is the defence based on regulation 9(1).

[1] (1959), 10 D.L.R. (2d) 338, 23 W.W.R. 241.

The contract which the appellant asks to have specifically enforced was made on June 25, 1955, between the respondents Oak, Amren, Daigle and MacKinnon, hereinafter referred to as "the prospectors", and Harquail who was acting as agent for the appellant. On June 29, 1955, the prospectors repudiated that contract by their conduct in entering into a contract with the respondent Canadian Pipelines and Petroleums Limited giving to that company the option to purchase the 37 mineral claims which formed the subject matter of the contract of June 25, 1955.

For the reasons given by my brother Judson I agree with his conclusions (i) that no valid distinction can be drawn between the position of the appellant during the period from June 25 to June 30, 1955, and what would have been its position if the first payment of $25,000 had been actually paid, and (ii) that the option granted by the contract of June 25, 1955, created an equitable interest in the claims and was rendered void because it was given and taken against the express prohibition contained in regulation 9(1).

The second of these conclusions is based on the decision of the Court of Appeal in *London and South Western Railway v. Gomm.*[1] It has been suggested that we ought not to follow that case, but in my opinion it was rightly decided. It is said that the decision of the Court of Appeal in *Manchester Ship Canal Company v. Manchester Racecourse Company*[2], conflicts with *Gomm.* In the *Manchester* case it was sought to enforce a conditional "right of pre-emption" contained in a contract which had been validated by Statute; no price was named in the contract but the trial judge, Farwell J., and the Court of Appeal held, against the argument of the defendant, that the price was ascertainable. Farwell J. used the expression "I think that clause 3 creates an interest in the land . . . But even if it does not create an interest in the land . . ." and went on to hold the plaintiff entitled to succeed on another ground based on the decision in *Willmott v. Barber.*[3] In the judgment of the Court of Appeal *Gomm's* case is not mentioned by name

[1] (1882), 20 Ch. D. 562. [2] [1901] 2 Ch. 37.
[3] (1880), 15 Ch. D. 96.

1959

FROBISHER LTD. v. CDN. PIPE-LINES & PETROLEUMS LTD. et al.

Cartwright J.

although it had been cited in argument. The only reference to the question whether the right of pre-emption created an interest in land is found in the following passage at p. 50:

> Then it was objected that clause 3 could not be enforced against the Trafford Park Company, who are only alienees of the land. Farwell J., thought that clause 3 created an interest in land, and that this objection could be thus answered. We do not think that clause 3 does create an interest in land, nor do we think that there is anything in the decisions in *Tulk v. Moxhay* or in *London and County Banking Co. v. Lewis* which gets over the objection.

The Court then went on to uphold the decision of Farwell J. on the ground that the case fell within the principle of *Willmott v. Barber, supra* and of *Lumley v. Wagner*[1].

An expression of opinion by the learned Lords Justices who composed the Court in the *Manchester* case is, of course, entitled to great weight but if they had intended to negative the principle enunciated in *Gomm* it seems to me that they would have stated their reason for so doing. Be this as it may, in so far as the two cases are in conflict I prefer the decision in *Gomm* on the point with which we are concerned and think that we should follow it.

I wish to add some observations as to two other suggested objections to the conclusion that the option was rendered void by regulation 9(1).

First, it is said that the contract contemplates that, upon performance of all its terms by the appellant, the 37 claims are to be transferred not to the appellant but to a company to be incorporated. Accepting this as the correct construction of the contract, I am unable to find that the appellant's case is assisted. The appellant cannot be heard to say that there did not exist on June 29, 1955, a contract, specifically enforceable in equity, binding the prospectors to hold the option open, and, ultimately, if all the stipulated payments were made, to convey the claims, nor can it be heard to say that it had not the right to enforce that contract, for it seeks to support a judgment in its favour decreeing specific performance thereof. I have already indicated my agreement with the view that the specifically enforceable contractual right to require the holders of the claims to convey them constitutes an interest in the claims; that interest must on the critical date, June 29, 1955, have been held by someone and unless that someone was the holder

[1] (1852), 1 De G.M. & G. 604, 42 E.R. 687.

of a licence as required by regulation 9(1) the acquisition of that interest was forbidden. The appellant is not assisted by saying "True, I had no licence but I was acquiring the interest for someone else who likewise had no licence, and indeed no existence". In my view, the effect of the contract was that on the execution of the agreement of June 25, 1955, the appellant acquired an interest in the claims which interest by the terms of the contract it was obligated to cause to be transferred to a company to be incorporated at some future time. The legal position would be the same whether the actual transfer of the claims were made from the prospectors direct to the new company or from the prospectors to the appellant and from the latter to the new company.

Secondly, it is said that, by analogy with certain cases dealing with the rule against perpetuities, even if in so far as it creates an interest in the claims the contract of June 25, 1955, is rendered void by regulation 9(1) it may still be enforced as a personal obligation binding the prospectors.

The effect of the cases referred to is conveniently summarized as follows, in Halsbury's Laws of England, 2nd ed., vol. 25, at p. 109:

> A contract relating to a right of or equitable interest in property *in futuro* may be intended to create a limitation of land only, in which case, if the limitation is to take effect beyond the perpetuity period, the contract is wholly void and unenforceable; or the contract may, upon its true construction, be a personal contract only, in which case the rule does not apply to it; or it may, upon its true construction, be, as regards the original covenantor, both a personal contract and a contract attempting to create a remote limitation, in which case the limitation will be bad for perpetuity, but the personal contract will be enforceable, if the case otherwise admits, against the promisor by specific performance or by damages, or against his personal representatives in damages only. In all cases it is a question of construction whether the contract is intended to create a limitation of property only, or a personal obligation only, or both.

In my respectful view the supposed analogy does not lead to the suggested result. Contracts in so far as they are merely personal are outside the rule against perpetuities altogether. We are not concerned with that rule in the case at bar. The question before us is whether or not on the true

1959

FROBISHER LTD. v. CDN. PIPE-LINES & PETROLEUMS LTD. et al.

Cartwright J.

construction of regulation 9(1) the contract of June 25, 1955, was forbidden by that Regulation, which has the force of a statute.

The regulation reads as follows:

9. (1) No person or mining partnership not a holder of a Prospector's, Developer's and Miner's licence shall prospect for minerals upon land subject to these regulations, or stake out or record any location, and no person, mining partnership or company not a holder of a Prospector's, Developer's and Miner's licence shall acquire by transfer, assignment or otherwise howsoever any mineral claim or any right or interest therein for which a lease or a patent has not been issued.

To determine whether the contract contravenes the regulation it is necessary to consider the nature of the rights which it conferred upon the appellant. The argument of counsel for the respondents that the contract was too vague and uncertain to be specifically enforceable was rejected by the learned trial judge and by the majority in the Court of Appeal and the appellant is seeking to uphold a judgment for the specific performance of the contract as construed by the learned trial judge. The manner in which he construed it appears from paras. 2, 3 and 5 of the formal judgment of April 10, 1956, which read as follows:

2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Defendant Canadian Pipelines and Petroleums Limited do cause the said mineral claims known as I.O. 1 to 12 inclusive, to be recorded in the names of the Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon jointly, failing which that the Mining Recorder do cancel the title of the Defendant Canadian Pipelines and Petroleums Limited to the said mineral claims and do record the same in the names of the Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon jointly, that the Mining Recorder do issue Certificates of Record of the said mineral claims to the said Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon jointly, that the Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon do execute in blank a Transfer of the said mineral claims, that the said Defendants and the Defendant Canadian Pipelines and Petroleums Limited do thereupon deposit in escrow at the Canadian Bank of Commerce at Uranium City, in the Province of Saskatchewan, in accordance with the said Agreement, the Certificates of Record and Transfers in blank of the said mineral claims known as I.O. 1 to 12 inclusive, Missing Link 1 to 9 inclusive, and E.O. 1 to 16 inclusive, that in the event of the Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon, or any of them, neglecting or refusing to execute or deliver to the said Bank any of the said Certificates of Record and Transfers in blank, that the Mining Recorder do execute and deliver over to the said Bank the necessary Certificates of Record and Transfers in blank of the said mineral claims, and that upon the receipt by the Bank of the said Certificates of Record and Transfers in blank of all the said mineral claims the Plaintiff do pay to the Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon, the sum of $25,000.00.

3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the date of the first option payment of $25,000.00 under the said Agreement be fixed at four months after the said Certificates of Record and Transfers in blank of all the said mineral claims are deposited in escrow at the said Bank, as aforesaid, that the date of the second option payment of $50,000.00 be fixed at four months thereafter, or so long as is necessary to assure to the Plaintiff the privilege of drilling on the ice during the months of January and February, that the date of the third option payment of $50,000.00 be fixed at eight months thereafter, and that the date of the fourth and final option payment of $50,000.00 be fixed at eight months thereafter.

* * *

5. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Injunction with respect to the said mineral claims granted by The Honourable Mr. Justice Dorion on the 20th day of July, 1955, and continued by the Honourable Mr. Justice Graham on the 6th day of September, 1955, be continued, except as herein otherwise ordered, until further order.

The injunction granted by Doiron J. which is continued by the terms of para. 5 is not copied in the appeal case but its effect is stated as follows in the appellant's factum:

On July 20th, 1955, Frobisher commenced this action for specific performance of its agreement with the prospectors and on the same date obtained an injunction restraining the Respondents from selling, transferring or otherwise disposing of or entering upon, drilling, exploring, developing, operating or otherwise dealing with the mining claims until the final disposition of the action.

It appears from this that the contract has been construed as conferring upon the appellant not only the right to call for a conveyance of the claims to a company to be incorporated when all the payments stipulated have been made, but also the right during the currency of the option, to the exclusion of all of the respondents, to enter upon drill and explore the mining claims. It is my opinion that on this construction of the contract the appellant, during the currency of the option, could have maintained an action of trespass not only against a stranger who entered on the claims but also against the respondents if they did so. I find myself quite unable to say that the appellant in these circumstances did not "acquire by transfer, assignment or otherwisehowsoever . . . any right or interest in the claims". It appears to me that it acquired, by contract, the exclusive right to enter upon drill and explore the claims during the currency of the option and the right to compel their conveyance upon completion of the option payments. On any reasonable view of the meaning of the words "right" and

1959

FROBISHER LTD. v. CDN. PIPE-LINES & PETROLEUMS LTD. et al.

Cartwright J.

"interest" as used in the regulation I am of opinion that what the appellant acquired under the contract falls within one or other or both of those words. The very wide meaning ordinarily attributed to both of these words may conveniently be found in "The Dictionary of English Law" by Earl Jowitt at p. 1560, sub. verb. "Right" and p. 991, sub. verb. "Interest".

Authority is scarcely needed for the proposition that a contract which is expressly or implicitly prohibited by statute is illegal and that what is done in contravention of the provisions of an act of the legislature cannot be made the subject matter of an action, but reference may be made to the judgment of Lord Ellenborough in *Langton v. Hughes*[1].

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

ABBOTT J.:—For the reasons given by my brothers Cartwright and Judson, with which I am in agreement, I would dispose of the appeal of Frobisher and the cross-appeal of Oak and Amren as proposed by my brother Judson.

MARTLAND J. (*dissenting*):—On June 18, 1955, the respondents Oak and MacKinnon made a discovery of uranium ore on Stewart Island in the Lake Athabaska district of Saskatchewan. The discovery was made on mining claims owned jointly by the respondents Oak, Amren, Daigle and MacKinnon (hereinafter referred to as "the prospectors").

By an agreement in writing, dated June 25, 1955, the prospectors granted to James A. Harquail, a mining engineer and geologist employed by the appellant (which company is hereinafter referred to as "Frobisher"), an option in the following terms:

Date—25th day of June, 1955.

*AGREEMENT*

We, the undersigned, the sole owners of mineral claims—EO—1 to 16 incl.

Missing Link 1 to 9 incl.

IO—1 to 12 incl.

In all 37 claims contiguous, Located on or near Stewart Island, Lake Athabasca, Province of Saskatchewan, Canada—do hereby grant to James A. Harquail, Mining Engineer—Suite 2810, 25 King St. West,

[1] (1813), 1 M. & S. 593, 105 E.R. 222.

Toronto, Ontario—in consideration of the sum of $1.00 (one dollar), receipt of which is hereby acknowledged, an option effective to 12 noon—June 30, 1955—to purchase said mineral claims from the undersigned under the terms of the following deal:

On receiving transfers to above claims in good order—on, or as close as possible to June 30th, 1955—said transfers to be turned over to Uranium City Bank of Commerce branch at which time sum of $25,000.00 (twenty-five thousand dollars) will be issued to MacKinnon and partners. (Vendors).

New company to be formed in which vendors will receive 10% (ten percent) of authorized stock.

*$25,000.* Firm cash.

*Option Payments*

| | |
|---|---|
| 1st option—Nov. 1, 1955 | $ 25,000.00 |
| 2nd option—March 1, 1956 | 50,000.00 |
| 3rd option—November 1, 1956 | 50,000.00 |
| 4th option—July 1, 1957 | 50,000.00 |
| | $200,000.00 |

The above agreement shall be binding on the executors, heirs, etc. of the people signing.

"A. Oak"

"Albin Amren"

"S. Daigle"

"Jock MacKinnon"

"A. D. Wilmot"

Witness to above four signatures.

June 25, 1955.

Signed in the Settlement of Uranium City, Saskatchewan.

S—Numbers

Claims IO—1 to 12 incl.—S-30628 to S-30639 inc.

Claims Missing Link—1-9 incl.—S-46551 to S-46559 inc.

Claims EO—1 to 16 incl.—Being recorded June 27—No S numbers as yet.

The respondents Morrisroe and Meschi, although they had knowledge of the existence of the agreement made between the prospectors and Harquail, subsequently persuaded the prospectors to enter into a written agreement, dated June 29, 1955, under which the prospectors purported to grant to Canadian Pipelines and Petroleums Limited (hereinafter referred to as "Pipelines") an option on the same mining claims on terms similar to those contained in the agreement with Harquail.

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Martland J.

On June 30, 1955, both Pipelines and Harquail filed caveats against the mining claims. Harquail had deposited $25,000 with the Canadian Bank of Commerce at Uranium City on June 28, 1955.

Pipelines obtained from the prospectors the documents of title with respect to the mining claims, together with transfers executed in blank by the persons in whose names the claims were recorded. Certain of the claims were actually transferred into the name of Pipelines.

On July 20, 1955, Frobisher commenced action for specific performance of its agreement with the prospectors and on the same date obtained an injunction restraining the respondents from selling, transferring or otherwise disposing of, or entering upon, drilling, exploring, developing, operating or otherwise dealing with the mining claims until the final disposition of the action.

The various respondents, in their statements of defence, pleaded that the agreement between Frobisher and the prospectors was invalid because it had been made on Sunday, June 26, 1955. They also contended that no consideration had been paid by Harquail to the prospectors and that Harquail did not enter into the agreement as agent of Frobisher.

Pipelines, Morrisroe and Meschi also counterclaimed against Frobisher, claiming compensation, pursuant to Reg. 124 of the *Quartz Mining Regulations* of Saskatchewan, enacted pursuant to *The Mineral Resources Act,* on the ground that the caveat filed by Harquail had been registered wrongfully and without reasonable and probable cause. A similar counterclaim was also made against Frobisher by Oak and Amren. Pipelines, Morrisroe and Meschi did not submit this contention in the present appeal, but Oak and Amren did.

The respondents Daigle and MacKinnon did not make any counterclaim against Frobisher, but did counterclaim against Pipelines, seeking a declaration that the agreement between Pipelines and the prospectors had been terminated, or, alternatively, that it should be rescinded on the grounds of undue influence and misrepresentation.

The main issues at the trial, which was a lengthy one, were those raised by the statements of defence as to the validity of the agreement between Frobisher and the prospectors. The learned trial judge, on ample evidence, found that these defences failed, that the agreement was made on Saturday, June 25, 1955, that there was consideration for the agreement and that it had been made by Harquail as agent for Frobisher. These findings were subsequently upheld by the Court of Appeal of Saskatchewan[1] and these issues were not involved in the hearing before this Court.

Toward the end of the trial a motion was made on behalf of the respondents Pipelines, Morrisroe and Meschi to amend their statement of defence so as to plead regulations 8(1) and 9(1) of the *Quartz Mining Regulations*. This motion was refused by the learned trial judge. The Court of Appeal, Gordon J.A. dissenting, was of the opinion that the amendment should have been allowed and that there should be a new trial restricted to the issues raised by the amendment.

At the conclusion of the trial it was contended by Frobisher that it should be entitled to compensation, pursuant to regulation 124, on the ground that the caveat filed by Pipelines had been registered wrongfully and without reasonable cause. Argument was subsequently presented regarding the validity of the regulation in question at a hearing at which the Attorney-General of Saskatchewan was represented. The learned trial judge later held that regulation 124(4) was *ultra vires* and he refused Frobisher's application to amend its statement of claim to claim damages pursuant to that particular regulation.

With respect to this issue, in the Court of Appeal, Martin C.J.S. agreed with the learned trial judge that regulation 124(4) was *ultra vires*. Procter J.A., McNiven J.A. and Culliton J.A. were of the opinion that there was no valid claim under regulation 124(4), since no damage had been proved by Frobisher. Gordon J.A. was of the opinion that leave should not have been given to Frobisher to raise this issue by an amendment to its statement of claim.

[1] (1959), 10 D.L.R. (2d) 338, 23 W.W.R. 241.

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Martland J.

The counterclaim of Daigle and MacKinnon as against Pipelines, which had been allowed by the learned trial judge, was dismissed by the Court of Appeal and no appeal was taken to this Court from that part of the judgment of the Court of Appeal.

At the trial the learned trial judge ruled that counsel for Pipelines, Morrisroe and Meschi was not entitled to cross-examine MacKinnon and Daigle, except only in respect of the issues raised in the counterclaim of MacKinnon and Daigle as against Pipelines.

On appeal it was contended by Pipelines that, because of this refusal to permit cross-examination by the learned trial judge, a new trial should be ordered. Four of the five judges of the Court of Appeal held that the learned trial judge should have permitted the cross-examination of MacKinnon and Daigle by counsel for Pipelines, Morrisroe and Meschi. Martin C.J.S. was of the opinion that the ruling of the learned trial judge was correct. However, four of the five judges held that in the light of the other evidence no substantial wrong or miscarriage of justice had been occasioned by the ruling the learned trial judge and accordingly held that a new trial should not be granted on this ground. Procter J.A. would have granted a new trial.

On the present appeal the following questions were in issue:

1. Was the Court of Appeal right in allowing the amendment to the statement of defence, so as to plead non-compliance by Frobisher and Harquail with the provisions of Regs. 8(1) and 9(1) of the *Regulation* made under the *Mineral Resources Act*, and in directing a new trial in respect of the issues thus raised?

2. Was the Court of Appeal right in refusing to order a new trial because of the refusal of the learned trial judge to permit cross-examination of Daigle and MacKinnon by counsel for Pipelines, Morrisroe and Meschi?

3. Was there any claim for damages established by Frobisher against Pipelines, or by Oak and Amren against Frobisher, pursuant to Reg. 124(4), in respect of the caveats filed respectively by Pipelines and by Frobisher?

I agree with the view of the majority in the Court of Appeal that the learned trial judge ought to have granted the amendment to the statement of defence so as to plead the non-compliance by Harquail and Frobisher with the provisions of regulations 8(1) and 9(1).

Rule 209 of the *Queen's Bench Rules* provides that the Court

> may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and upon such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Lord Esher, in *Steward v. North Metropolitan Tramways Company*[1], stated the general rule as to amendments as follows:

> The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made.

The issue raised by the proposed amendment was one which questioned the legal validity of the agreement of June 25, 1955. If decided in favour of Pipelines, the claim of Frobisher would fail. It was, therefore, an issue of vital importance which Pipelines should have been entitled to raise, unless by making the amendment Frobisher would have been put into a position that it must be injured. I do not think, despite the weighty arguments of Gordon J.A. to the contrary, that Frobisher would have been placed in such a position and consequently I am of the opinion that the amendment should have been allowed.

Regulations 8 and 9(1) of the *Quartz Mining Regulations* provide as follows:

MINING COMPANY

> 8. (1) No mining company shall be granted a licence under these regulations unless such company is licensed or registered under the provisions of the Companies Act of Saskatchewan and in the case of a mining syndicate unless such syndicate is registered under The Securities Act.
>
> (2) Notwithstanding anything contained in these regulations, except as provided in Part XIV hereof, a Prospector's, Developer's and Miner's licence issued to a company shall only convey the authority to hold mineral claims by transfer or assignment. A licence held by a company does not include the privilege of staking claims and shall not entitle any shareholder, officer or employee thereof to the rights and privileges of a licensee.

[1] (1886), 16 Q.B.D. 556.

1959

FROBISHER LTD. v. CDN. PIPE-LINES & PETROLEUMS LTD. et al.

Martland J.

LICENCE REQUIRED

9. (1) No person or mining partnership not a holder of a Prospector's, Developer's and Miner's licence shall prospect for minerals upon lands subject to these regulations, or stake out or record any location, and no person, mining partnership or company not a holder of a Prospector's, Developer's and Miner's licence shall acquire by transfer, assignment or otherwise howsoever any mineral claim or any right or interest therein for which a lease or a patent has not been issued.

Counsel for Frobisher admitted on the argument before this Court that Harquail did not acquire a miner's licence until July 27, 1955, that Frobisher was not registered under the provisions of *The Companies Act* of Saskatchewan until March 9, 1956, and that it did not acquire a miner's licence until March 12, 1956. This admission was made for the purpose of avoiding a new trial on incontrovertible facts and counsel for all parties agreed that it should be regarded as evidence given before this Court under s. 67 of the *Supreme Court Act*.

Accordingly the issue which was argued was as to whether or not the agreement of June 25, 1955, was rendered void by reason of the provisions of these regulations.

The argument of Pipelines was that the agreement, being an option in respect of the mineral claims described in it, created an interest in Frobisher in the claims. It was contended that the acquisition of any interest in the claims by a company not holding a miner's licence being forbidden by regulation 9(1), the agreement was, therefore, illegal and was void.

For Frobisher it was contended that at the time the agreement was made with the prospectors on June 25, 1955, Frobisher did not acquire any interest in the claims, but only an option which gave time for it to decide whether, on the turning over of the transfers to the mineral claims by the prospectors, it would pay the cash sum of $25,000 and thus acquire an option in respect of the claims on the terms provided in the agreement. It was also urged that the agreement did not contemplate an ultimate transfer of the mineral claims to Frobisher, but to a new company for the incorporation of which the agreement provided.

The argument of Pipelines is based upon the judgment of the Court of Appeal in England in the case of *London and South Western Railway Company v. Gomm*[1], which is the decision chiefly relied upon by the majority of the Court of Appeal in directing that there be a new trial. Counsel for Pipelines also referred to other cases in which that judgment had been followed.

That case involved an indenture dated August 10, 1865, between the London and South Western Railway Company and George Powell, by which the railway company conveyed to Powell a parcel of land no longer required for the purposes of the railway. Powell, for himself, his heirs, executors, administrators and assigns, convenanted with the railway company, its successors and assigns, that he, his heirs and assigns, owner and owners for the time being of the lands intended to be conveyed, and all persons who should or might be interested, should, at any time thereafter, whenever the land might be required for the railway or works of the company, whenever requested by the company, its successors or assigns, by six months' previous written notice and on payment of 100 pounds, reconvey the land.

In 1879 Powell sold the lands to Gomm, who had full notice of the contents of the deed of 1865. Notice was given by the railway company to Gomm on March 12, 1880, claiming to repurchase. Gomm refused to reconvey and the railway company sued for specific performance of the covenant in the deed.

The case was first heard by Kay J., who held that the covenant did not create any estate or interest in land and, therefore, was not obnoxious to the rule against perpetuities. He held that Gomm was bound by the covenant in the deed on the principle of *Tulk v. Moxhay*[2].

On appeal it was held that the covenant gave to the railway company an executory interest in land, to arise on an event which might occur after the period allowed by the rules as to remoteness, and was invalid.

Jessel M.R., at p. 580, after referring to the covenant giving the right of repurchase, said:

> If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears

[1] (1882), 20 Ch. D. 562.
[2] (1848), 2 Ph. 774, 41 E.R. 1143.

1959

FROBISHER LTD. v. CDN. PIPE-LINES & PETROLEUMS LTD. et al.

Martland J.

to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present Appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contact it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.

Sir James Hannen and Lindley L.J., the other members of the Court, agreed.

On principle it would appear to me that the decision of Kay J., who later, in *Mackenzie v. Childers*[1], described the proposition thus enunciated as "entirely novel", was right. An option to purchase land is nothing more than an offer to sell and differs only from other offers in that for a stipulated period it is irrevocable. No contract for the acquisition of land results unless the offer is accepted.

In this connection the decision of the House of Lords in *Helby v. Matthews*[2], is of some interest. In that case there was under consideration the effect of an option to purchase a chattel. The owner of a piano let it on hire, the hirer agreeing to pay rent by monthly instalments. The hirer could terminate the hiring by delivering up the piano to the owner, the hirer remaining liable for all arrears of hire. If the hirer paid all of a stipulated number of monthly instalments, he would then acquire title to the piano, but, until that time, it remained the sole property of the owner. The question in issue was as to whether the hirer was "a person having agreed to buy goods" within the meaning of the *Factors Act*, he having pledged it to a pawnbroker after paying only a few instalments of rent and the pawnbroker claiming title to the piano under that Act.

The Lord Chancellor, Lord Herschell, said at p. 477:

It was said in the Court of Appeal that there was an agreement by the appellant to sell, and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words "agreement to sell" be

[1](1889), 43 Ch. D. 265 at 279. [2][1895] A.C. 471.

used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense that there can be said to have been an agreement to sell in the present case.

It is of interest to note that the grantee of a mineral claim under the *Quartz Mining Regulations* acquires a chattel interest. Regulation 38 provides:

38. The interest of a grantee of a mineral claim shall, prior to the issue of a lease, be deemed to be a chattel interest, equivalent to a lease of the minerals in or under the land for one year, and thence from year to year, subject to the performance and observance of all of the terms and conditions of these regulations.

In the *Gomm* case itself the option to the railway company was a term of the agreement by which Powell himself acquired title to the land from the railway company and it might be regarded as a limitation upon the grant of that title. The decision, however, appears to be based on an analogy between the option itself and the agreement to purchase which would result upon its acceptance. In that case the terms of the option were such that the optionee, by accepting it, immediately became entitled to a conveyance of title. It will be found that the options considered in other cases which have followed the *Gomm* case were similar to it in that respect. It seems to me that it is only on this basis that an option might, perhaps, be considered as analogous to an agreement for sale so as to create an interest in land.

In the case of *Manchester Ship Canal Company v. Manchester Racecourse Company*[1], the Court of Appeal had to consider a provision in an agreement between these two companies which read, in part, as follows:

3. If and whenever the lands and hereditaments belonging to the racecourse company, and now used as a racecourse, shall cease to be used as a racecourse, or should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes, then and in either of such cases the racecourse company shall give to the canal company the first refusal of the aforesaid land and hereditaments en bloc. . . .

This agreement was scheduled to an Act of Parliament, which declared it to be valid and binding upon the parties thereto.

[1] [1901] 2 Ch. 37

1959

FROBISHER LTD. v. CDN. PIPE-LINES & PETROLEUMS LTD. et al.

Martland J.

The racecourse company had offered to sell the lands in question to the canal company for 350,000 pounds. At that time the racecourse company already had an offer to purchase from the Trafford Park Company, which wished to use the land for dock purposes, for 250,000 pounds. The canal company offered 200,000 pounds, which was not accepted, and the racecourse company later sold the land to the Trafford Park Company for 280,000 pounds. The latter company had knowledge of the provision in question and agreed to indemnify the racecourse company in respect of any claim under that clause.

Farwell J., at the trial[1], held that the racecourse company could not sell the racecourse without offering it to the canal company at the actual price offered by the Trafford Park Company. He held, on the authority of *London and South Western Railway Company v. Gomm,* that the right of first refusal gave the canal company an interest in the land which could be enforced by it against the Trafford Park Company.

The Court of Appeal held that the clause did not create any interest in the land in the railway company, but also held that the clause involved a negative covenant whereby the racecourse company agreed not to part with one racecourse to anyone else without giving the canal company first refusal and that consequently the clause could be enforced as against the Trafford Park Company by the canal company within the principle of *Lumley v. Wagner*[2].

*London and South Western Railway Company v. Gomm* was followed by Warrington J. in *Woodall v. Clifton*[3]. That was a case in which a lease of land for a term of ninety-nine years contained an option to the lessee, his heirs or assigns, to purchase the freehold at a price of 500 pounds per acre. An assignee of the lease sought to exercise the option as against the assigns of the lessor.

Warrington J. held that the option gave to the lessee an interest in land which might not vest within the period fixed by the rule against perpetuities. He held that the option was invalid on the ground of remoteness.

[1] [1900] 2 Ch. 352.
[2] (1852), 1 De G.M. & G. 604, 42 E.R. 687.
[3] [1905] 2 Ch. 257.

The Court of Appeal upheld his decision on other grounds, holding that the covenant did not come within 32 Hen. VIII, c. 34, so as to make the liability to perform it run with the reversion and that consequently the action could not be maintained against the lessor's assigns.

Warrington J. again followed *London and South Western Railway Company v. Gomm* in *Worthing Corporation v. Heather*[1]. As in the case of *Woodall v. Clifton*, this decision related to an option contained in a lease and the only material difference in the facts was that the option was given for charitable purposes. The option to purchase was held to be void for remoteness and the fact that it was for charitable purposes did not cure it because the interest of the charity did not become effective until the happening of the future event.

Although it was held that specific performance could not be granted, Warrington J. held that the plaintiff was entitled to damages for breach of contract by the defendant for failure to convey upon the exercise of the option. His reasoning on this point was stated at p. 540:

> It is not in my opinion the contract which is void because it infringes the rule against perpetuities, but it is the limitation which, by the operation of the doctrines of the Court of Equity, it is the effect of the contract to create, that is void. The contract remains a valid contract in every respect, but it is the limitation it creates in the contemplation of the Court of Equity, and it is that alone, which is void.

The *Gomm* case was considered again by Wynn-Parry J. in *Wright v. Dean*[2]. In explaining why the option under consideration by him in that case created an interest in land, he says at p. 693:

> The option confers upon its exercise a right to call for a conveyance of the freehold and, therefore, it creates an interest in land.

In *Griffith v. Pelton*[3], Jenkins L.J., at p. 533, defines what he refers to as an "option in gross" to purchase land in the following manner:

> An option in gross for the purchase of land is a conditional contract for such purchase by the grantee of the option from the grantor, which the grantee is entitled to convert into a concluded contract of purchase, and to have carried to completion by the grantor, upon giving the prescribed notice and otherwise complying with the conditions upon which the option is made exercisable in any particular case.

[1] [1906] 2 Ch. 532.
[2] [1948] Ch. 686.
[3] [1957] 3 W.L.R. 522.

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Martland J.

The *Gomm* case was cited with approval by Duff J. (as he then was) in his dissenting opinion in *Davidson v. Norstrant*[1].

Reference has been made to the foregoing authorities because they are of assistance in deciding the extent of the judgment of the Court of Appeal in the *Gomm* case. Is it to be considered as laying down, as a general proposition of law, that any option which relates to land of necessity vests in the optionee, forthwith upon the granting of it, an interest in land? I do not think that it does.

The word "option" is not a term of art. It does not, by itself, necessarily mean an option to purchase or to call for the whole of the interest of the person giving the option in the subject-matter. Its meaning depends upon the context. Its acceptance results in a contract, the nature of which must depend upon the terms of the offer which is made.

In each of the cases above cited in which the *Gomm* case has been followed the offer which was made for valuable consideration was to convey a title to land to the optionee forthwith upon payment of a stipulated sum of money.

The initial option given to Harquail did not, to paraphrase Wynn-Parry J. in *Wright v. Dean,* confer upon its exercise a right to Frobisher to call for a conveyance of the title to the mineral claims. For that reason, even assuming the correctness of the decision in the *Gomm* case, I do not think that Frobisher acquired, by virtue of the agreement, any property interest in the mineral claims. What it had was the right, upon payment of the $25,000 when the transfers of the mineral claims had been turned over to the Uranium City Bank of Commerce branch, to acquire an option under the terms of which, upon the payment of the option payments in accordance with the agreement, the mineral claims would, in due course, become the property of a new company to be formed, in which the prospectors would have 10 per cent. of the authorized capital stock. It was that company, not yet in existence, which the agreement contemplated as becoming the ultimate owner of the mineral claims. It was that company which could, in due course, acquire a property interest in the mineral claims, but it was not yet a legal entity and there was no certainty that it would ever exist. If the periodic payments

[1] (1921), 61 S.C.R. 493 at 509, 57 D.L.R. 377.

called for by the agreement were not made by Frobisher there would never be any occasion for it to be created. Frobisher acquired only a contractual right, by making the various stipulated payments, to see that the mineral claims were dealt with in this way. In view of this, I do not think that Frobisher could be regarded, even on the reasoning of the *Gomm,* case as having acquired an equitable property interest in the mineral claims.

There is a second ground upon which I think that the contention of Pipelines fails on this issue. To sum up that argument again, it is this: (1) Applying the rule in the *Gomm* case, Frobisher purported to acquire, by the option, an interest in the mineral claims. (2) Regulation 9(1) says that Frobisher, not having a miner's licence, shall not acquire such an interest. (3) Therefore, the contract is illegal and void.

An option for the purchase of land creates contractual rights and, if the reasoning in the *Gomm* case be accepted, its effect may be to create also a contingent limitation of land which may take effect in the future. This is what is referred to by Warrington J. in *Worthing Corporation v. Heather* in the passage from his judgment previously quoted. The point is well stated by Farwell L.J. in *South Eastern Railway v. Associated Portland Cement Manufacturers (1900), Limited*[1], where he says:

> But the fact that there is some connection with or reference to land does not make a personal contract by A. less a personal contract binding on him, with all the remedies arising thereout, unless the Court can by construction turn it from a personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant.
>
> The real answer to the argument founded on the inconvenience of tying up land is that the action upon the covenant sounds in damages only unless the defendant has still got the land to which the covenant relates. If he has still that land, then in an action on the covenant the plaintiff may claim specific performance, and it is for the Court to see whether in such circumstances it is inequitable to grant specific performance, or whether the covenantor ought to pay damages in lieu of it. There is no defence to such an action in the present case.

[1] [1910] 1 Ch. 12 at 33.

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Martland J.

If the option did create an interest in the mineral claims in Frobisher, such limitation would be rendered void by regulation 9(1), as, in the *Worthing* case, the limitation was rendered void by virtue of the rule against perpetuities. However, the contractual right still remains.

In other words, Frobisher, by the effect of regulation 9(1), did not, when the option was made, have the capacity to acquire, at that time, an interest in the mining claims, but it could acquire contractual rights as against the prospectors to require that the mineral claims should be dealt with, in the future, in accordance with the terms of the agreement.

The *Quartz Mining Regulations* in question are a part of a code of rules laid down by the Government of Saskatchewan regarding the acquisition of quartz mining claims, the property of the Crown in the right of the Province of Saskatchewan. The Crown does not recognize any interest in a mining claim in anyone not possessing a miner's licence. In the case of a company, the authority to hold mining claims by transfer or assignment is acquired by the obtaining of a miner's licence as provided in regulation 8(2). It does not seem to me that these *regulations* make it illegal for a company which does not possess a miner's licence to obtain contractual rights as against persons who have acquired title to mineral claims regarding the disposition of those claims in the future. Their effect is that such a company is not recognized, in law, as having the capacity to acquire any property interest in mineral claims.

For the foregoing reasons I do not think that the agreement of June 25, 1955, was rendered void by regulations 8 and 9 of the *Quartz Mining Regulations*.

It was contended by Pipelines that specific performance of the contract could not be granted unless it did create an interest in land.

With respect to this point I agree with the proposition stated by Jenkins J. in *Hutton v. Watling*[1], that the jurisdiction to grant specific performance of a contract for the sale of land is founded, not on the equitable interest in land

[1] [1948] Ch. 26 at 36.

which the contract is regarded as conferring on the purchaser, but on the simple ground that damages will not afford an adequate remedy. Specific performance is merely an equitable mode of enforcing a personal obligation.

While specific performance is granted normally only against a party to the contract, if a stranger gets possession of the subject-matter he may be made a party to the action for specific performance of the contract on the equitable ground that his conscience is affected by the notice.

I turn now to the second point raised on this appeal; namely, as to whether a new trial should be ordered because of the refusal of the learned trial judge to permit cross-examination of Daigle and MacKinnon by counsel for Pipelines.

During the course of the cross-examination of Daigle the learned trial judge ruled that he could not be cross-examined in respect of the issues as between Frobisher and Pipelines because his interest as a defendant in Frobisher's action, as disclosed in the pleadings, was the same as that of Pipelines. This view was also adopted by Martin C.J.S. in the Court of Appeal.

I agree with the view of the majority of the Court of Appeal that permission to cross-examine should not have been refused. However, I also agree with the majority of the Court of Appeal that, applying Rule 40 of the *Court of Appeal Rules,* a new trial should not be granted because no substantial wrong or miscarriage of justice had been occasioned thereby.

The third question is in respect of the claims for damages sought to be made by Frobisher against Pipelines and by Oak and Amren against Frobisher by reason of the filing of the caveats by Pipelines and Frobisher.

These claims are based upon regulation 124 of the *Quartz Mining Regulations,* which provides as follows:

> 124. (1) Any person registering or continuing a caveat wrongfully and without reasonable cause shall make compensation to any person who has sustained damage thereby.
>
> (2) Such compensation with costs may be recovered by proceedings at law, if the caveator has withdrawn his caveat and no proceedings have been taken by the caveatee as herein provided.
>
> (3) If proceedings have been taken by the caveatee the compensation and costs shall be determined by the court and judge acting in the same proceedings.

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Martland J.

(4) Where compensation is determined by the court, the compensation to the claim owner and all other persons who have sustained damage by the wrongful registration or continuation of the caveat without reasonable cause shall be not less than $25.00 per claim affected thereby for every day such caveat has been so wrongfully registered or continued, to be apportioned by the court as it deems fit.

No claim can be made under this regulation unless the person claiming can establish that he has sustained damage thereby. I do not find any evidence of damage having been sustained by Frobisher by reason of the filing of the caveat by Pipelines. Any damages sustained by Frobisher resulted from the making of the agreement by the prospectors with Pipelines and the turning over of the documents relating to the mineral claims to Pipelines in breach of the prospectors' agreement with Frobisher. There was no increase in such damages because of the filing of the caveat by Pipelines and the position as between Frobisher and Pipelines was not altered by the filing of it.

No damages were sustained by Oak and Amren as a result of the filing of the Frobisher caveat.

In view of the above conclusions, it is not necessary to express any opinion as to the validity of regulation 124.

In the result, in my opinion, the appeal of Frobisher from that portion of the judgment of the Court of Appeal which directed, on terms, a new trial in respect of the issues raised as to non-compliance by Harquail and Frobisher with regulations 8(1) and 9(1) should be allowed. In all other respects, save as to costs, I think the judgment of the Court of Appeal should be affirmed. Frobisher should be entitled to its costs in this Court as well as in the Court of Appeal.

JUDSON J.:—On June 25, 1955, the appellant, Frobisher Limited, through its agent James A. Harquail, took an option to purchase certain mining claims from four prospectors. On June 29, 1955, the prospectors gave a similar option on the same claims to Canadian Pipelines and Petroleums Limited. This company not only took with notice of the first agreement but actively induced the breach of it. Frobisher, immediately after hearing of the second agreement, began this action against Canadian Pipelines, its two officers Morrisroe and Meschi and the four prospectors for specific performance of its agreement and an injunction

against any dealings with the claims by the defendants. The main defence was that the Frobisher agreement was made on Sunday and the greater part of the evidence was directed to this issue. The learned trial judge, on ample evidence, made a clear finding that this defence failed and that the Frobisher agreement was made on Saturday, June 25, 1955, and not on Sunday, June 26, 1955, as alleged by the defence. The Court of Appeal[1] agreed with this finding and this matter is no longer in issue.

Towards the end of what had proved to be a very long trial, the defence moved to amend by pleading regulations 8 and 9 of the Regulations made under *The Mineral Resources Act*. The learned trial judge refused leave to amend and gave judgment for the plaintiff. The Court of Appeal[1] was of the opinion, Gordon J.A. dissenting, that the amendment should have been allowed and that there should be a new trial restricted to the issue raised by the amendment. In all other respects the appeal was dismissed. Frobisher now appeals to this Court from the order of the Court of Appeal allowing the amendment and seeks the restoration of the judgment given at trial.

Briefly, the regulations provide that no mining company shall be granted a licence unless it is registered under the *Companies Act* of Saskatchewan and that no person or company, not a holder of a licence shall prospect for minerals, stake out or record any location or "acquire by transfer, assignment or otherwise howsoever, any mineral claim or any right or interest therein." The appellant now admits that its agent Harquail had no licence until July 27, 1955; that Frobisher did not register under the *Companies Act* of Saskatchewan until March 9, 1956, and that it acquired its Miner's licence on March 12, 1956. This admission is made for the purpose of avoiding a new trial on incontrovertible facts and all counsel agree that it should be regarded as evidence given before us under s. 67 of the *Supreme Court Act*. The question, therefore, is whether Frobisher or its agent acquired any "right or interest" in the claims on June 25, 1955, the date of the Frobisher agreement when neither company nor agent held

[1] (1959), 10 D.L.R. (2d) 338, 23 W.W.R. 241.

1959

FROBISHER LTD. v. CDN. PIPE-LINES & PETROLEUMS LTD. et al.

Judson J.

any licence. If they did and if, in consequence, the Frobisher agreement is null and void, then, on the admissions made, the action must be dismissed.

The Frobisher agreement, signed by the four prospectors, is in the following terms:

Date—25th day of June, 1955.

*AGREEMENT*

We, the undersigned, the sole owners of mineral claims—EO-1 to 16 incl.

Missing Link 1 to 9 incl.

IO—1 to 12 incl.

In all 37 claims contiguous, located on or near Stewart Island, Lake Athabasca, Province of Saskatchewan, Canada—do hereby grant to James A. Harquail, Mining Engineer—Suite 2810, 25 King st. West, Toronto, Ontario—in consideration of the sum of $1.00 (one dollar), receipt of which is hereby acknowledged, an option effective to 12 noon—June 30, 1955—to purchase said mineral claims from the undersigned under the terms of the following deal:

On receiving transfers to above claims in good order—on, or as close as possible to June 30th, 1955—said transfers to be turned over to Uranium City Bank of Commerce branch at which time sum of $25,000.00 (twenty-five thousand dollars) will be issued to Mackinnon and partners. (Vendors)

New company to be formed in which vendors will receive 10% (ten percent) of authorized stock.

*$25,000.* Firm cash

*Option Payments*

| | |
|---|---|
| 1st option—Nov. 1, 1955 | $ 25,000.00 |
| 2nd option—March 1, 1956 | 50,000.00 |
| 3rd option—November 1, 1956 | 50,000.00 |
| 4th option—July 1, 1957 | 50,000.00 |
| | $200,000.00 |

The above agreement shall be binding on the executors, heirs, etc. of the people signing.

Frobisher submits that during the interval from June 25 to June 30, it acquired no interest in the claims and that the prospectors granted this period of time to Harquail to enable him to find out whether his principal would make the payment of $25,000 on June 30; that, on the other hand, the prospectors needed time to record claims E.O. 1-16 and to complete their deposit of their title papers with the bank to be delivered on payment of the $25,000; and further that the option did not begin until the $25,000

had been paid. During this five day period Frobisher says that it held no more than an option to decide whether it would take an option. It was conceded that an interest in land would arise when the payment of $25,000 was made.

I am quite unable to see any valid distinction between Frobisher's position during the five day period and what it would have been had the first $25,000 actually been paid. It was during this five day period that the prospectors repudiated their obligation to Frobisher by making the other agreement with Canadian Pipelines and refusing to deposit their title papers with the bank. Frobisher did everything that it could do in the circumstances to make the payment on June 30. What Frobisher had during the five day period was an irrevocable offer, obtained for the consideration of one dollar, which was actually paid. What it would have had on June 30 on payment of $25,000 was an irrevocable offer for the period ending November 1, 1955. The further payments provided for in the agreement would hold the offer irrevocable until the dates specified and on the making of the last payment Frobisher would be entitled to the title papers for the purpose of transfer to the new company. The position of Frobisher as the optionee under this agreement is the same throughout all its stages. It has the right to have the offer kept open on payment of the stated consideration. The payments, if completed, constitute the purchase price and all that then remains to be done is to form the new company, transfer the claims and allot to the prospectors 10 per cent. of the authorized stock.

Does an option to purchase land give rise to an equitable interest in land? The question has usually been considered in connection with conveyances and leases and the rule against perpetuities, and it has been held that the option is too remote if it can be exercised beyond the perpetuity period. The underlying theory is that the option to purchase land does create an equitable interest because it is specifically enforceable. There is a right to have the option held open and this is similar to the right that arises when a purchaser under a firm contract may call for a conveyance.

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Judson J.

In both cases there is an equitable interest but in the case of the option it is a contingent one, the contingency being the election to exercise the option.

In *London & South Western Railway Co. v. Gomm*[1], Kay J. held that such an interest did not arise, that an option to purchase was not within the rule against perpetuities and that a purchaser for value without notice of the option would not be bound by the covenant to re-convey. In the particular case before him, he held that the defendant Gomm had taken with notice and that he was bound in Equity by the covenant, on the principle of *Tulk v. Moxhay*[2]. The facts of the case may be stated in very simple terms for the purpose of these reasons. The Railway Company conveyed surplus lands to one Powell in fee simple and exacted a covenant that the grantee, his heirs or assigns would re-convey on payment of the consideration of £100, should the lands at any time be required for railway purposes. The Court of Appeal, reversing the judgment of Kay J., held that Gomm, the purchaser from Powell, was not bound by the covenant because it created an equitable interest in the land, which offended the rule against perpetuities. The two conflicting views of the problem are thus stated in the plainest terms in this decision. Is the matter one of contract or property? Since the decision in *Gomm,* I am unable to find in any judicial decision in England any deviation from the rule that the matter is one of a property interest and not merely of contract. Even though Kay J. in the subsequent case of *Mackenzie v. Childers*[3], expressed the opinion that the doctrine enunciated in *Gomm* was "entirely novel", judicial re-examination from time to time has resulted only in an affirmation of the rule that an option holder has an equitable interest—for example, by Warrington J. in *Woodall v. Clifton*[4], and in *Worthing v. Heather*[5], and by Jenkins L.J. in *Hutton v. Watling*[6], and in *Griffith v. Pelton*[7].

[1] (1882), 20 Ch. D. 562.
[2] (1848), 2 Ph. 774, 41 E.R. 1143.
[3] (1889), 43 Ch. D. 265 at 279.
[4] [1905] 2 Ch. 257.
[5] [1906] 2 Ch. 532.
[6] [1948] Ch. 26.
[7] (1957), 3 W.L.R. 522.

In this Court, Duff J. in *Davidson v. Norstrant*[1], in a dissenting opinion which alone referred to this matter, stated:

> It seems quite clear that the option if validly created would vest in the optionee an interest in land. The decision of the Court of Appeal in *London and Southwestern Railway Co. v. Gomm* (1882) 20 Ch. D. 562, seems to be conclusive. Each one of the three judges, Sir George Jessel, Sir James Hannen, and Lindley L.J. explicitly hold that the grant of an option has the effect of creating an interest in land and these opinions are not mere dicta; they are the foundation of a distinct ground upon which the judgment of the court was based.

Further, in *Auld v. Scales*[2], where there was option to purchase contained in a lease which, at the time of the litigation, had become one from year to year, it was held that the option did not offend the rule against perpetuities, because the lease and with it the option could be terminated at any time on proper notice. Although the decision in *Gomm* is not expressly mentioned, the judgment is based on the assumption that the option to purchase under consideration did create an interest in land.

The New Zealand Court of Appeal, in *Morland v. Hales*[3], also reached the same conclusion. An owner of land, for valuable consideration, gave an option to purchase for a period of ten days. Under the mistaken impression that the option had been abandoned by the optionee, the owner gave a similar option to a second person, and then the first optionee exercised his option by acceptance within the ten days. It was held, following the decision in *Gomm*, that the option created an interest in land and that the holder of the first option had therefore a superior equity to that of the holder of the second option.

In the present case, in view of my opinion that Frobisher's attempt to distinguish its position at the first stage of the option from the later stages fails, there is no conclusion possible other than the one that in the period June 25 to June 30 it did acquire an interest in these claims. This was also the opinion of the Court of Appeal and once they had reached this conclusion, which is really decisive of the whole case, they had no choice but to rule that the rejection of the amendment by the learned trial judge was an erroneous

[1] (1921), 61 S.C.R. 493, 57 D.L.R. 377.

[2] [1947] S.C.R. 543, 4 D.L.R. 721.

[3] (1911), 30 N.Z.L.R. 201.

1959

FROBISHER LTD. v. CDN. PIPE-LINES & PETROLEUMS LTD. et al.

Judson J.

exercise of discretion. I am in respectful agreement with their order based, as it is, upon the theory that the option created an equitable interest in the claims. Gordon J.A. dissented and would have rejected the motion to amend on many grounds, all of them substantial; that it was made too late; that the point should have been raised in the statement of defence; that the litigant should be bound by his conduct of the case; and finally, that the amendment might leave the plaintiff open to a large claim for damages under regulation 124 for "wrongfully and without reasonable cause" registering a caveat against the claims. The force of most of these objections to the amendment largely disappears when one has in mind that the facts on which the application was based were not open to controversy. In the view I take of regulation 124 no claim for damages can arise in this case.

My conclusion therefore is that this option, creating as it did an equitable interest in these claims, was rendered void and of no effect because it was given and taken against the express prohibition contained in regulation 9. I reach this conclusion with regret and with knowledge that an honest bargain is being defeated on technical objections, taken late in the proceedings by defendants who, by concurrent findings of fact, have been found guilty of a conspiracy to induce a breach of contract. The appeal of Frobisher must be dismissed with costs and in view of the admission that the necessary licences were not held at the date of the taking of the option and that a new trial is unnecessary, the action must be dismissed. I would maintain the disposition of the Court of Appeal as to costs of the trial and the appeal to the Court of Appeal.

Two of the prospectors, Oak and Amren, counter-claimed against Frobisher for damages for breach of regulation 124 in connection with the registration of a caveat against the claims. Regulation 124 reads:

> 124. (1) Any person registering or continuing a caveat wrongfully and without reasonable cause shall make compensation to any person who has sustained damage thereby.
>
> (2) Such compensation with costs may be recovered by proceedings at law, if the caveator has withdrawn his caveat and no proceedings have been taken by the caveatee as herein provided.

(3) If proceedings have been taken by the caveatee the compensation and costs shall be determined by the court and judge acting in the same proceedings.

(4) Where compensation is determined by the court, the compensation to the claim owner and all other persons who have sustained damage by the wrongful registration or continuation of the caveat without reasonable cause shall be not less than $25.00 per claim affected thereby for every day such caveat has been so wrongfully registered or continued, to be apportioned by the court as it deems fit.

The learned trial judge, on proper notice to the Attorney-General held this regulation to be void as going beyond the authority contained in the statute. In the Court of Appeal only the Chief Justice dealt with this matter and he agreed with the trial judge. In this Court counsel for Oak and Amren opened the question again and argued in favour of the validity of the regulation and sought an assessment of damages. I agree with the majority in the Court of Appeal that it is unnecessary in this case to determine whether or not regulation 124 is *intra vires* because it was clearly shown that no damage arose from the registration of the caveat. The damage, if any, resulted from the litigation which followed almost inevitably when the prospectors gave two options for the same claims to competing interests. I am also of the opinion, although it is unnecessary to base my judgment on this ground, that registration of a caveat "wrongfully and without reasonable cause" means something in the nature of an officious intermeddling without any colour of right and that the regulation, if valid, has no application when there is a *bona fide* dispute.

The result is that the appeal of Frobisher and the cross-appeal of Oak and Amren are dismissed with costs. Judgment should be entered dismissing the action and the counterclaim both with costs to the plaintiff because of the shortcomings of the defendants in the conduct of their defence. The costs of the appeal to the Court of Appeal should stand as ordered by that Court. The cross-action of the two prospectors Daigle and MacKinnon against Pipelines was finally disposed of in the Court of Appeal.

*Appeal and cross-appeals dismissed with costs,* LOCKE *and* MARTLAND JJ. *dissenting.*

*Solicitors for the plaintiff, appellant: Davidson, Davidson & Blakeney, Regina.*

1959

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. et al.

Judson J.

*Solicitors for the defendants, Canadian Pipelines & Petroleums, Morrisroe and Meschi: MacPherson, Leslie & Tyerman, Regina.*

*Solicitors for the defendants, Oak and Amren: Pitcher, Ehmann & Murphy, Regina.*

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1959

*Oct. 22, 23
Dec. 21

THE BOARD OF EDUCATION FOR THE CITY OF TORONTO AND J. C. HUNT (*Defendants*) ..... APPELLANTS;

AND

WILLIAM HIGGS by his next friend, JOHN CECIL LOWINGS, AND HELEN HIGGS (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Negligence—Boy injured by another during school recess—Injury aggravated by teacher ordering boy into line and into class—Liability—Finding of failure to have sufficient teachers on duty—Whether liability of Board of Education and teacher—The Public Schools Act, R.S.O. 1950, c. 316, s. 108(g).*

During the school recess period, the plaintiff infant was injured when another pupil, known as a boy who indulged in rough play, lifted him off his feet and carried him over to a rink where he dropped him on the ice. None of the four teachers who were supervising the recess saw the incident. One was called over by other pupils and ran across the ice. The boy refused help, and another teacher ordered him into line and into class although he was limping and complaining. Ultimately he was sent to see the nurse and then sent home in a taxi. The initial injury was found to have been a hip bone displacement which was aggravated when the boy was required to walk.

The action alleged negligence in (1) failure to provide adequate supervision; (2) permitting rough play which the defendants knew or ought to have known would cause injury; and (3) failure to intervene when they saw or ought to have seen that the rough play was likely to cause serious injury. At trial and in this Court liability for the initial injury was treated separately from liability for the aggravation. The jury found that the initial injury was the result of the failure of the defendants to supervise the activities of the pupils because there was not a sufficient number of teachers on duty, in view of the winter conditions, the number and ages of the children and the fact that ice being on such a large area would limit the access of the teachers to the scene of the accident. On the second branch of the

*PRESENT: Taschereau, Cartwright, Martland, Judson and Ritchie JJ.

case, the jury found negligence which had aggravated the injury. The action was accordingly maintained, and this judgment was affirmed by the Court of Appeal.

*Held*: The appeal should be allowed in part by dismissing the claim for the initial injury.

As to the initial injury. The omission as found by the jury did not constitute the breach of a duty owing to the injured boy by both or either of the defendants. Neither inadequate supervision of the rough boy nor failure to see him pick up and carry the injured boy formed any part of the failure found. The finding of the jury raised the question of the adequacy of the system for supervising the break period used by the school principal, who alone had the authority to control the matter. That system had been employed satisfactorily by the principal for several years, and, in the absence of proof to the contrary, he had no reason to believe that it did not constitute a reasonable safe system having regard to the number and ages of the children, and there were not any unusual circumstances that day which made it reasonably foreseeable that a greater number of teachers would be required. The winter conditions specified by the jury did not constitute such an unusual circumstance. Even if the "failure" as found by the jury had constituted a breach of duty, it had not been shown to be probable that any of the ingredients of that "failure" caused or contributed to the injury. The particulars of the failure found by the jury were such as to negative the other grounds of negligence suggested. Even on the view that the jury's answers included a finding of "inadequate supervision," it is not the duty of school authorities to keep pupils under supervision every moment while they are in attendance at school.

As to the aggravation of injury. Section 108(*g*) of *The Public Schools Act* imposes upon every teacher a duty "to give assiduous attention to the health and comfort of the pupils . . .". There was evidence to support the jury's answers as to the negligence of the two teachers particularly having regard to the requirement of "assiduous attention", and the Board must bear the responsibility for their subsequent actions.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment given at a jury trial. Appeal allowed in part.

*C. L. Yoerger, Q.C.*, for the defendants, appellants.

*P. de C. Cory*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal by the defendants from a judgement delivered by Laidlaw J.A. on behalf of the Court of Appeal for Ontario dismissing an appeal from the judgment of McLennan J., sitting with a jury. The plaintiff (respondent) in this action was a student in the academic and vocational class of the Maurice Cody School in the City of Toronto and in the month of January 1957 was 15 years

1959

BD. OF EDUCATION FOR TORONTO v. HIGGS et al.

Ritchie J.

of age or thereabouts. He was apparently a normal boy and had achieved some distinction as a golfer, and while there is some evidence that he was subjected to ridicule from time to time by other students, there is nothing to suggest that he was in any way markedly different from his fellows or that he required any special attention from the authorities. He had an association with a boy by the name of Taylor who was a fellow student in the same class which involved lunching together and a certain amount of horse play which Higgs himself describes by saying "We used to fall around all the time".

On January 31, 1957, Higgs appears to have spent the greater part of the morning break talking to some girls in the neighbourhood of a large patch of ice generally referred to as the "pleasure rink" which had been cleared away in the school yard for the purpose of sliding and skating and which was played on to some extent during the break. Towards the end of the break, while Higgs was still in conversation with the girls, Taylor appears to have come up from behind, and lifting him off his feet, carried him a distance of about 20 feet and dropped him on the ice.

Taylor was a boy about the same size as Higgs but apparently a good deal stronger. He was known to the school authorities to be a boy who indulged in rough play. He had been warned and disciplined for his behaviour on more than one occasion in the past, and indeed his behaviour on this morning bears out the character of a rough and overbearing youth. After he dropped Higgs on the ice, he proceeded to kick snow in his face from the pile of snow that had been cleared off around the ice-covered area.

Although five students, who had been close to the boys at the time of the incident, gave evidence, none of them was able to testify to seeing Higgs being picked up, although two say that they saw him being carried and two others that they saw him being dropped on the ice.

It is important to note that the school yard consisted of an area of about 250 feet in length and approximately 400 feet in width although the width varied. At the north end of the yard a substantial area consisted of a hockey rink and in approximately the middle of the yard there was the pleasure rink above referred to and at the southern end of the yard there was a concrete area in front of the L-shaped

school building itself. The evidence discloses that there were four teachers out of doors on duty supervising the break period. One of them, Mr. Hunt, was stationed in the northwest portion of the yard and his area of operations ran from the southwest corner of the hockey rink down the western side of the pleasure rink to approximately the point where the concrete surface began. Mr. Herlick fulfilled a similar function on the east side of the yard and there is some evidence to the effect that both these masters were directing their attention more to the students on the hockey rink than to those in the central part of the playground. There were also two female teachers stationed on the concrete surface outside the school who covered the southern area of the playground and one of whom, according to Higgs, was only about 35 feet away from the scene of the accident. None of the teachers saw this happening or knew anything about it until Herlick, who was then standing at the southeast corner of the hockey rink, was alerted by some boys who came across the ice to draw his attention to it. Herlick appears to have acted quickly because he ran across the ice and reached Higgs before he had got up. Higgs' own estimate was that Herlick was there in two or three minutes while other say that it only took him one minute.

Herlick found the boy with tears in his eyes and gained the impression that he was hurt and very much aggrieved, but the boy refused his offer of assistance and Herlick did not insist on taking him in to the school nurse. Shortly after this Mr. Hunt also came to the scene, and although there is some conflict as to exactly how Higgs reached the school it is apparent that when he got there he hung up his coat and hat, and although he was limping quite obviously and complaining, Mr. Hunt ordered him into line and into class. The boy says that Hunt struck him, but in any event he was required to walk into the classroom, and having reached it he appears to have shown very apparent signs of pain and disturbance as a result of which Mr. Hunt ultimately sent him to the nurse. The treatment he received from the nurse was somewhat superficial, although this is no reflection on her, and the upshot of it all was that he was sent home in a taxi and on arrival there was put to bed where the family physician attended him that evening. Upon X-rays

1959

BD. OF EDUCATION FOR TORONTO v. HIGGS et al.

Ritchie J.

being taken, it appeared that the boy's hip bone was dislocated and it was the opinion of his doctors that the original injury sustained by being dropped on the ice would probably not have resulted in more than a 20 per cent. displacement which could have been cured by manipulation, but that the fact that he had been required to put his weight on his leg was likely to have caused the more severe condition which required hospitalization.

Higgs, by his next friend, sued the Board of Education and Mr. Hunt claiming general damages and Mrs. Higgs joined in the action asserting her claim for special damages.

The statement of claim alleges that the injuries to the plaintiff were caused by the negligence of the defendant in the manner following:

(*a*) failure to provide reasonable or adequate supervision during the recess period:

(*b*) allowing and permitting rough play of such a nature or kind that they knew or ought to have known that it was likely to cause serious injury to pupils such as the plaintiff entrusted to their care;

(*c*) failure to intervene when they saw or ought to have seen that the actions hereinbefore related were likely to cause serious injury to the plaintiff.

In putting this matter to the jury and indeed to this Court, the question of liability for the initial injury sustained when the boy was dropped on the ice was treated separately from that of liability for the events which succeeded and allegedly aggravated it.

On the first branch of the case the following questions were submitted to the jury and answered in the manner indicated:

1(*a*) Were the injuries suffered by the Infant Plaintiff the result of the failure of the defendants to supervise the activities of the students?
Answer "Yes" or "No" Answer: YES

(*b*) If your answer to Question 1(*a*) is "Yes", then in what respect did the defendants fail to supervise such activities. *Answer fully*
There was not a sufficient number of teachers on duty in the playground, in view of the winter conditions, the number and ages of the children and the fact that ice being on such a large area of the yard would limit the access of teachers to the scene of any accident.

(*c*) Irrespective of how you answer Question 1(*a*), at what amount do you assess the damages
(1) of the adult plaintiff .....$ 1,184.40
(2) of the infant Plaintiff .....$ 13,000.00

It is noteworthy that these answers do not appear to reflect the last two particulars of negligence alleged in the statement of claim, but it was urged in this Court on behalf of the respondent that by reason of his known tendency to rough play the Taylor boy constituted a species of foreseeable danger against which the school authorities were under a duty to guard his fellow pupils, and that it could be assumed that the jury's verdict included a breach of this duty as a part of the "failure" referred to in questions 1(*a*) and 1(*b*), and it would appear that the Court of Appeal for Ontario shared this view.

In this regard it is to be noted that the learned trial judge, in directing the jury to answer question 1(*b*) "fully", had this to say:

> . . . and I should tell you now, when I say "Answer fully", it is not sufficient to say the defendants failed to supervise, but the Court requires you to give the facts on which you say there is no supervision, if that is the conclusion you come to.
>
> These are the submissions of counsel for the plaintiff:
>
> In the circumstances there were not enough teachers supervising;
>
> There was, secondly, an inadequate supervision of Taylor that day;
>
> And thirdly, there was a failure of the particular supervisors to see Taylor pick up Higgs and carry him the twenty feet and dump him on the ice, which could have been stopped by a single word.
>
> Counsel for the defendant, on the other hand, says you should answer Question 1(*a*), "No", and he says that there was adequate supervision—two men teachers over these boys on the north end of the school yard—and that teachers are not bound to watch Taylor every minute; and I think there is undoubtedly something in that submission. If a person is so dangerous a character that he has to be watched every minute, then he should not be in the school at all. Then, as to the defendants' third point, he says there was no time to do anything because it happened so quickly.

When the answers to questions 1(*a*) and 1(*b*) are read together in light of these instructions and of the pleadings, it is my view that neither "inadequate supervision of Taylor" nor "failure of any particular supervisor to see Taylor pick up Higgs and carry him twenty feet and drop him" forms any part of the "failure" which the jury found to have resulted in the respondent's injury, which "failure" is confined to not having "a sufficient number of teachers in the playground in view of:

(1) The winter conditions;
(2) The number and ages of the children;
(3) The fact that ice being on a large area of the yard would limit the access of teachers to the scene of any accident."

1959

BD. OF EDUCATION FOR TORONTO v. HIGGS et al.

Ritchie J.

In rendering the decision of the Court of Appeal for Ontario from which this appeal is asserted, Laidlaw J.A., having expressed his opinion to the effect that the jury properly took these three matters into consideration, went on to say, "The omission constituting a breach of duty consisted in not having sufficient teachers on duty in the particular circumstances as found by the jury". With all respect, I have the greatest difficulty in agreeing that the "omission" as so found did indeed constitute the breach of a duty owing to the infant respondent by both or either of the appellants.

The primary responsibility for the manner in which the pupils in this school are to be supervised while at play lies upon the Board of Education for the City of Toronto (hereinafter called the "Board") itself as distinct from its employees, but the regulations which it had promulgated to this end were excluded from the evidence by the learned trial judge and there is, accordingly, no evidence one way or the other respecting the steps, if any, taken by the Board as such in this regard.

At the other end of the chain of responsibility are the teacher-supervisors (including the appellant, Hunt) who were seized with the task of actual supervision but who had neither the power nor the responsibility of controlling or regulating the number of teachers to be on duty in the playground. The law does not contemplate the existence of a duty in an individual who is powerless to discharge it, and it must, therefore, be concluded that these findings cannot apply to the appellant, Hunt, and that the order appealed from should be set aside insofar as it relates to his responsibility for the initial injury to the respondent.

Under the circumstances disclosed by the evidence, the school principal, Mr. Macpherson, was the person and the only person vested with authority to control the matter of "having sufficient teachers on duty in the playground", and it is the nature of the duty resting upon him which must be examined in order to determine whether there was such a failure as to make the Board liable for the injury which resulted from the actions of the Taylor boy.

The duty of supervision which a school authority owes to its pupils while they are at play must of necessity vary from school to school and even from day to day, and it

is, therefore, not possible to elicit from the decided cases any guiding principle for the exact measurement of the degree of care to which any particular set of circumstances may give rise.

In the decision appealed from in the present case, Laidlaw J.A. has this to say on the subject:

> I do not suggest that it is the duty of a school teacher or a supervisor to keep pupils under supervision during every moment while they are in attendance at school. Nor do I suggest that the duty of supervision should be measured or determined by the happening of an extraordinary accident. It has been said that the duty is to take such care as a careful father would take in the particular circumstances. He must guard the pupils against danger that could reasonably be foreseen.

There can be no disagreement with the views of the learned judge in this regard except that it seems to me that the analogy between the duty of a school master to his pupils and that of a parent to his children, while it applies with some force to the duty which the individual master owes to children under his care, cannot be related with the same validity to the responsibilities of organization and administration which rested on Mr. Macpherson as principal of a school with an enrolment of 750 pupils. If the jury had found any "failure" on the part of an individual supervisor, then other considerations might apply, but the jury did not find this and their answers to questions 1(*a*) and 1(*b*) are directed solely to the "failure" to so organize the break period as to have more than four teachers on duty in the playground. It is, therefore, a question of what standard of organization the law requires of a school authority under such circumstances which must be determined.

It is really the "system" employed by Mr. Macpherson for supervising the break period which is in question and it is a factor to be considered, although not a conclusive one, that exactly the same number of teachers had been stationed in the same area of the same playground in both winter and summer ever since Mr. Macpherson came to the school in 1952.

In direct examination Mr. Macpherson gave the following evidence:

> Q. Who allocates the various portions of the playground for supervision?

1959

BD. OF EDUCATION FOR TORONTO
*v.*
HIGGS
*et al.*

Ritchie J.

A. That is my duty, sir, which I do after consultation with the staff and expressions of their opinion as to the most suitable and effective places for the teachers. That, of course, has been long since established for the grounds of Maurice Cody School and its areas were very specifically specified for the four teachers on full-time duty outside in the yard.

Q. You say the areas of the Maurice Cody School had been established for some time prior to January 31st, 1957?

A. Well, that was my first duty on appointment as principal, to be sure that there was a clear understanding of the locations of the teachers on supervisory duty.

* * *

Q. Did your number of supervisors ever vary at any time?

A. Not throughout the time that I have been in Maurice Cody School, sir, up to the time after the portable was removed, which happened at the end of last year, 1957.

On the face of it there does not appear to be anything unreasonable about the system which was employed, and although no evidence was called to show that it had proved satisfactory over the years there was, on the other hand, no evidence called to the contrary effect except the happening of this one accident, and, as Laidlaw J.A. has said in the decision appealed from, it is not suggested that "the duty of supervision should be measured or determined by the happening of an extraordinary accident." As the burden of proving that the system was defective lay upon the respondents, it can, I think, be taken that Mr. Macpherson had no reason to believe that the four teachers allocated to the various areas of the playground specified by him constituted anything less than a reasonably safe system of supervision having regard to the number and ages of the children at the school unless there existed on the day in question any unusual circumstances which made it reasonably foreseeable that a greater number of teachers would be required.

In my view the winter conditions specified by the jury did not constitute such an unusual circumstance. The evidence in this regard is to the effect that the pupils might be a little more excitable in wintertime and that the attention of the supervisors at the north end of the yard might be somewhat more engaged with the activities on the hockey rink than on the centre of the playground but that there was about the same amount of activity in both areas throughout the year. This does not indicate a condition

which would cause a prudent school principal to anticipate danger to his pupils, and certainly gives no ground for anticipating such an accident as that which occurred.

Nor does the fact that ice, being on a large area of the yard, would limit the access of teachers to the scene of any accident indicate any such condition. The relevant evidence in this connection is that when the accident in question happened one of the pupils ran over and brought Mr. Herlick back across the ice to the scene within one or at most two or three minutes, and in any event before Higgs had got up from the ice.

There was a teacher on duty at each corner of the playground and indeed Higgs himself stated that one of the women teachers was within 35 feet of him. The only evidence to suggest that this number was inadequate was the fact that the accident happened. It is said that this was an event which the principal was under a duty to foresee and guard against, but even if this had been so it was not a duty to which any of the matters specified in the answer to question 1(*b*) gave rise.

Looking at another aspect of these same facts, I have also concluded that even if the "failure" as found by the jury had constituted a breach of duty, it has not been shown to be probable that any one of the ingredients of that "failure" as specified in the answer to question 1(*b*) caused or contributed to the respondent's injury which was occasioned by the sudden and unheralded action of the boy Taylor.

In analyzing the jury's answers to these questions as I have done, I am not unaware of the caution with which any Appellate Court should embark upon too meticulous a criticism of the findings of a jury, but having regard to the pleadings and the very full charge of the learned trial judge I am satisfied that this is a proper case in which to invoke the principle which is embodied in the decision of Taschereau C.J. in *Andreas v. Canadian Pacific Railway*[1], and to hold that the particulars of "failure" as set forth in the jury's answer to question 1(*b*) are such as to negative the other grounds of negligence which have been suggested.

[1] (1905), 37 S.C.R. 1 at 10; 5 C.R.C. 450.

1959

BD. OF EDUCATION FOR TORONTO v. HIGGS et al.

Ritchie J.

It would not be proper to leave this branch of the case without taking note of the fact that the decision appealed from is based in large measure on the assumption that the jury's answers were capable of being construed as including a finding that the school authorities were negligent in failing to provide against the foreseeable danger represented by the Taylor boy. It seems to me that even if this element were deemed to form a part of the jury's answers, it would have to be remembered that not only did none of the teachers see the incident but that of the 750 pupils in the playground, some of whom were only 10 feet away, not one of them saw its inception and only two even saw Higgs being carried.

It is true that the rough habits of Taylor made him a pupil to be watched, but with the greatest respect the facts do not seem to me to make it probable that having additional teachers on duty would have resulted in his being seen and stopped before the damage was done, and the fact that the presence of a teacher within 30 or 40 feet at the time of the incident did not deter him strongly suggests that the presence of additional persons in authority would not have affected his conduct.

As Laidlaw J.A. has said, "It is not the duty of school authorities to keep pupils under supervision during every moment while they are in attendance at school" and in my opinion nothing less would have served any effective purpose in the present case.

Speaking of circumstances which were not dissimilar, Denning L.J. said in the Court of Appeal in England in *Clark v. Monmouthshire County Council*[1]:

> It was the sort of scuffle which would pass unnoticed in a playground in the ordinary way. The incident would take place in the fraction of a second which the presence of . . . a master, would not have done anything to prevent at all.

and in the same case Morris L.J., speaking of supervisors in the playground, said at p. 250:

> . . . it is not shown that this accident might not have happened whether they had been there or not. It was the sort of accident which might have happened suddenly and unexpectedly and be all over before anyone could intervene.

[1] [1954] 52 L.G.R. 246 at 248.

Even on the view that the jury's answers included a finding of "inadequate supervision of Taylor" as a cause of the accident, I am still far from satisfied that this accident would not have happened whether additional supervisors had been there or not.

As to the second branch of the case, the following questions were put to the jury and answered in the manner indicated below:

2. (*a*) After the Infant Plaintiff was thrown to the ice, was there any negligence or improper conduct on the part of
   (1) Herlick "Yes"
   (2) Hunt "Yes"
   which aggravated the Plaintiff's original injury?

   (*b*) If your answer to Question 2(*a*) is "Yes", state the particulars with respect to each; *Answer fully*
   (1) Herlick should have taken Higgs, personally and carefully, straight to the nurse, despite the protestations of Higgs. In the alternative, Herlick should have immediately informed Hunt as to the obvious suffering of Higgs. By these omissions we hold him to be partially responsible for the aggravation.
   (2) By ignoring the plea from Higgs that he could not walk and following his admitted observance of Higgs in the playground, he caused further aggravation of the injury by insisting that Higgs walk into the class room.

   (*c*) If your answer to Question 2(*a*) is "Yes", at what amount do you assess the damages caused by the aggravation of the Infant Plaintiff's original injury
   (1) of the adult plaintiff .....$ *510.95*
   (2) of the infant plaintiff .....$ *10,000.00*

As to this phase of the matter, very different considerations apply. Section 108, subs. (*g*) of *The Public Schools Act*, R.S.O. 1950, c. 316, imposes upon every teacher a duty "to give assiduous attention to the health and comfort of the pupils . . . ." The master, Herlick, came promptly to the aid of the respondent as he lay on the ice and his offer of further assistance was refused, but it cannot be said that there was no evidence to support the jury's answer to question 2(*b*)(1) particularly having regard to the requirement of "assiduous attention" which is prescribed in the statute and the Board must bear the responsibility for his actions. These latter considerations apply with even greater force to the conduct of Hunt, and there is no reason to disturb the finding of the jury contained in the answers to questions 2(*a*), (*b*) and (*c*).

1959

BD. OF EDUCATION FOR TORONTO v. HIGGS et al.

Ritchie J.

In view of all the above, I am of opinion that the appeal should be allowed insofar as the first branch of this case is concerned and the order of the trial judge should be set aside insofar as it attributes responsibility to either of the appellants for the initial injuries sustained by the respondent, but as to the second branch of the case the appeal is dismissed. In the result the adult respondent will recover $510.95 and the infant respondent $10,000.

In the special circumstances of this case, the respondents will have their costs of this appeal.

*Appeal allowed in part.*

*Solicitor for the defendants, appellants: D. H. Osborne, Toronto.*

*Solicitors for the plaintiffs, respondents: Horkins & Cory, Toronto.*

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1959

*Oct. 8, 9, 13, 14, 15 Dec. 21

EDWIN McDONALD .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law—Narcotic drugs—Charge of trafficking—Evidence of association with convicted drug addict—Alleged conspiracy by police against accused—Whether acquittal on same facts of charge of conspiracy to traffic raises question of res judicata—The Opium and Narcotic Drug Act, R.S.C. 1952, c. 201, s. 4, as re-enacted by 1953-54, c. 38.*

The accused, who had previously been acquitted on the same facts on a charge of conspiracy to commit the same indictable offence, was convicted on the substantive charge of being in possession of a drug for the purpose of trafficking. This conviction came at a new trial ordered by the Court of Appeal. The conviction was affirmed by the Court of Appeal, and the accused was granted leave by this Court to appeal on six grounds.

*Held* (Cartwright J. *dissenting*): The appeal should be dismissed.

*Per* Taschereau, Fauteux, Abbott, Martland, Judson and Ritchie JJ.: As held by the Court of Appeal, there was no violation at the trial of the principle that the prosecution cannot attack initially the character of the accused and that he is to be tried upon the evidence pertaining to the crime with which he is charged.

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*PRESENT: Taschereau, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

2. The evidence which the accused sought to introduce for the purpose of attacking the credibility of the witnesses, was not properly admissible. The accused wanted to show a conspiracy on the part of the narcotic squad to prepare false reports and give false evidence against him. It was proposed to lead evidence that two other persons, at other hearings, had given inaccurate evidence, on the basis that such evidence would be admissible because they were members of the same police squad as the witnesses in this case and were "acting in concert" together. This was proposed to be done by putting in evidence of a transcript of their testimony at the other hearings.

3. The crown was under no duty to call these two officers as they were not witnesses to the important incidents related to this case. Consequently, there was no necessity for the trial judge, in instructing the jury, to comment upon the fact that they had not been called.

4. There was no substance to the contention that the trial judge had failed adequately to present to the jury the theory of the defence.

5. The submission that it was wrong to permit the Crown to adduce evidence as to the movements of F (who had been seen talking to the accused on the day of the offence) in the absence of the accused, and as to F's addiction to drugs and his previous convictions for narcotic offences, could not be maintained. That evidence was relevant to the charge of trafficking which was laid under s. 4(3)(*b*) of the *Opium and Narcotic Drug Act*. The clear purpose of s. 4(4) of the Act is that once there has been a finding of possession the onus then rests upon the accused to prove that he was not in possession for the purpose of trafficking. This cannot preclude the Crown from bringing evidence in its case in chief to establish the purpose of trafficking, nor can defence counsel preclude the leading of such evidence merely by stating, as was done in this case, that the defence will be that the accused was not in possession of the drug.

6. The accused contended that the acquittal on the conspiracy charge must mean that the verdict resulted from a finding that he was not in possession of the drug, that there was *res judicata* in respect of the substantive charge and that he should have been permitted to adduce evidence of the acquittal. That contention could not be entertained. The essence of the charge of conspiracy is the agreement for that purpose. The verdict of innocence only established his innocence in respect of the conspiracy, and not that he was found not to be in possession. The principle of *res judicata* enunciated in *Sambasivam v. The Public Prosecutor, Federation of Malaya,* [1950] A.C. 458 at 479, only estops the Crown in the later proceedings from questioning that which was in substance the ratio of and fundamental to the decision of the earlier proceedings. The acquittal in the earlier trial was not relevant to the charge which was the subject-matter of this case and was not admissible in evidence.

*Per* Cartwright J., *dissenting*: It was the duty of the trial judge to admit the evidence related to the acquittal of the accused on the charge of conspiracy and to give to the jury an unequivocal direction that in approaching the question of his guilt or innocence they must give due weight to the facts thus conclusively established. These facts were that during the period which included the date of the offence of which the accused was convicted he was not engaged in a conspiracy with

1959

McDONALD v. THE QUEEN

one J or others to have possession of a drug for the purpose of trafficking; their relevance could not be doubted as the Crown had elicited evidence tending to show that the appellant was working in a conspiracy with J to have a drug for the purpose mentioned. The matter fell within the reasoning of the *Sambasivam* case. If an acquittal necessarily involves a finding of fact, which fact would be an item of circumstantial evidence relevant to the question of guilt or innocence on the subsequent trial on another charge of the person acquitted, that fact may be proved in the last-mentioned trial, and is conclusively established by proof of the acquittal. It was of no significance that in cross-examination, the accused volunteered the information that he had been acquitted.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the conviction of the accused. Appeal dismissed, Cartwright J. dissenting.

*M. Robb, Q.C.*, and *C. Thomson*, for the appellant.

*J. D. Hilton, Q.C.*, for the respondent.

The judgment of Taschereau, Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal of Ontario[1] affirming the conviction of the appellant on a charge of being in possession of heroin for the purpose of trafficking. The conviction was made following a trial by jury on November 18, 1958.

The date of the offence alleged was September 18, 1955. The appellant was tried in April, 1957, on a charge of conspiracy to commit the indictable offence of having possession of heroin for the purpose of trafficking, and was acquitted. He was tried before a jury on the substantive charge in October, 1957, and was convicted, but, on appeal, the Court of Appeal[2] ordered a new trial, following which the trial in question in these proceedings was held.

The evidence on behalf of the Crown was mainly that of two RCMP officers, Corporal Macauley and Constable Yurkiw. Briefly summarized, this was that at about 6.55 p.m. on September 18, 1955, the appellant was observed to make a throwing motion near a hydro pole on Dupont Street in Toronto and then to depart. The two officers then discovered a cigarette package near the pole, which contained

[1] [1959] O.W.N. 187, 124 C.C.C. 278, 30 C.R. 243.
[2] [1958] O.R. 413, 120 C.C.C. 209, 27 C.R. 333.

fifty capsules of heroin. Some of these were removed and then, after the package had been initialled, it was replaced near the pole. As Yurkiw was about to replace the package they saw one Fillmore, a convicted drug addict, walk past the pole.

Later, at about 8.40 p.m., the appellant was seen to cross Dupont Street to the pole and make a motion as though picking something up. The base of the pole was subsequently searched and it was found that the package was gone. The police officers then saw the appellant and Fillmore together about 240 feet away.

Later they saw the appellant's car stalled in the middle of the street on Lansdowne Avenue, about one block south of Dupont Street, and being pushed by one Cook into a parking lot. The appellant then got into Cook's car and drove away, following which Macauley and Yurkiw found the appellant's car on the parking lot.

Subsequently, at about 9.30 p.m., the cigarette package, containing no narcotics, was found on the lawn of a house about six to eight feet from the place where the appellant and Fillmore had been seen earlier standing together.

Evidence was given by Constable Webster of the RCMP that at about 11.30 p.m. he, in company with Corporal LaBrash, saw the appellant and one Fred Walsh leave 180 Lansdowne Avenue, go to a parking lot and put something into the gas tank of the appellant's car. The appellant then drove off.

Leave to appeal to this Court was granted on six grounds of appeal, each of which was fully argued.

The first ground alleged was that the Crown led evidence and cross-examined the appellant and other witnesses for the defence to show the appellant's association with known criminals, including persons with previous convictions for narcotic offences, and to show that the appellant had committed other criminal acts of which he had not been convicted. It was contended that the Crown had generally attacked the appellant's character, both before and while he was in the witness box, and had sought to have it inferred that, by reason of his alleged associations with persons of bad character, he was likely to have committed the offence charged.

1959

McDONALD v. THE QUEEN

Martland J.

With respect to this point, I agree with what has been said concerning it in the judgment of the Court of Appeal and am of the opinion that it fails.

The second point argued was that counsel for the appellant had been prevented from adducing the most substantial supporting aspects of his defence; namely, that a small group of officers, acting in concert, were engaged in submitting false reports and preparing false evidence to implicate the appellant in the traffic of drugs during the period surrounding September 18, 1955.

The evidence which counsel for the appellant sought to adduce was taken on the voir dire, but was not given before the jury. In brief, it was that Constable Tomalty of the RCMP, at the preliminary hearing, and Corporal LaBrash of the RCMP, at the conspiracy trial, had testified to having seen the appellant in the company of one Fred Walsh in the early hours of October 19, 1955, whereas, in fact, the evidence was that Walsh was in custody at the No. 8 Police Station in Toronto, sometimes referred to as the Pape Avenue Station, at the time in question.

The contention of the appellant was that the Narcotic Squad of the RCMP in Toronto, consisting of LaBrash, Macauley, Tomalty, Yurkiw and Webster, were "acting in concert" to prepare false reports and give false evidence concerning the appellant and that the evidence above referred to should have been admitted as being relevant to the establishment of a conspiracy among them for that purpose.

It is true that on a charge of conspiracy the acts and declarations of each conspirator in furtherance of the common object are admissible in evidence as against the rest. The same rule has been applied in civil cases. The rule is, however, one which determines the admissibility of evidence as against a person who is a party to legal proceedings.

In the present case what is sought to be done is to introduce evidence of this kind, not as against a person charged with conspiracy or sued in relation to a conspiracy, but in respect of a witness who, it is alleged, was a party to a conspiracy not the subject of these proceedings. In the one case the conspiracy is in issue as a part of the case and the rule determines the kind of evidence which may be adduced

in relation to that issue. In the present case it is proposed to lead such evidence for the collateral purpose of attacking the credibility of a witness.

Facts to establish bias on the part of a witness may be elicited on cross-examination and, if denied, may be independently proved. It was open to the defence to cross-examine Macauley and Yurkiw as to whether they were parties to a conspiracy which sought wrongfully to obtain a conviction against the appellant. If denied, evidence which directly implicated either of them as being parties to a conspiracy for that purpose would be relevant because this would relate directly to the establishing of bias. But the evidence sought to be introduced here is not evidence of that kind. It was proposed to lead evidence that two other persons, at other hearings, had given inaccurate evidence, on the basis that such evidence would be admissible because they were members of the same RCMP squad as the witnesses who gave evidence in this case and were "acting in concert" together. This was proposed to be done, not by calling these two persons themselves, but by putting in evidence of a transcript of their testimony at the other hearings. In my opinion this is not evidence which is properly admissible for the purpose of attacking the credibility of the witnesses in this case.

The third ground of appeal was that the Crown did not call as a witness either LaBrash or Tomalty and that the learned trial judge did not instruct the jury as to the inferences which they might draw from this fact.

That counsel for the Crown was under no duty to call either Tomalty or LaBrash is, I think, sufficiently established by the decision of this Court in *LeMay v. The King*[1]. Neither LaBrash nor Tomalty was a witness to the important incidents on Dupont Street on the evening of September 18, 1955. Any evidence they could give related only to collateral matters. This being so, I do not see why there was any necessity for the learned trial judge, in instructing the jury, to make any comment upon the fact that they had not been called to give evidence.

[1] [1952] 1 S.C.R. 232, 102 C.C.C. 1, 14 C.R. 89.

1959

McDONALD v. THE QUEEN

Martland J.

The fourth point submitted was that the learned trial judge failed adequately to present to the jury the theory of the defence. I agree with the Court of Appeal that there is no substance to this contention.

The fifth ground of appeal is that the Crown was permitted to adduce evidence as to the movements of Fillmore in the absence of the appellant and as to Fillmore's addiction to drugs and his previous convictions for narcotic offences.

The charge in this case was laid under s. 4(3)(*b*) of the *Opium and Narcotic Drug Act* of being in possession of heroin for the purpose of trafficking. The evidence relating to Fillmore was relevant to the question of trafficking. The appellant contended, however, that, because of the provisions of subs. (4) of s. 4 of that Act and because it had been stated by counsel for the defence, at the outset of the trial, that the defence would be that the appellant was not in possession of the drug at the time and place alleged, the Crown was, therefore, not entitled to lead the evidence regarding Fillmore.

Subsection (4) of s. 4 provides as follows:

> In any prosecution for an offence under paragraph (*b*) of subsection (3), the court shall, unless the accused pleads guilty to the charge, first make a finding as to whether or not the accused was in possession of the drug; if the court finds that he was not in possession of the drug, the court shall acquit him; if the court finds that the accused was in possession of the drug, the court shall give the accused an opportunity of establishing that he was not in possession of the drug for the purpose of trafficking, and if the accused establishes that he was not in possession of the drug for the purpose of trafficking, he shall be acquitted of the offence as charged but shall, if the court finds that the accused was guilty of an offence under subsection (1), be convicted under that subsection and sentenced accordingly; and if the accused fails to establish that he was not in possession of the drug for the purpose of trafficking he shall be convicted of the offence as charged and sentenced accordingly.

The clear purpose of this provision is that, in the case of a charge of being in possession of a drug for the purpose of trafficking, once there has been a finding of possession the onus then rests upon the accused to prove that he was not in possession for the purpose of trafficking. I do not see how this can preclude the Crown from bringing evidence in its case in chief to establish the purpose of trafficking, or how defence counsel can preclude the leading of such evidence

merely by stating that his defence will be that the accused was not in possession of the drugs. The Crown must establish its case in respect of the charge laid. Subsection (4) of s. 4 assists the Crown in proving its case once possession has been established, but I cannot see how that subsection can serve to prevent the adducing of evidence which is obviously relevant to the charge as laid.

The sixth point is that the appellant was not permitted to adduce evidence of his previous acquittal on the charge of conspiracy, although the circumstances and evidence upon which the conviction was sought in the conspiracy trial included the incident upon which the substantive charge was based. It was contended by the appellant that the learned trial judge refused to allow the defence to rely on the findings of fact encompassed by the acquittal in the conspiracy charge in so far as such findings might be relevant in relation to the substantive charge of possession.

In fact, on cross-examination the appellant did testify as to his acquittal on the conspiracy charge, but counsel for the appellant was not permitted to lead evidence otherwise to prove that acquittal. The learned trial judge was obviously following the decision of the Court of Appeal made on the appeal which had been taken in the first trial and which dealt with this specific matter[1].

Counsel for the appellant, on this phase of his argument, relied upon the statement of the law regarding *res judicata* made by Lord MacDermott, who delivered the reasons for the decision of the Privy Council in *Sambasivam v. Public Prosecutor, Federation of Malaya*[2], as follows:

> The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of

[1] [1958] O.R. 413, 120 C.C.C. 209, 27 C.R. 333.
[2] [1950] A.C. 458 at 479.

1959

McDONALD v. THE QUEEN

Martland J.

the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other.

In that case the accused had been tried on two charges, under the *Emergency Regulations*, 1948, of carrying a firearm and of being in possession of ammunition respectively. He was acquitted of the second charge, but a new trial was ordered on the first one.

At the second trial a statement of the accused was introduced which had not been in evidence at the first trial. If accepted as the truth, it went to prove his guilt on the second charge, of which he had been acquitted, as clearly as it would establish his guilt on the first charge. The statement was admitted and no intimation was given to the assessors of the fact that the accused had been acquitted on the second charge and was, therefore, to be taken as innocent of that offence.

In view of these circumstances it was felt that the acquittal of the appellant on the charge of being in possession of ammunition was relevant to the consideration by the assessors in the second trial of the effect of this statement. It might have been a ground for excluding the statement in its entirety, because it could not have been severed satisfactorily. The result of the omission to refer to the acquittal on the second charge was that the Crown was enabled to rely upon the existence of facts in respect of which there had already been a contrary finding in favour of the accused.

The appellant does not contend that in every case an acquittal on a charge of conspiracy must result in an acquittal on the substantive charge in respect of the crime to which the alleged conspiracy related. His argument is that in a case of the kind before us an accused could only become in wrongful possession of narcotics as a result of a conspiracy with somebody. Therefore, he contends that an acquittal on the conspiracy charge must mean that the verdict of acquittal resulted from a finding that the accused was not in possession of the drug. Consequently that finding is a bar to a conviction in respect of the substantive offence.

I do not accept the validity of this reasoning. The conspiracy charge was in relation to an alleged conspiracy to be in possession of drugs for the purpose of trafficking. The essence of that charge is the agreement for that purpose. The verdict of acquittal establishes, but only establishes, innocence in respect of the conspiring. It does not establish that the appellant was found not to be in possession of drugs. He could have been in possession of them without being party to a conspiracy to have that possession for the purpose of trafficking.

As I see it, the principle of *res judicata* enunciated in the *Sambasivam* case only estops the Crown in the later legal proceedings from questioning that which was in substance the ratio of and fundamental to the decision in the earlier proceedings. The use of the statement of the accused in that case involved an allegation against the accused of guilt, in relation to the possession of ammunition, which had already been decided in his favour. The acquittal of the appellant, on the charge of having conspired with others to be in possession of drugs for the purpose of trafficking, did not decide in his favour that he had not been in possession of drugs on September 18, 1955. This being so, the acquittal in the earlier trial was not relevant to the charge which was the subject-matter of the present proceedings and was not admissible in evidence in those proceedings.

For the foregoing reasons I am of the opinion that this appeal should be dismissed, but the time during which the appellant has been confined in prison pending the determination of this appeal should count as part of the term of imprisonment imposed pursuant to his conviction.

CARTWRIGHT J. (*dissenting*):—The nature of this appeal and the facts out of which it arises are stated in the reasons of my brother Martland.

The notice of motion for leave to appeal to this Court sought to raise six questions of law and leave was granted as to all of them. I find it necessary, however, to deal with only the following two of those questions:

2. Whether the learned trial judge erred in law in preventing counsel for the applicant from adducing the most substantial supporting aspects of his defence, namely that a small group of officers acting in concert were

1959

McDONALD
v.
THE QUEEN

Cartwright J.

engaged in submitting false reports and preparing false evidence to implicate the accused in the traffic of drugs during the period surrounding September 18th 1955, and whether the learned trial judge erred in law in not adequately setting out to the jury the above theory of the defence?

* * *

6. Whether the learned trial judge erred in law in refusing to allow counsel for the applicant to adduce evidence of a previous acquittal of the applicant on a charge of conspiring to possess narcotic drugs for the purpose of trafficking, especially as evidence was led by the Crown of the applicant's association with Victor Jowett and certain other persons named and persons unknown during the period under review, and erred in law in not charging the jury that such verdict of acquittal was binding and conclusive in all subsequent proceedings between the parties to the adjudication with respect to all facts which must necessarily have been decided in favour of the applicant in order that the first verdict could have been reached?

I propose to deal first with the last-mentioned point.

In September 1956 an indictment was preferred at the sittings of the Court of General Sessions of the Peace for the County of York, count 1 of which read as follows:

EDWIN McDONALD (the appellant) VICTOR JOWETT, JOSEPH NICOLUCCI, NORMAN LABRASSEUR, SADIE McINTOSH and FREDERICK WALSH, in the year 1955, at the City of Toronto, in the County of York, and elsewhere in the Province of Ontario, unlawfully did conspire together, the one with the other or others of them, and with Harry Ross and persons unknown, to commit the indictable offence of having in their possession a drug, to wit, diacetylmorphine, for the purpose of trafficking, an indictable offence under the Opium and Narcotic Drug Act, contrary to the Criminal Code.

Counts 2 to 5 inclusive charged Jowett, Nicolucci, Walsh, McIntosh and LaBrasseur with having possession of the drug mentioned for the purpose of trafficking on or about specified dates in the year 1955.

Count 6 read as follows:

6. AND THE SAID JURORS FURTHER PRESENT that the said Edwin McDonald, on or about the 18th day of September, in the year 1955, at the said City of Toronto, unlawfully did have in his possession a drug, to wit, diacetylmorphine, for the purpose of trafficking, contrary to Section 4(3)(*b*) of the Opium and Narcotic Drug Act, Revised Statutes of Canada, 1952, Chapter 201, and amendments thereto.

In December 1956, Jowett, Nicolucci, LaBrasseur, McIntosh and Walsh, were tried together on count number 1, before His Honour Judge Forsyth and a jury and on December 12, 1956, Jowett and Nicolucci were convicted and the other three were acquitted.

In April, 1957, the appellant was tried on count number 1, before His Honour Judge Forsyth and a jury and, on April 17, 1957, was acquitted.

In October 1957, the appellant was tried on count number 6 before His Honour Judge Factor and a jury and, on October 24, 1957, was convicted of having possession of the drug mentioned for the purpose of trafficking; on the following day he was sentenced to seven years' imprisonment.

On March 3, 1958, the Court of Appeal[1] gave judgment quashing this conviction and directing a new trial.

The new trial was held before His Honour Judge Shea and a jury and resulted in a conviction on November 18, 1958. On the following day the appellant was sentenced to six years' imprisonment. An appeal was dismissed by the Court of Appeal[2] on April 29, 1959, and it is from that judgment that this appeal is brought.

In order to deal adequately with question 6, it is necessary to say something as to the course of the trial. It should first be mentioned that the indictment was not placed before the jury; they were given only a copy of count 6.

In his opening address to the jury Crown counsel said in part:

> Now the evidence began and it involves, as you heard from the charge, an incident on the 18th of September 1955, that is quite a while ago, and that particular day, pursuant to their instructions, two officers of the Royal Canadian Mounted Police, Corporal Macauley and Police Constable Yurkiw, were proceeding, *in the course of an investigation,* on Bloor St. in an easterly direction some time shortly after supper, I think around 6.55. As they were proceeding easterly, at the corner of Dundas and Bloor they were stopped for a stoplight and they saw an automobile which they knew or believed was the automobile of the accused Edwin McDonald, which was a red and black sedan, proceed in a northerly direction on Dundas and make a sharp right hand turn to go east on Bloor. *Now in relation to their investigation they were interested in this automobile,* so when the light changed they took off after it.

After outlining the incidents on Dupont St. in regard to the cigarette package containing capsules of heroin described in the reasons of my brother Martland, Crown counsel continued:

> The officers then went and got their car and started to go up and down the area to see where they had gone, and a short time later working down through these side streets got down to Bloor Street and as they

[1] [1958] O.R. 413, 120 C.C.C. 209, 27 C.R. 333.
[2] [1959] O.W.N. 187, 124 C.C.C. 278, 30 C.R. 243.

1959

McDONALD v. THE QUEEN

Cartwright J.

were coming in a westerly direction saw a car of *one Cook, who was known to them,* go up Margueretta Street, made a left hand turn in front of them and they went on past and went up Emerson Avenue, up the laneway, came across the stop of Emerson Avenue ahead of the Cook car and paused at the top and allowed the Cook car to pass them. I think they stopped about at the corner of Dufferin and I forget the name of the street, Wallace I believe, and allowed the car to pass them and they then followed this car and it came up and stopped back of the McDonald car where it had been left on the north side of Dupont. McDonald got out of Cook's car, got into his own car and drove it in a westerly direction on Dupont to Lansdowne.

* * *

McDonald got again into the Cook car and proceeded into a house farther down Lansdowne Avenue. Later that night, others observed, and the evidence will be how they came back *with other persons known to the Police* and picked up the McDonald car later on.

Counsel for the appellant submits that the effect of these passages and particularly the words I have italicized would be to convey to the jury that prior to the date of the alleged offence the activities of the appellant and "others known to the police" were the subject of a continuing investigation by the police, with the natural inference that the appellant and these others were working in association.

The first witness called by the Crown was Sergeant Gove who gave evidence as to the taking of certain photographs and as to the examination he had made of the cigarette package. In cross-examination, in the absence of the jury, counsel for the appellant put the following questions to Sergeant Gove:

Q. Now, Sergeant Gove, were you present at the trial of this same Edwin McDonald at this same court room, in the Court of General Sessions of the Peace in the County of York, held at Toronto, on the 8th, 9th, 10th, 11th, 12th, 15th, 16th and 17th days of April 1957 and did you give evidence at that trial on that date?

* * *

Q. And the next question, Sergeant Gove, is: was he, Edwin McDonald, there acquitted of a charge of conspiracy with Victor Jowett, Joseph Nicolucci, Harry Ross and persons unknown that at the City of Toronto, in the County of York, and elsewhere in the Province of Ontario, in the year 1955 he did commit the indictable offence of having in their possession a drug, to wit, diacetylmorphine, for the purpose of trafficking, an indictable offence under the Opium and Narcotic Drug Act.

* * *

Q. And finally, Sergeant Gove, during that trial did you give substantially the same evidence as you have given here with reference to the taking of photographs at the general vicinity of Dupont and Emerson Avenues, Toronto, on September the 19th and with respect to the handling of a cigarette package with respect to fingerprints at some other time?

All these questions were objected to by Crown counsel and were disallowed by the learned trial judge, who regarded himself as bound to follow this course by the judgment of the Court of Appeal[1] on the appeal from the conviction before His Honour Judge Factor.

In the examination-in-chief of Corporal Macauley Crown counsel, referring to September 1955, brought out the following:

Q. And who was living at 58 South Kingsway, Swansea, Ontario, at that time, to your knowledge?

A. The accused man Edwin McDonald and another man known to me as Victor Jowett.

In the examination-in-chief of Constable Webster Crown counsel brought out that the appellant had been seen at 58 South Kingsway with Frederick Walsh.

The defence called a number of witnesses. Among these was Mrs. Near, a sister of the appellant, who testified in chief that Corporal Macauley had made a threat to the appellant some years prior to the date of the alleged offence at a time when the appellant and his brother Alex were living with her, the alleged threat being "I'll get you yet". In her cross-examination by Crown counsel the following appears:

Q. And where is Alex now?

A. Alex is living in Vancouver.

Q. Is that all you know about Alex, do you not know—

A. I beg your pardon?

Q. Do you not know that he is in jail on the West Coast at the moment?

A. No, I did not know that.

Q. You didn't? On a narcotics charge?

A. No, I didn't. He was here in July.

The defence called Mary Olive Lehman who was living with the accused as his wife at the time of the alleged offence to prove two things, (i) that he never went out without her on Sundays during a period which included September, 1955, and (ii) that he never went out without wearing a hat as he was sensitive about premature baldness. In her cross-examination, Crown counsel brought out the fact that at the date of the alleged offence she and the appellant were

[1] [1958] O.R. 413, 120 C.C.C. 209, 27 C.R. 333.

1959

McDONALD v. THE QUEEN

Cartwright J.

living in the same house with Jowett and his wife and that Jowett and the appellant were working together in taking bets on horse-races. The cross-examination continued:

Q. Did you have any knowledge at that time of any other source of income of this man Jowett?

A. I did not—I heard that he had sold the odd car, that he was a car dealer or something like that.

Q. But then you found out something else about him. What was that?

A. Well I never found out anything until his court case came out, that I heard anything about him.

Q. What did you find out?

A. Well that's just what they said.

Q. What was that?

A. That he had something to do with narcotics, I don't know. I still don't know actually what it was about.

Q. That came as quite a surprise to you?

A. Yes it did, because he seemed like a very nice man to me.

This was the Jowett named in count 1 of the indictment.

The effect of certain evidence given by police officers called by the Crown was summarized as follows in the closing address of Crown counsel to the jury:

And so much for all that my friend said in an hour and a half this morning in criticism of these officers. Why was the arrest not made for four months? Staff-Sergeant Carson told you, the officers told you. This was one facet in a larger investigation being carried on with great difficulty by these officers in the interest of the public to stem the flow of illicit heroin into our city. And it wasn't important to pick up an individual person who had a few "caps" but it was important, as you all know from your general knowledge of Police activities and investigations to find out what was the source, to get if they could the "top man". And so they were instructed to find out, not to arrest on that night but to find out where it was that McDonald was getting his source of supply.

Following the cross-examination of the witness Lehman and while she was still in the witness box defence counsel again, in the absence of the jury, sought permission to prove the fact that the appellant had been tried and acquitted on count 1. Crown counsel again objected and again the learned trial judge refused to allow this proof.

In my opinion the evidence tendered should have been received. It was legally admissible and was logically relevant to the question of the guilt or innocence of the accused on count 6, the charge on which he was being tried, for as between the Crown and the appellant his acquittal on count 1 conclusively established the facts that he was not on

or about September 18, 1955, or at any time in that year in conspiracy with Jowett or any of the other persons described in count 1 to have in his possession a drug for the purpose of trafficking. In my opinion it was the duty of the learned trial judge to admit the evidence and having done so to give to the jury an unequivocal direction that in approaching the question of the guilt or innocence of the appellant they must give due weight to the facts thus conclusively established.

I agree with Mr. Robb's submission that as a matter of common sense it appears improbable, although not impossible, that the appellant could have had the fifty capsules of heroin and dealt with them as the officers testified he did unless he was engaged in a conspiracy such as that of which he had been acquitted, and that therefore the fact that he was not so engaged was relevant to the question which the jury were trying; but the matter does not rest there; Crown counsel, as appears from what is set out above as to the course of the trial, had elicited evidence having a tendency to show or at least to suggest that the appellant was working in conspiracy with Jowett and others, and the passage quoted from his closing address to the jury pointed unmistakably in that direction.

In my opinion the question falls within the reasoning contained in the passage from the *Sambasivam* case quoted by my brother Martland and in the following further passage at p. 480 of the report of that case:

> The fact appears to be—and the Board must judge of this from the record and the submissions of counsel who argued the appeal—that the second trial ended without anything having been said or done to inform the assessors that the appellant had been found not guilty of being in possession of the ammunition and was to be taken as entirely innocent of that offence. In fairness to the appellant that should have been made clear when the statement had been put in evidence, if not before.

Applying this reasoning to the facts of the case at bar it is my opinion that in fairness to the appellant the fact and the effect of his acquittal should have been made clear to the jury when the Crown had adduced evidence of his association with Jowett and of the latter's conviction on a narcotic charge, if not before.

1959

McDONALD v. THE QUEEN

Cartwright J.

The governing principle is that if an acquittal necessarily involves a finding of fact, which fact would be an item of circumstantial evidence relevant to the question of guilt or innocence on the subsequent trial on another charge of the person acquitted, that fact may be proved in the last-mentioned trial, and is conclusively established by proof of the acquittal.

It follows that, in my view, question no. 6, quoted above, should be answered in the affirmative, and this is fatal to the validity of the conviction.

I have not overlooked the circumstance mentioned in the reasons of the Court of Appeal that the appellant, in the course of his cross-examination, although not asked about it, volunteered the information that he had been acquitted. In my opinion this is of no significance. The appellant was entitled not only to have the fact of the acquittal properly proved but also to have its effect clearly explained to the jury by the learned trial judge in the manner I have indicated above. Counsel agree that, in obedience to the ruling which the learned trial judge had made, defence counsel made no reference to the acquittal in his address to the jury.

Having reached this conclusion it is not strictly necessary for me to deal with question no. 2 but I wish to state briefly the principles on which, in my view, it would fall to be decided if it were necessary to express a final opinion upon it. It is clear that facts showing a witness to be biased may be elicited on cross-examination or, if denied, independently proved; see *R. v. Shaw*[1] and *Attorney-General v. Hitchcock*[2]. Evidence showing that a witness was a member of a conspiracy the object of which was to fabricate evidence against a party would be admissible as it would be cogent evidence of bias. I see no reason why in considering the admissibility of evidence tendered to prove a witness to be a member of such a conspiracy the Court should not follow the ordinary rule which is accurately stated in Phipson on Evidence, 9th ed., p. 98, as follows:

> On charges of conspiracy, the acts and declarations of each conspirator in furtherance of the common object are admissible against the rest; and it is immaterial whether the *existence* of the conspiracy, or the *participation* of the defendants be proved first, though either element is nugatory without the other.

[1] (1888), 16 Cox 503.

[2] (1847), 1 Ex. 91, 154 E.R. 38.

1959

McDONALD v. THE QUEEN

Cartwright J.

Of course the witness is not on trial, but once it is conceded that the question whether or not he is a participant in such an alleged conspiracy may be inquired into I see no reason why the rules of evidence which are applicable to both civil and criminal combinations would not govern the admission of any evidence tendered.

The circumstance that where such evidence is offered much time might be expended at a trial in inquiring into a collateral issue would not afford a sufficient ground for refusing to receive it. To decide whether in the case at bar the evidence tendered for the purpose of showing bias and rejected by the learned trial judge was properly rejected would require a critical examination of the record and as I have concluded that the appeal succeeds on another ground I do not pursue this question further.

I would allow the appeal and quash the conviction.

As the view of the majority of the Court is that the appeal fails, nothing would be gained by my expressing an opinion as to what further order should have been made had the conviction been quashed.

*Appeal dismissed,* CARTWRIGHT J. *dissenting.*

*Solicitor for the appellant: M. Robb, Toronto.*
*Solicitor for the respondent: J. D. Hilton, Toronto.*

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THE GLOBE AND MAIL LIMITED (*Defendant*) ..... APPELLANT;

1959

*Dec. 9, 10, 11

AND

JOHN BOLAND (*Plaintiff*) ..... RESPONDENT.

1960

Jan. 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Libel and Slander—Newspaper—Editorial during election campaign on fitness of candidate—Defence of qualified privilege not available—Fair comment—Rights and duties of newspapers.*

The plaintiff, a candidate in a federal election, sued the defendant newspaper for libel in connection with an editorial published by the defendant. The defence of qualified privilege was pleaded. The trial

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

1960

GLOBE AND MAIL LTD. v. BOLAND

judge dismissed the action on the ground that the publication was made on an occasion of qualified privilege and there was no evidence of malice. The Court of Appeal ordered a new trial on the ground that there was evidence of malice to go to the jury, but did not affirm or reject the view of the trial judge on the question of qualified privilege. The defendant appealed to this Court.

*Held:* The appeal should be dismissed.

The defence of qualified privilege, based on the plea that the newspaper had a duty to inform the public and the public had an interest in receiving information relevant to the question of the candidate's fitness for office, is not open to a newspaper which has published defamatory statements about the candidate. To hold otherwise would be not only contrary to the great weight of authority in England and in this country but harmful to that "common convenience and welfare of society" which is the underlying principle on which the rules as to qualified privilege are founded.

APPEAL from a judgment of the Court of Appeal for Ontario[1], ordering a new trial in an action for libel. Appeal dismissed.

*C. F. H. Carson, Q.C., C. H. Walker, Q.C.* and *J. B. S. Southey,* for the defendant, appellant.

*J. Boland, Q.C.,* in person.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing the plaintiff's appeal from the judgment of Spence J. The action is for damages for libel. At the conclusion of the plaintiff's case counsel for the defendant stated that he did not intend to call evidence and moved for a dismissal of the action. The learned trial judge held that the words complained of were published on an occasion of qualified privilege and that there was no evidence of malice to go to the jury and accordingly dismissed the action.

The Court of Appeal, in a unanimous judgment delivered by Lebel J.A., allowed the appeal and directed a new trial on the ground that there was evidence upon which the jury might find express malice. As I read his reasons, the learned justice of Appeal neither affirms nor rejects the view of the learned trial judge that it was established that the words were published on an occasion of qualified privilege.

[1] (1959), 17 D.L.R. (2d) 313.

In my opinion the order made by the Court of Appeal was right but as there is to be a new trial I think it desirable to say something as to the appellant's plea of qualified privilege.

The respondent was a candidate for election in Parkdale riding in the general election held in Canada on June 10, 1957.

The words complained of appeared on May 27, 1957, as an editorial in all issues of the Globe and Mail, a daily newspaper published by the appellant. They read as follows:

*SHABBY TACTICS*

One of the less creditable episodes of the election campaign occurred on Thursday evening in Parkdale constituency, in Toronto, when Mr. John Boland, self-styled independent Conservative candidate, introduced an issue which does not exist in this election. McCarthy-style, he put forward an ex-Communist in an attempt to show the Liberals are "Soft on Communism". The results were far from edifying.

The reason for this disgusting performance was undoubtedly to mislead the so-called New Canadian vote in that riding, in the hope that their anti-Communist fears might be translated into an anti-Liberal anti-Conservative prejudice. An election won by such tactics would be a degradation to the whole democratic system of Government in Canada. Let us have no more of that sort of thing, this time or ever.

In the statement of claim it is alleged that the defendant falsely and maliciously published this editorial of and concerning the plaintiff and that in its plain and ordinary meaning it is defamatory of him. In paras. 6 to 15, inclusive a number of innuendoes are alleged.

In the statement of defence publication is admitted. The defences pleaded are, (i) that the words complained of in their natural and ordinary meaning are no libel, (ii) that the said words do not bear and were not understood to bear and are incapable of bearing or being understood to bear the meanings alleged in paras. 6 to 15 of the statement of claim, (iii) a plea of qualified privilege, and (iv) the defence of fair comment, pleaded in the form of the "rolled-up" plea.

The plea of qualified privilege is set out in paras. 3 and 4 of the statement of defence which read as follows:

3. The Defendant says that the words complained of were published in the following circumstances—

During the campaign preceding the Federal Elections of June 10, 1957, the Plaintiff, as a Candidate for election, was seeking the support of the electors in Parkdale Riding in the City of Toronto, as an

1960

GLOBE AND MAIL LTD. v. BOLAND

Cartwright J.

Independent Conservative Candidate. The Plaintiff, as part of his campaign, introduced the issue that the Liberal Government was employing pro-Communists in the Department of External Affairs and was soft on Communism. This issue was further developed at a Public Meeting held at Parkdale Collegiate Auditorium on 23rd May, 1957, when one, Pat Walsh, addressed the meeting in the interest of the Plaintiff. The raising of this issue by the Plaintiff was the subject of discussion and comment in the Public Press.

4. By reason of such circumstances it was the duty of the Defendant to publish and in the interests of the Public to receive communications and comments with respect to the Candidature of the Plaintiff and by reason of this the said words were published under such circumstances and upon such occasion as to render them privileged.

The rule as to the burden of proof where a defence of qualified privilege is set up is accurately stated in Gatley on Libel and Slander, 4th ed., p. 282, as follows:

Where a defence of qualified privilege is set up, it is for the defendant to allege and prove all such facts and circumstances as are necessary to bring the words complained of within the privilege, unless such facts are admitted before or at the trial of the action. Whether the facts and circumstances proved or admitted are or are not such as to render the occasion privileged is a question of law for the judge to decide.

The learned trial judge found that the facts alleged in para. 3 of the statement of defence were proved and, for the purposes of this appeal, I will assume the correctness of that finding. He then went on to hold as a matter of law that these facts established the existence of an occasion of qualified privilege. The learned judge based this conclusion primarily on the decisions of Mackay J., as he then was, the trial judge in *Dennison et al. v. Sanderson et al.* reported in appeal at[1], and of Kelly J., the trial judge in *Drew v. Toronto Star Ltd.*, reported in appeal at[2]. In the view of the learned trial judge in neither of these cases did the Court of Appeal disapprove of the statements made by the learned judges presiding at the trials to the effect that statements made in a newspaper during an election campaign as to the fitness, or otherwise, for office of candidates offering themselves for election were made on occasions of qualified privilege. The learned trial judge continued:

Therefore in my view we have two judges of this Court who have found that the publication of comment in newspapers as to candidates for election to public office, and made during the course of an election campaign, are uttered on occasions of qualified privilege and the opinion of neither one of those has been disturbed on appeal. Apart from the authority

[1] [1946] O.R. 601, 4 D.L.R. 314. [2] [1947] O.R. 730, 4 D.L.R. 221.

I would be much inclined to come to the same opinion. Surely no section of the public has a clearer duty to publish, for the information and guidance of the public, political news and comment, even critical comment, during a Federal Election in Canada than the great Metropolitan daily newspaper such as the Defendant. Just as certainly the public, every citizen in Canada, has a legitimate and vital interest in receiving such publications. At this point I do not intend to deal with either the bona fides of the publication or with the alleged over extension of the publication thereof, to both of which I shall refer later, but only with the question of whether the occasion was one of qualified privilege. I have come to the conclusion that a Federal Election in Canada is an occasion upon which a newspaper has a public duty to comment on the candidates, their campaigns and their platforms or policies, and Canadian citizens have an honest and very real interest in receiving their comments, and that therefore this is an occasion of qualified privilege.

With respect, I am of opinion that this is an erroneous statement of the law. It is directly opposed to the unanimous judgment of this Court in *Douglas v. Tucker*[1], particularly at pp. 287 and 288 (which does not appear to have been brought to the attention of the learned judge) and to *Duncombe v. Daniell*[2], which was approved and followed in *Douglas v. Tucker*.

An attempt was made to distinguish the case at bar from *Duncombe v. Daniell* and *Douglas v. Tucker* on the ground that in each of those two cases the libel referred to the private life rather than the conduct in public affairs of the plaintiff; but the judgments in both of those cases proceeded on the basis that the defamatory statement made about the candidate would, if true, have been relevant to the question of his fitness for office and was such as the electors had an interest in hearing. In my opinion there is nothing in this suggested distinction which renders the principle of *Douglas v. Tucker* inapplicable to the case at bar.

With respect it appears to me that, in the passage from his reasons quoted above, the learned trial judge has confused the *right* which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of public interest with a *duty* of the sort which gives rise to an occasion of qualified privilege.

[1] [1952] 1 S.C.R. 275, 1 D.L.R. 657.
[2] (1837), 8 Car. & P. 222, 143 E.R. 470, 2 Jur. 32, 1 W.W. & H. 101.

1960

GLOBE AND MAIL LTD. v. BOLAND

Cartwright J.

It is well to bear in mind the following passage from the judgment of Lord Shaw in *Arnold v. The King Emperor*[1], quoted by Lebel J.A.:

> The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

To hold that during a federal election campaign in Canada any defamatory statement published in the press relating to a candidate's fitness for office is to be taken as published on an occasion of qualified privilege would be, in my opinion, not only contrary to the great weight of authority in England and in this country but harmful to that "common convenience and welfare of society" which Baron Parke described as the underlying principle on which the rules as to qualified privilege are founded. See *Toogood v. Spyring*[2]. It would mean that every man who offers himself as a candidate must be prepared to risk the loss of his reputation without redress unless he be able to prove affirmatively that those who defamed him were actuated by express malice. I would like to adopt the following sentence from the judgment of the Court in *Post Publishing Co. v. Hallam*[3]:

> We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.

and the following expression of opinion by the learned author of Gatley (*op. cit*) at page 254:

> It is, however, submitted that so wide an extension of the privilege would do the public more harm than good. It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation.

[1] (1914), 30 T.L.R. 462 at 468.
[2] (1834), 1 C.M. & R. 181 at 193, 149 E.R. 1044.
[3] (1893), 59 Fed. 530 at 540.

The passages just quoted recall the words of Cockburn C.J. in *Campbell v. Spottiswoode*[1]:

> It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation.

The interest of the public and that of the publishers of newspapers will be sufficiently safeguarded by the availability of the defence of fair comment in appropriate circumstances.

As, in my opinion, it is settled by authority binding upon us that the facts pleaded by the appellant even if established would not render privileged the occasion on which the editorial complained of was published, I do not find it necessary to consider those parts of the reasons of the learned trial judge and of the Court of Appeal which discuss the question whether there was evidence of express malice.

At the new trial, in view of the state of the pleadings it should be taken that, as a matter of law, the defence of qualified privilege is not open to the defendant.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the defendant, appellant: MacDonald & MacIntosh, Toronto.*

*Solicitor for the plaintiff, respondent: C. I. O'Reilly, Toronto.*

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[1] (1863), 3 B. & S. 769 at 777, 122 E.R. 288.

1959
*Nov. 5, 6, 9
Dec. 21

PRUDENTIAL TRUST COMPANY LIMITED AND CANADIAN WILLISTON MINERALS LIMITED (*Defendants*) ..... APPELLANTS;

AND

HARRY G. FORSETH AND EMMA JENSINA FORSETH (*Plaintiffs*) . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Contracts—Non est factum—Mines and Minerals—Mistaken belief that option for oil lease given—Actual transfer with option—Alleged fraudulent misrepresentation—Document read to vendor—Subsequent bona fide purchaser—Homestead—Trading in securities—Rule against Perpetuities—Trial judge's findings on credibility reversed by Court of Appeal—The Homesteads Act, R.S.S. 1940, c. 101—The Security Frauds Prevention Act, R.S.S. 1940, c. 287.*

In 1949, the male plaintiff, with the consent of his wife, granted an oil lease on his homestead to I Co. In 1951, the husband assigned, with his wife's consent, an undivided one-half interest in all oil rights in the land, subject to the terms of the existing lease, to the defendant trust company and its *bona fide* assignee W Co. The plaintiffs sued to have the assignment and transfer set aside on the ground, *inter alia*, of *non est factum*. They alleged that the defendants' agent B represented that the documents were only an option to lease. The evidence disclosed that the female plaintiff, in the presence of her husband and B, had read aloud the document assigning the minerals. The trial judge dismissed the action and stated that he accepted B's evidence. This judgment was reversed by the Court of Appeal which disagreed with the finding on credibility. The defendants appealed to this Court.

*Held:* The action should be dismissed.

The circumstances of this case were not such as to warrant the exceptional course of reversing the findings of fact of the trial judge. On the contrary, there was ample evidence to justify them.

A literate person who signs a document after reading it through, or hearing it fully read, must be presumed to know the nature of the document which he is signing. The plea of *non est factum* cannot be established in such a case, even though some of the terms of the document may be difficult to comprehend. It is only when there is a misunderstanding as to the nature of the document itself that a claim of nullity can be made against a *bona fide* purchaser for value. *Prudential Trust Co. v. Cugnet*, [1956] S.C.R. 914, distinguished.

On a consideration of the terms of the document, the submission that it did not entitle the *bona fide* purchaser to receive a one-half share of the royalties payable under the lease with I Co., failed.

The essential requirements of ss. 3(1) and 4(1) of *The Homesteads Act* were met in this case. The fact that the wife's signed consent inaccurately described the document signed by her husband as a lease

*PRESENT: Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

could not vitiate her consent as against a subsequent *bona fide* purchaser for value. That purchaser was entitled to benefit of the provisions of s. 7(3) of the Act.

Section 17*a* of *The Security Frauds Prevention Act* had no application to the circumstances of this case. The purchase of an interest in mineral rights in land and the acquisition of an option to lease mineral rights do not constitute a trade in a security within the ordinary meaning of those words, nor do they fall within the extended meaning of s. 2(8) and (10) of the Act.

The submission that the provision regarding the option to lease was void as against the Rule against Perpetuities, could not be entertained. It could not be said that the document did not constitute a personal contract.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], reversing a judgment of Davis J. Appeal allowed.

*E. D. Noonan, Q.C.*, and *A. W. Embury*, for the defendants, appellants.

*D. G. McLeod*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—The respondent Harry G. Forseth is the registered owner of section 7, township 4, range 5, west of the second meridian, in the Province of Saskatchewan. The respondent Emma Jensina Forseth is his wife. They resided on the northeast quarter of that section until June of 1956.

On April 28, 1949, Forseth entered into a petroleum and natural gas lease with Imperial Oil Limited in respect of all petroleum, natural gas and related hydrocarbons, except coal and valuable stone, within, upon or under those lands for a term of ten years and so long thereafter as the leased substances, or any of them, are produced from the said lands. The lease provided that if operations were not commenced for the drilling of a well within one year from its date the lease would terminate, but that this drilling commitment could be deferred for a period of one year on payment of the sum of $64 and that drilling operations could be further deferred from year to year by making like payments. There was no other drilling commitment except in relation to offset wells.

[1] (1959), 17 D.L.R. (2d) 178, 30 W.W.R. 25.

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

It was not until January 19, 1953, that oil was discovered at Forget, Saskatchewan, which was about thirty miles away from Forseth's land. By the time of the trial in 1956, however, there were eight producing wells on that land.

On May 8, 1951, Forseth executed a document in the following form:

ASSIGNMENT

I, Harry G. Forseth, of the Hamlet of Kingsford (hereinafter called the Assignor), in the Province of Saskatchewan, being registered as owner of the Mines and Minerals, excepting Coal, of, in, upon or under that certain piece or parcel of land described as follows:

All of Section Seven (7) in Township Four (4) in Range Five (5) West of the Second Meridian, in the Province of Saskatchewan,

IN CONSIDERATION of the sum of One Dollar ($1.00) and other valuable consideration (the receipt whereof is hereby acknowledged), paid to me by the Prudential Trust Company Limited of the City of Calgary, in the Province of Alberta (hereinafter called the Assignee),

DO HEREBY assign, transfer and set over unto the said Assignee an undivided one-half interest in all Petroleum, Natural Gas and related hydrocarbons in and under the said lands, subject to the terms and conditions of the Petroleum and Natural Gas Lease covering the said lands, and agree to deliver to the Assignee herewith a registerable Transfer of such interest;

PROVIDED that notwithstanding such transfer the Assignor shall be entitled to collect and retain for his sole use and benefit the total amount of all future annual delay rentals payable to the Lessor under the terms of the existing Lease.

AND the Assignor hereby grants to the Assignee the exclusive option to acquire from the Assignor and the Assignee, in the name of the Assignee or its Nominee upon the termination of the current Petroleum and Natural Gas Lease covering the said lands a Petroleum and Natural Gas Lease for a term of Ninety-nine (99) years to be computed from the date hereof, subject to the same terms and conditions as contained in the current Lease, except that the cash rental payable thereunder shall be 25 cents per acre. The option is to be exercised within Ninety (90) days of the termination of the current lease by the Assignee tendering to the Assignor an executed Lease, and the first year's rental payable thereunder. In addition to the share of production to which the Assignee, or its Nominee, will become entitled as Lessee under the terms of any Lease obtained under the Option, the Assignee shall be entitled to its share of production reserved by the Assignor and Assignee as Lessors in such lease.

AND THE Assignor hereby covenants and agrees to execute any further or additional documents or agreements as may be required to grant a lease and for the purpose of assuring and securing to the above named Assignee the aforesaid share of production herein assigned to the Assignee, and in particular and without limiting the generality of the foregoing, upon the request of the Assignee and at the expense of the Assignee, the Assignor will execute and deliver (with the duplicate Certificate of Title therefor) a registerable Transfer of the Assignor's interest in the petroleum and natural gas, in, upon or under the lands hereinbefore described to the

Prudential Trust Company Limited, together with the duplicate of any existing lease of the same, and a duly executed Assignment thereto to such Trust Company with full authority to such Trust Company, to enforce the terms of any lease, provided that such Trust Company shall account to the Assignor for his share of the Petroleum and Natural Gas.

AND the Assignment shall be binding upon and enure to the benefit of the parties hereto and each of them, their respective heirs, executors, administrators, successors and assigns.

AND I hereby undertake and agree that I have good title to the said Mines and Minerals, and that I have unimpeded right to make the Assignment herein.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 8th day of May A.D. 1951

SIGNED, SEALED AND DELIVERED in the presence of } (Sgd.) Harry G. Forseth (Seal)
Assignor

(Sgd.) James Kenean
Witness to the signature of the Assignor.

On the reverse side of the paper on which this agreement appeared was a consent by Mrs. Forseth and a certificate under *The Homesteads Act* as follows:

I, Emma Jensina Forseth the wife of Harry G. Forseth the Lessor named in the within Lease, do hereby declare that I have executed this Lease for the purpose of relinquishing all my rights to the said homestead in favour of The Prudential Trust Company Limited of Calgary, Alta.

(Sgd.) Emma Jensina Forseth
Signature of Wife

CERTIFICATE UNDER THE HOMESTEADS ACT

I, Joseph Sinkewicz of the Village of Lampman in the Province of Saskatchewan DO HEREBY CERTIFY that I have examined Emma Jensina Forseth wife of Harry G. Forseth the Lessor in the within Petroleum and Natural Gas Lease separate and apart from her husband and she acknowledged to me that she signed the same of her own free will and consent and without any compulsion on the part of her husband and for the purpose of relinquishing her rights in the homestead in favour of The Prudential Trust Company Ltd. and further that she was aware of what her rights in the homestead were.

I FURTHER CERTIFY that I am not disqualified, under Section 3 of The Homesteads Act, from taking the above acknowledgment.

(Seal) (Sgd.) Joseph Sinkewicz
A Notary Public

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

On the same date Forseth executed a transfer to the appellant Prudential Trust Company Limited (hereinafter referred to as "Prudential") of an undivided one-half interest in all the mines and minerals within, upon or under his lands, reserving all coal. Mrs. Forseth signed her consent on the transfer pursuant to *The Homesteads Act* and a certificate under that Act was signed, as a notary public, by Joseph Sinkewicz.

The transfer calls for more than is provided for in the assignment in that the latter relates only to petroleum, natural gas and related hydrocarbons, whereas the former relates to all mines and minerals other than coal. Counsel for the appellants explains this difference as resulting from the fact that in 1951, when these documents were executed in Saskatchewan, a transfer limited to petroleum, natural gas and related hydrocarbons would not be accepted in the land titles offices for registration. It is acknowledged by the appellants that they would not be entitled to obtain from Forseth any beneficial interest in any minerals other than petroleum, natural gas and related hydrocarbons.

Prudential was a bare trustee of any rights acquired under these documents on behalf of Amigo Petroleums Limited. The rights of the latter company were twice transferred and are now held by the appellant Canadian Williston Minerals Limited (hereinafter referred to as "Williston"). It is admitted that Williston was a *bona fide* purchaser for value of these rights.

The execution of the two documents mentioned was obtained by one Benson, who was an agent for Amigo Petroleums Limited. On May 8, 1951, he called at the residence of the respondents and obtained their agreement to the execution of the assignment and of the transfer. The main issue in this case is as to whether, in the light of what then occurred, it should be found, as is contended by the respondents, that the mind of Forseth did not go with his hand, so as to establish a plea of *non est factum,* or whether, as is contended by the appellants, Forseth is not entitled to rely upon that plea.

At the outset it should be pointed out that it was admitted that Mrs. Forseth, in the presence of her husband and Benson, read aloud the document described as an

assignment. The evidence of the respondents, supported by their son David, who was present when Benson visited his parents, is that Benson represented that the documents he presented to them would only grant to Prudential an option to lease the petroleum and natural gas and related hydrocarbons in the lands to be exercised within ninety days after the termination of the lease to Imperial Oil Limited and that this was their understanding when the documents were executed. The evidence of Benson is that he explained to the respondents that he was buying an assignment of mineral rights which had an option to lease in it.

Following the discussion at the Forseth's house, Benson drove Forseth and his wife to Lampman, Saskatchewan, to the office of Sinkewicz, a notary public, who was secretary-treasurer of the rural municipality of Browning, where the assignment and the transfer were both signed by Forseth and where Mrs. Forseth signed consents printed on the assignment and the transfer forms. Sinkewicz signed a certificate on each one pursuant to *The Homesteads Act*.

After the documents were executed, Benson paid Forseth $100. Benson took both the executed copies of the assignment, as well as the transfer, and later one copy of the assignment was mailed to Forseth at his house. A caveat was filed by Prudential against Forseth's land on May 18, 1951, in which Prudential claimed an interest in the lands by virtue of the transfer from the registered owner of an undivided one-half interest in all mines and minerals other than coal and in respect of the option. Forseth later received a notice that a caveat had been filed.

In April, 1953, one McNeil, an agent of Williston, came to Forseth's house and asked for his duplicate certificate of title for the lands for the purpose of registering the transfer of mineral rights under *The Land Titles Act*. Forseth refused to deliver up the certificate of title. He says that he had not read the copy of the assignment when it was returned to him, but that he did read it at this time and realized that it involved something more than an option to lease.

On August 17, 1953, Forseth commenced action against Prudential, asking for a declaration that the assignment and the transfer were null and void. The statement of claim

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

was amended in November, 1955. Mrs. Forseth was added as a party plaintiff and Williston was added as a party defendant.

The learned trial judge gave judgment in favour of the appellants. On the main issue of *non est factum* he made certain important findings of fact as follows:

> I can find no reason for disbelieving Benson and I accept his evidence as to what in fact took place. I found him to be an honest and reliable witness. Regrettably, I cannot say the same for the plaintiffs. Apart from the obvious contradictions in their evidence, their demeanour in the box belied the story which they told. . . .
>
> * * *
>
> I, therefore, find there was no fraudulent misrepresentation as alleged and that the plaintiff Harry Forseth executed the documents in question with full knowledge of the terms thereof. I find further that the documents contain the agreement entered into between Benson on behalf of his principal and the plaintiff Harry Forseth. There was no misunderstanding as to the terms of the assignment or option.

The judgment at the trial was reversed by the Court of Appeal[1], which refused to accept the findings of fact made by the learned trial judge. The appellants have appealed from that judgment.

The attitude to be taken by an appellate Court in respect of findings of fact by a trial judge has been defined frequently. I cite two expositions of the principle. In *S.S. Hontestroom v. S.S. Sagaporack*[2], Lord Sumner says:

> What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In The Julia,

[1] (1959), 17 D.L.R. (2d) 178, 30 W.W.R. 25.

[2] [1927] A.C. 37 at 47-8.

(1860) 14 Moo. P.C. 210, 235, Lord Kingsdown says: "They, who require this Board, under such circumstances, to reverse a decision of the Court below, upon a point of this description, undertake a task of great and almost insuperable difficulty. . . . We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong." Wood L.J., in The Alice, (1868) L.R. 2 P.C. 245, 248, says: "The principle established by the decision in The Julia, 14 Moo. P.C. 210, 235, is most singularly applicable. . . . We should require evidence that would be overpowering in its effect on our judgment with reference to the incredibility of the statements made." James L.J. thus laid down the practice in The Sir Robert Peel, (1880) 4 Asp. M.L.C. 321, 322: "The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression."

In *Powell v. Streatham Manor Nursing Home*[1], Viscount Sankey L.C. says:

On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses: see Clarke v. Edinburgh Tramways Co., per Lord Shaw, 1919 S.C. (H.L.) 35, 36, where he says: "When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

[1] [1935] A.C. 243 at 249-50.

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

The Court of Appeal in the present case, while clearly aware of these principles, considered that there were sound reasons to show that the learned trial judge failed to use the advantage afforded him of having seen the witnesses and observed their demeanour and concluded that he had failed properly to evaluate the evidence. These conclusions must now be considered.

The Court of Appeal considered that the finding as to credibility by the learned trial judge "was primarily based on the unwarranted opinion that the assignment was an 'uncomplicated document' ". With respect, it appears to me that the finding as to credibility was largely based upon his conclusion that there were contradictions in the evidence of the respondents and upon their demeanour in the witness box, as mentioned by the learned trial judge in the passage from his judgment previously quoted. As to the assignment document itself, it must be borne in mind that the primary issue is not as to whether Forseth understood all its terms, but as to whether Forseth, by reason of misrepresentations by Benson, was not aware that it involved a sale of an interest in mineral rights. Whatever may be said as to the complications in those clauses of the assignment which deal with the option to lease, the paragraph which deals with the transfer of mineral rights, which is the very first covenant by Forseth in the assignment, is obviously a transfer of a one-half interest in petroleum and natural gas rights. The nature of that covenant is clearly stated in the opening words of that paragraph in almost the same words as a transfer under *The Land Titles Act*.

The Court of Appeal also reaches the conclusion that, even if Benson was, as the learned trial judge found him to be, an honest and reliable witness, he completely misled the respondents as to the real nature and character of the documents which he presented to them. I have reviewed Benson's evidence. There is no doubt that the contents of the documents could have been more clearly and precisely described. Furthermore he was in error as to the legal consequences of at least one of the clauses relating to the option; but, granting all of this, if Benson's evidence be accepted, the respondents should have understood that the assignment was more than an option and that it did involve

a transfer of an interest in Forseth's mineral rights. In other words, if Benson's evidence is accepted, Forseth should not have misunderstood the nature of the document which he executed, even if there was some misunderstanding as to the contents of it. It is only if there was a misunderstanding as to the nature of the document itself that Forseth could claim that it was null and void as against a *bona fide* purchaser for value, as Williston is in this case.

Considerable weight is attached in the judgment of the Court of Appeal to the inherent improbability of Forseth's making the deal contained in the assignment if he had known what he was doing. Admittedly a consideration of $100 for a one-half interest in the petroleum and natural gas rights in a section of land which now has on it eight producing oil wells appears to-day to be absurdly low, but it must be recalled that when the deal was made in 1951 there had been no oil discovery anywhere in the vicinity of this land. It was not until 1953 that a discovery was made some thirty miles away. The lease with Imperial Oil Limited had no obligatory drilling commitment which could not be avoided by the payment of a delay rental and the delay rental fixed was only ten cents an acre. These various factors appear to have been considered by the learned trial judge in reaching his decision.

With respect, after reviewing carefully all of the reasons advanced in the judgment of the Court of Appeal, I am of the opinion that the circumstances of this case were not such as to warrant the exceptional course of reversing the findings of fact of the learned trial judge. On the contrary, I think there was ample evidence to justify them.

In my view the most important fact of all is the one which was not only admitted by the respondents, but was pleaded in their statement of claim; namely, that Mrs. Forseth actually read aloud the contents of the assignment to her husband. Counsel were unable to refer us to any case in which a plea of *non est factum* had been upheld where a literate person executed a document after having read it through, or after having heard its contents completely read. The fact that some of the terms may be difficult to comprehend, a matter which weighed heavily in the Court of Appeal, does not serve to establish such a plea. This goes

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

only to the issue of a misconception as to the contents of the document and not as to its nature and character. A literate person who signs a document after reading it through, or hearing it fully read, must, I think, be presumed to know the nature of the document which he is signing.

This proposition does not conflict in any way with the judgment of this Court in *Prudential Trust Company Limited v. Cugnet*[1], a case which involved the same sort of documents as those in question here and in which a plea of *non est factum* was upheld. In that case the respondent had never read the assignment or heard it read. The agent who obtained his execution of the document was not called as a witness and the learned trial judge found in fact that the respondent had relied upon misrepresentations by the agent.

My conclusion, therefore, is that the learned trial judge was right in rejecting the plea of *non est factum* and that Williston, as a *bona fide* purchaser for value, is entitled to enforce the agreement.

The respondents contended that, even if the assignment were valid and enforceable by Williston, it did not entitle Williston to receive a one-half share of the royalties payable under the lease with Imperial Oil Limited. This involves a consideration of the terms of the document to determine its legal effect.

Forseth transferred to Prudential an undivided one-half interest in all petroleum, natural gas and related hydrocarbons in and under the lands in question, subject to the terms and conditions of the Imperial Oil Limited lease providing that Forseth would be entitled to retain all future, annual delay rentals payable under that lease. Forseth was the registered owner of those mineral rights. By virtue of the petroleum and natural gas lease, he had granted and leased those mineral substances to Imperial Oil Limited for a term of ten years and so long thereafter as the leased substances, or any of them, were produced from the lands in question. Imperial Oil Limited had agreed to pay a royalty of $12\frac{1}{2}$ per cent. of the current market value at the point of measurement of the oil produced and of the natural gas marketed. The result is that Forseth transferred to Prudential one-half of the petroleum, natural gas and related

[1] [1956] S.C.R. 914, 5 D.L.R. (2d) 1.

hydrocarbons which, by virtue of its lease, Imperial Oil Limited was entitled to produce from these lands. Imperial Oil Limited had agreed to pay a 12½ per cent. royalty in respect of those substances which it produced, saved and marketed from the lands. As one-half of those substances thus produced, by virtue of the assignment, had become the property of Prudential, it seems clear that Prudential would be entitled to one-half of the royalties paid in respect of their production and sale.

This view is reinforced by the proviso which assured to Forseth the full amount of the delay rentals paid by Imperial Oil Limited. This clearly implies that, without the proviso, Prudential would have been entitled also to share in those payments.

It is further reinforced by the covenant for further assurances contained in the assignment, which provides that Forseth agrees to execute any further or additional documents or agreements as may be required "for the purpose of assuring and securing to the above named Assignee the aforesaid share of production herein assigned to the Assignee". For this purpose Prudential could require from Forseth an assignment of the Imperial Oil Limited lease, in which event Prudential could enforce the lease, but "shall account to the Assignor for his share of the Petroleum and Natural Gas".

In my view the submission of the respondents on this point fails.

Another point urged was that, in respect of the north-east quarter of the section of land on which the respondents had resided, the assignment was void by virtue of the provisions of *The Homesteads Act* which, as then applicable, was R.S.S. 1940, c. 101, as amended, because it was the homestead quarter section. The relevant provisions of that statute are as follows:

3. (1) Every transfer, agreement of sale, lease or other instrument intended to convey or transfer an interest in a homestead to any person other than the wife of the owner, and every mortgage intended to charge a homestead in favour of any such person with the payment of a sum of money, shall be signed by the owner and his wife, if he has a wife who resides in Saskatchewan or has resided therein at any time since the marriage, and she shall appear before a district court judge, local registrar of the Court of Queen's Bench, registrar of land titles or their respective deputies, or a solicitor or justice of the peace or notary public and, upon

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

being examined separate and apart from her husband she shall acknowledge that she understands her rights in the homestead and signs the instrument of her own free will and consent and without compulsion on the part of her husband:

* * *

4. (1) Every such transfer, agreement, lease, mortgage or other instrument shall contain or have annexed to or endorsed or written thereon a declaration by the wife (form A) that she has executed the same for the purpose of relinquishing her rights in the homestead.

* * *

5. (1) There shall be annexed to or endorsed on the transfer, agreement, lease, mortgage or other instrument a certificate (form B) signed by the officer taking the same, to the effect that he has examined the wife separate and apart from her husband, that she understands her rights in the homestead and that she signs such instrument of her own free will and consent and without any compulsion on the part of her husband.

* * *

7. (1) Every transfer, agreement of sale, lease or other instrument intended to convey or transfer an interest in land, and every mortgage, which does not comply with the provisions of sections 4 and 5, shall be accompanied by an affidavit of the maker (form C) stating either that the land described in such instrument is not his homestead and has not been his homestead at any time or that he has no wife, or that his wife does not reside in Saskatchewan and has not resided therein at any time since the marriage.

* * *

(3) No transferee, mortgagee, lessee or other person acquiring an interest under such instrument shall be bound to make inquiry as to the truthfulness of the facts alleged in the affidavit hereby required to be made or in the certificate of examination in form B, and upon delivery of an instrument purporting to be completed in accordance with this Act the same shall become valid and binding according to its tenor save as provided in section 11, R.S.S. 1940, c. 101, s. 7.

Section 11, which is referred to in subs. (3) of s. 7, has no application to the facts of this case.

The contention on this point is that there was no proper consent by Mrs. Forseth to the assignment, because that document is inaccurately referred to in the printed form of consent and in the printed certificate signed by Sinkewicz, the notary public, as a lease.

There is nothing in the evidence to suggest that the wording of the consent or of the certificate in any way influenced the consent which Mrs. Forseth gave. Furthermore, she also executed the consent to the transfer of mineral rights to Prudential and there is no error in relation to the description of that instrument in the consent form or the certificate form.

The essential requirements of ss. 3(1) and 4(1) of *The Homesteads Act* are that the wife shall sign the instrument; that, on separate examination by a proper officer, she shall acknowledge that she understands her rights in the homestead and signs the instrument of her own free will and consent, without compulsion by her husband, and that she has executed it for the purpose of relinquishing her rights in the homestead. All these various requirements were met. There is no question that Mrs. Forseth knew she was relinquishing her homestead rights in favour of Prudential in relation to the document which she had read to her husband and which he had signed. She contends that she misunderstood the nature of the document itself, but does not suggest that the wording of the two forms in any way contributed to that misunderstanding. I do not, therefore, think that the inaccuracy of the description of the document in those two forms is material in the circumstances of this case.

In my opinion Williston is properly entitled to the benefit of the provisions of subs. (3) of s. 7.

The effect of that subsection was considered by the Court of Appeal of Saskatchewan in *Bonkowski v. Cordillera Petroleums Limited*[1]. It was there held that the subsection means that a person acquiring an interest under an instrument intended to convey an interest in land is not bound to inquire into the truth of the facts alleged in the certificate of examination and that an instrument delivered, which purports to comply with the provisions of the Act, shall be valid and binding. The object of the subsection is to give a transferee in good faith protection where there has been a *prima facie* compliance with the provisions of the statute. With this I agree and I think, therefore, that the respondents' submission based upon *The Homesteads Act* fails.

The respondents further contend that the transaction was rendered void by reason of the provisions of *The Security Frauds Prevention Act*, R.S.S. 1940, c. 287, on the basis that Benson was trading in royalty rights. The relevant provisions of this Act, in effect at the time, are the following:

2. In this Act, unless the context otherwise requires, the expression:

* * *

[1](1955) 16 W.W.R. 481, 5 D.L.R. 229.

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

8. "Security" includes:

(a) any document, instrument or writing commonly known as a security;

(b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company;

(c) any document constituting evidence of an interest in an association of legatees or heirs;

(d) any document constituting evidence of an interest in an option given upon a security; and

(e) any document designated as a security by the regulations.

* * *

10. "Trade" or "trading" includes any solicitation or obtaining of a subscription to, disposition of, transaction in, or attempt to deal in, sell or dispose of a security or interest in or option upon a security, for valuable consideration, whether the terms of payment be upon margin, installment or otherwise, and any underwriting of an issue or part of an issue of a security, and any act, advertisement, conduct or negotiation directly or indirectly designated as "trade" or "trading" in the regulations. R.S.S. 1930, c. 239, s. 2.

3. (1) No person shall:

(a) trade in any security unless he is registered as a broker or salesman of a registered broker;

(b) act as an official of or on behalf of a partnership or company in connection with a trade in a security by the partnership or company, unless he or the partnership or company is registered as a broker;

(c) act as a salesman of or on behalf of a partnership or company in connection with a trade in a security by the partnership or company, unless he is registered as a salesman of a partnership or company which is registered as a broker;

and unless such registrations have been made in accordance with the provisions of this Act and the regulations; and any violation of this section shall constitute an offence.

* * *

17a. (1) No person shall call at any residence and:

(a) trade there in any security; or

(b) offer to trade there or at any other place in any security;

with the public or any member of the public.

This point was not pleaded by the respondents, nor was it raised at the trial of the action. It was argued before the Court of Appeal, but no conclusion has been expressed by that Court on this point.

In so far as the respondents rely upon subs. (1) of s. 3, there was no plea and no evidence adduced that Benson was not registered as a broker, or salesman of a registered broker. This being so, the only section on which the respondents can

rely is s. 17*a*, whose terms are equally applicable to a person who is registered under the Act as well as to one who is not. In my opinion, however, that section has no application to the circumstances of this case. The transaction in question here is the purchase of an interest in mineral rights in land and the acquisition of an option to lease mineral rights. This does not constitute a trade in a security within the ordinary meaning of those words, nor, in my opinion, does it fall within the extended meanings given to them by subss. (8) and (10) of s. 2. The extended meanings given to the words "trade" and "trading" in subs. (10) seem to contemplate the soliciting of subscriptions for or the making of sales of security by the person trading and do not contemplate the soliciting for or making of purchases of securities by such a person. Furthermore the extended meanings of the word "security" in subs. (8) contemplate a "document" of one of the kinds defined. In relation to royalties it means a document which is evidence of title to an interest in royalties. The only document, in this case, which related to royalties was the Imperial Oil Limited lease. There was no "trading" in that document. The assignment provided for a purchase of mineral rights subject to that lease and, solely to assure to Prudential its share of production of those minerals, gave it a right to obtain an assignment of the lease. In my opinion, therefore, Benson did not trade in any security or offer to trade in any security so as to fall within the provisions of s. 17*a*.

Finally it was contended that, in any event, the provision of the assignment regarding the option to lease was void as offending against the Rule against Perpetuities.

In view of the fact that there are eight producing oil wells on this property, it would seem to me that this issue is really academic, since the option can only be exercised after the termination of the Imperial Oil Limited lease. We are being asked, therefore, to determine questions of law which are unlikely to arise and which, if they arise at all, can only arise in the remote future.

1959

PRUDENTIAL TRUST CO. LTD. v. FORSETH

Martland J.

It is sufficient to say that at this stage I would not be prepared to hold that the option is void. The law regarding the subject of contracts relating to rights in the future has been well summarized in Halsbury's Laws of England, 2nd ed., vol. 25, at p. 109, as follows:

> A contract relating to a right of or equitable interest in property *in futuro* may be intended to create a limitation of land only, in which case, if the limitation is to take effect beyond the perpetuity period, the contract is wholly void and unenforceable; or the contract may, upon its true construction, be a personal contract only, in which case the rule does not apply to it; or it may, upon its true construction, be, as regards the original covenantor, both a personal contract and a contract attempting to create a remote limitation, in which case the limitation will be bad for perpetuity, but the personal contract will be enforceable, if the case otherwise admits, against the promisor by specific performance or by damages, or against his personal representatives in damages only. In all cases it is a question of construction whether the contract is intended to create a limitation of property only, or a personal obligation only, or both.

I am not prepared to say that the assignment did not constitute a personal contract by Forseth, especially when it is borne in mind that the agreement contemplates a future petroleum and natural gas lease to be granted, not by Forseth only, but by both Forseth and Prudential as co-owners. The real effect of his covenant was to give assent to a leasing of his share of the petroleum and natural gas rights along with the share of his co-owner Prudential.

I am, therefore, of the opinion that this appeal should be allowed with costs both here and in the Court of Appeal.

*Appeal allowed with costs.*

*Solicitors for the defendants, appellants: Noonan, Embury, Heald & Molisky, Regina.*

*Solicitors for the plaintiffs, respondents: Pedersen, Norman & McLeod, Regina.*

PRUDENTIAL TRUST COMPANY LIMITED AND CANADIAN WILLISTON MINERALS LIMITED (*Defendants*) ..... APPELLANTS;

AND

TURE OLSON AND RUTH MARIE OLSON (*Plaintiffs*) ..... RESPONDENTS.

1959
*Nov. 9
Dec. 21

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Contracts—Non est factum—Mines and Minerals—Oil lease—Assignment of interest in lease—Allegation of fraud—Whether uncontradicted—Subsequent bona fide purchaser—False affidavit that land not homestead—Trading in security—Rule against Perpetuities—Trial judge's findings on credibility reversed by Court of Appeal—The Homesteads Act, R.S.S. 1940, c. 101—The Security Frauds Prevention Act, R.S.S. 1940, c. 287.*

In 1949, the male plaintiff granted an oil lease to I Co. In 1951, he assigned and transferred to the defendant trust company and its *bona fide* assignee W Co. an undivided one-half interest in all mines and minerals, subject to the existing lease. The transfer was accompanied by an affidavit in which he falsely stated that the land was not his homestead. The plaintiffs sued to have the assignment and transfer set aside on the ground *inter alia*, of *non est factum*. They alleged that the defendants' agent F represented that the documents were only an option to lease. The trial judge dismissed the action and stated that he accepted F's evidence. The Court of Appeal reversed this judgment and held that the plaintiff's evidence was uncontradicted because F, in his evidence, could not recognize the male plaintiff and could not recall the particular transaction with him. The defendants appealed to this Court.

*Held:* The action should be dismissed.

A person can properly deny fraudulent representations attributed to him on a specific occasion, even though he may not remember the exact occasion or the person who alleges that such representations were made, if he is able, as was done in this case, to say that he followed the same pattern as in other cases and describes what that pattern was. After such a denial of fraud, it cannot properly be said that the allegations are uncontradicted. In fact they are contradicted. There were no sufficient reasons to warrant a reversal of the findings of fact made by the trial judge, based as they were on the credibility of the witnesses who had testified before him. On those findings of fact, the plaintiffs have failed to bring themselves within the principles of *Prudential Trust Co. v. Cugnet*, [1956] S.C.R. 914.

Even though the male plaintiff had falsely affirmed that the land was not his homestead, the *bona fide* purchaser for value was properly entitled to avail itself of the protection afforded by s. 7(3) of *The Homesteads Act*.

*PRESENT: Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

1959

PRUDENTIAL TRUST CO. LTD. v. OLSON

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], reversing a judgment of Davis J. Appeal allowed.

*E. D. Noonan, Q.C.,* and *A. W. Embury,* for the defendants, appellants.

*D. G. McLeod,* for the plaintiffs, respondents.

The judgment of the Court was delivered by

MARTLAND J.:—The respondent Ture Olson is the registered owner of the east half of section 35, township 3, range 5, west of the second meridian, in the Province of Saskatchewan. The respondent Ruth Marie Olson is his wife. They resided on the south-east quarter of section 35, township 3, range 5, west of the second meridian, until October, 1946, when they purchased a house in Regina. They have lived in that city since that time.

On April 28, 1949, Olson entered into a petroleum and natural gas lease with Imperial Oil Limited of all petroleum, natural gas and related hydrocarbons, excepting coal and valuable stone, within, upon or under the half section for a term of ten years and so long thereafter as the leased substances, or any of them, were produced from the said lands. The lease provided that, if operations were not commenced for the drilling of a well within one year from its date, the lease would terminate, but that this drilling commitment could be deferred for a period of one year on the payment of the sum of $32 and that drilling operations could be further deferred from year to year by making like payments. There was no other drilling commitment except as to offset wells.

On March 26, 1951, Olson executed a document, entitled an assignment, in favour of the appellant Prudential Trust Company Limited (hereinafter referred to as "Prudential") in the same form as that which is set out in full in my reasons for judgment in the case of *Prudential Trust Company*

[1] (1959) 17 D.L.R. (2d) 341.

*Limited v. Forseth* (ante p. 210) which was argued immediately prior to the present appeal. On the reverse side of this document there appears the following form of affidavit:

HOMESTEAD AFFIDAVIT

CANADA
PROVINCE OF SASKATCHEWAN
TO WIT:

I, Ture Olson, also known as Ture I. Olson, of the Town of Hirsch, in the Province of Saskatchewan, Farmer, make oath and say:

1. THAT I am the Lessor named in the within Petroleum and Natural Gas Lease and I say:

THAT no part of the land described in the said lease is my homestead or has been my homestead at any time within the period of seven years immediately preceding the execution of the said lease:

—or—

GD. TIO ~~THAT I have no wife.~~

—or—

GD. TIO ~~THAT my wife does not reside in Saskatchewan and has not resided therein at any time since the marriage.~~

SWORN before me at Hirsch, in the Province of Saskatchewan, this 26th day of March, A.D. 1951.

(Sgd) Ture I. Olson

(Sgd) George Van Dutchak
A Commissioner for Oaths in and for the Province of Saskatchewan.
My commission expires December 31, 1955.

The letters "GD" and "TIO", which appear on the left-hand side of this affidavit, are the initials of George Van Dutchak and of Olson.

On the same date Olson executed a transfer to Prudential of an undivided one-half interest in all the mines and minerals within, upon or under his lands, reserving all coal. On this transfer form appears a form of affidavit, signed by Olson, stating that no part of the land described in the transfer was his homestead or had been his homestead within the period of seven years immediately preceding the execution of the said transfer.

The documents in question were taken by Prudential as a bare trustee for Amigo Petroleums Limited. The rights of the latter company were twice transferred and are held by the appellant Canadian Williston Minerals Limited (here-

1959

PRUDENTIAL TRUST CO. LTD. v. OLSON

Martland J.

inafter referred to as "Williston"), which is admittedly a *bona fide* purchaser for value of any rights of Prudential under these documents.

Prudential filed a caveat on April 6, 1951, in respect of the transfer of one-half the mines and minerals and the option to acquire a lease on the termination of the existing lease to Imperial Oil Limited.

At the time of the transaction on March 26, 1951, there was no indication of oil discoveries anywhere in the area of these lands. At the time of the trial, in November, 1956, two wells had been drilled on Olson's land. Oil had been discovered in the Steelman Field in which Olson's lands are situate before this action was commenced on July 7, 1955.

The execution of the documents in question was obtained in Regina by one Fesser, an agent of Amigo Petroleums Limited. There is a direct conflict of evidence as between Fesser and Olson as to what occurred on that occasion, they being the only persons who testified as to their conversation. Olson's version of this discussion is that Fesser stated to him that he, Fesser, was representing Prudential and that he wished an option to lease, if Imperial Oil Limited dropped their lease, and would pay Olson $40 for such option. The lease for which the option was given was supposed to be the same as the lease to Imperial Oil Limited, only providing for twenty-five cents an acre delay rental instead of ten cents. Nothing else was said. Olson says that he did not feel like signing it at that time and that he wished to obtain advice from his friends. Fesser left and took the documents with him. Olson consulted with his brother-in-law about the matter. On the next evening, Fesser returned and the discussion was the same as on the previous occasion. Olson says he understood that the document was an option for a lease, if Imperial Oil Limited dropped its lease. He said he did not read the document.

Fesser's evidence is that he worked on and off for four or five months in 1951, making similar deals; that he interviewed about one hundred farmers in all and was successful in obtaining agreements in about a couple of dozen cases. He did not remember Olson or the particular transaction, but he followed a similar pattern in all cases. He would

introduce himself, explain that he was representing Prudential and was interested in acquiring one-half the mineral rights. If the existing lease expired or was dropped, Prudential would have the option of leasing, in which case the delay rental would be tweny-five cents an acre.

Olson signed the assignment and the transfer at his house in Regina and signed the affidavits, under *The Homesteads Act*, which appeared on each of these documents. He denied that these affidavits were sworn or that Van Dutchak, the Commissioner for Oaths whose signature appears on each of these affidavits, was present. He was later paid $40 as consideration for his execution of the documents. He says that in September, 1951, he received a copy of the assignment, which he then read for the first time and realized that he had granted something more than an option.

After hearing the evidence, the learned trial judge stated in his judgment that he did not believe Olson's story that Fesser had misrepresented the transaction to him. He said that there could be no doubt that when Olson signed the documents he was fully aware of their contents and did so willingly. He stated that neither of the respondents was a satisfactory witness and that where their evidence conflicted with Fesser's he accepted the latter. Judgment was given in favour of the appellants.

This judgment was reversed by the Court of Appeal[1], which accepted Olson's evidence. From that decision the present appeal is brought.

In my reasons for judgment in the *Forseth* case[2] I cited authorities regarding the proper position to be taken by an appellate Court in relation to findings of fact by a trial judge based upon the credibility of witnesses. It is unnecessary to repeat them here. In the present case the judgment of the Court of Appeal is based upon the conclusion that the respondents' evidence was uncontradicted because Fesser, in his evidence, had stated that he did not recognize Olson and did not have any recollection of the particular transaction with him. I do not think that such a conclusion must follow because of that evidence, since Fesser went on to say that he had followed the same pattern in his dealings with Olson as that which he followed in his interviews with other

[1] (1959) 17 D.L.R. (2d) 341. [2] [1960] S.C.R. 210.

1959

PRUDENTIAL TRUST CO. LTD. v. OLSON

Martland J.

persons who had executed similar documents, which pattern he described. The point is that Fesser was accused by Olson of fraud in misrepresenting the nature of the documents which Olson was to sign. This Fesser denied. It seems to me that a person can properly deny fraudulent representations attributed to him on a specific occasion, even though he may not remember the exact occasion or the person who alleges that such representations were made, if he is able to say that he followed the same pattern as in other cases and describes what that pattern was. Having made such a denial of fraud, I do not think that it can properly be said that the allegations were uncontradicted. The fact is that they were contradicted, the denial of fraud by Fesser was believed and the allegations of fraud made by Olson were not believed by the learned trial judge.

With respect, I do not think that the reasons stated in the judgment of the Court of Appeal were sufficient to warrant a reversal of the findings of fact made by the learned trial judge, based as they were on the credibility of the witnesses who had testified before him. Accepting those findings of fact, the respondents have failed to bring themselves within the principles enunciated in *Prudential Trust Company v. Cugnet*[1].

The respondents then contended that at least in respect of the south-east quarter the transaction was void for non-compliance with the provisions of *The Homesteads Act*. This contention is based upon the ground that, contrary to what appears in Olson's affidavits, the south-east quarter had been his homestead within the period of seven years immediately preceding the execution of the documents. The respondents had purchased their house in Regina to which they moved in October, 1946. The documents were executed on March 26, 1951. The south-east quarter was, therefore, at that time, still the homestead of the respondents, as defined in the statute then applicable, that is, s. 2 of R.S.S. 1940, c. 101, as amended.

[1] [1956] S.C.R. 914, 5 D.L.R. (2d) 1.

However, it seems to me that Williston, as a *bona fide* purchaser for value, is entitled to rely upon the provisions of subs. (3) of s. 7 of that Act. Subsections (1) and (3) of s. 7 provide as follows:

> 7. (1) Every transfer, agreement of sale, lease or other instrument intended to convey or transfer an interest in land, and every mortgage, which does not comply with the provisions of sections 4 and 5, shall be accompanied by an affidavit of the maker (form C) stating either that the land described in such instrument is not his homestead and has not been his homestead at any time or that he has no wife, or that his wife does not reside in Saskatchewan and has not resided therein at any time since the marriage.
>
> * * *
>
> (3) No transferee, mortgagee, lessee or other person acquiring an interest under such instrument shall be bound to make inquiry as to the truthfulness of the facts alleged in the affidavit hereby required to be made or in the certificate of examination in form B, and upon delivery of an instrument purporting to be completed in accordance with this Act the same shall become valid and binding according to its tenor save as provided in section 11, R.S.S. 1940, c. 101, s. 7.

Sections 4 and 5, referred to in subs. (1) of s. 7, relate to a declaration by the wife of a registered owner of a homestead that she has executed an instrument for the purpose of relinquishing her rights in the homestead and to the certificate by a qualified officer that she has been separately examined and understood her rights. No such declaration or certificate was made in the present case.

Turning to the terms of subs. (3) of s. 7, it appears to me that Williston acquired an interest under instruments purporting to be completed in accordance with the Act and, in so far as it is concerned, the same would, therefore, be valid and binding. Section 11, referred to in subs. (3), has no application because there is no evidence that Williston had any knowledge that the lands involved included Olson's homestead. In fact there is no evidence that Fesser had any such knowledge.

It is true that the affidavit of Olson on the assignment form states that he is "the Lessor named in the within Petroleum and Natural Gas Lease" and that the document in question was not a lease. However, it seems to me that the essential part of the affidavit is that which is specifically required by the terms of subs. (1) of s. 7, that is that it must state "either that the land described in such instrument is not his homestead and has not been his homestead

1959

PRUDENTIAL TRUST CO. LTD. v. OLSON

Martland J.

at any time within the period of seven years immediately preceding the execution of the instrument, or that he has no wife, or that his wife does not reside in Saskatchewan and has not resided therein at any time since the marriage". This is specifically stated in the affidavits which Olson signed and, having been so stated, it is my view that, for the reasons stated in the *Forseth* case[1], Williston is properly entitled to avail itself of the protection afforded by subs. (3) of that same section.

In my view, therefore, the contention of the respondents based on *The Homesteads Act* fails.

Additional points were argued by the respondents, contending that the assignment did not involve a transfer to Prudential of one-half of any royalties payable under the Imperial Oil Limited lease; that the whole transaction was void by reason of the provisions of *The Security Frauds Prevention Act* and that, in any event, the provisions of the assignment relating to the option to lease were void as being contrary to the rule against perpetuities. Each of these points was fully discussed in my reasons for judgment in the *Forseth* case[1] and the same reasons are equally applicable in the present case.

I am, therefore, of the opinion that the appeal should be allowed with costs payable by the respondents both here and in the Court of Appeal.

*Appeal allowed with costs.*

*Solicitors for the defendants, appellants: Noonan, Embury, Heald & Molisky, Regina.*

*Solicitors for the plaintiffs, respondents: Pedersen, Norman & McLeod, Regina.*

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[1] [1960] S.C.R. 210.

FAUBERT AND WATTS (*Plaintiff*) .....APPELLANT; 1959 *Dec. 7, 8

AND

TEMAGAMI MINING CO. LIMITED (*Defendant*) ..... RESPONDENT. 1960 Jan. 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Arbitration—Error of law upon face of award—Jurisdiction of arbitrators—Distinction where question of law arises in course of arbitration and where question of law specifically referred—Nature of order extending time to apply to set aside award—Leave required of Supreme Court of Canada—The Arbitration Act, R.S.O. 1950, c. 20, s. 30—The Supreme Court Act, R.S.C. 1952, c. 259, ss. 41, 44.*

The contract between the plaintiff and the defendant, for the construction by the plaintiff of a mining access road, provided for arbitration. Disputes arose between the parties and the plaintiff commenced arbitration proceedings. The defendant's motion to set aside the arbitrators' award on the grounds that it was bad on its face and that the arbitrators had exceeded their jurisdiction, was dismissed after the time for bringing the motion had been extended pursuant to s. 30 of *The Arbitration Act*. The Court of Appeal set aside the award and dismissed the plaintiff's cross-appeal in which he had contended that the defendant had accepted a benefit under the award and was thereby precluded from applying to have it set aside. The plaintiff appealed to this Court.

*Held:* The appeal should be dismissed; but the order of the trial judge extending the time to make the motion to set aside the award should be restored.

The order of the Court of Appeal, affirming the order made by the trial judge to extend under s. 30 of the Act the time for applying to set aside the award was a discretionary order within s. 44 of the *Supreme Court Act*. No appeal lay from that order unless leave be given by this Court under s. 41, and under the circumstances of this case leave would not be given.

There was no acceptance by the defendant of any benefit under the award or acquiescence in it so as to preclude it from applying for an extension of time, or from applying to set aside the award itself.

There was error of law appearing upon the face of the award. The authorities make a clear distinction between a case where disputes are referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him for decision. In the first case, the Court can interfere if and when any error of law appears on the face of the award but in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one. In the case at bar, the pleadings indicate that no specific question of law was submitted to the arbitrators.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Judson JJ.

1960

FAUBERT AND WATTS v. TEMAGAMI MINING CO. LTD.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside an arbitration award. Appeal dismissed.

*F. P. Varcoe, Q.C.*, for the plaintiff, appellant.

*J. J. Robinette, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal by Faubert and Watts against the judgment of the Court of Appeal for Ontario[1] allowing with costs an appeal by Temagami Mining Co. Limited from an order of Landreville J. dismissing without costs Faubert and Watts' cross-appeal, setting aside the order appealed from and also an award of a Board of Arbitration, dated April 1, 1958. The costs of the application to Landreville J. were also directed to be paid by Faubert and Watts. The latter will be referred to as the Contractor and Temagami Mining Co. Limited as the Company.

On October 9, 1956, these parties entered into a written agreement (the construction contract) whereby the Contractor agreed to

> (*a*) construct a mining access road (hereinafter called the "road"), as hereinafter provided, from a point on Highway No. 11 approximately four (4) miles south of the Village of Temagami, westerly a distance of approximately twelve (12) miles to Sulphide Point on Lake Temagami along the route indicated on the plan hereto annexed as Schedule "A", subject to slight variation therefrom to secure better grades; and
>
> (*b*) provide all the materials and complete the road including all bridges and culverts as follows and as in this agreement provided:—
>
> (i) the road will be built to the specifications prescribed for mining access roads which include a road bed of gravel twenty-eight feet (28') wide and at least one foot (1') thick over base, of a grade of not more than seven percent (7%) and curves of not more than ten degrees (10°);
>
> (ii) construction will be of the standard which may be required by the District Engineer of the Department of Highways at North Bay;
>
> (iii) construction to commence immediately and proceed continuously, subject to weather conditions, and to be completed to the satisfaction of the company's engineers, Geophysical Engineering & Surveys Limited.

[1] (1959), 17 D.L.R. (2d) 246.

The Company agreed to:—

(a) pay the Contractor in lawful money of Canada for the materials and services aforesaid at the rate of Ten Thousand Dollars ($10,000.00) per mile plus Two Dollars ($2) per cubic yard of necessary rock cut and One Dollar ($1) per lineal foot of necessary corduroy, exclusive of bridges and culverts for which payment will be made at cost of labour and materials plus ten percent (10%) and

(b) make payments on account thereof upon the certificate of the Engineers as set out.

"The General Conditions of the Contract" which were annexed to the agreement and were to be read into and form part thereof contained Art. XII the relevant parts of which provided:

In the case of any dispute between the Company, or the Engineers on its behalf, and the Contractor during the progress of the work, or afterwards, or after the determination or breach of the contract as to any matter arising thereunder, either party hereto shall be entitled to give to the other notice of such dispute and to demand arbitration thereof.

Such notice and demand being given, each party shall at once appoint an arbitrator and these shall jointly select the third. The decision of any two of three arbitrators shall be final and binding upon the parties who covenant that their disputes shall be so decided by arbitration alone and not by recourse to any court by way of action at Law. However, if within a reasonable time the two arbitrators appointed by the parties do not agree upon a third or a party who has been notified of a dispute fails to appoint an arbitrator, then a third arbitrator or an arbitrator to represent the party in default or both such arbitrators may, upon simple petition of the party not in default, be appointed by a Judge of the Supreme Court of the Province of Ontario.

The original construction agreement was amended by another between the same parties, dated June 4, 1957, clause (a) of which reads:

(a) Notwithstanding any other provision in the Construction Contract to the contrary, from and after the 4th day of June, 1957, the Company will pay the Contractor in lawful money of Canada, Three Dollars ($3) per cubic yard of necessary rock cut and Fifty-five Cents ($.55) per cubic yard for gravel fill hauled to and used for the construction of said road (exclusive of such material hauled for surfacing the mining access road to a uniform depth of one foot). Payment for said fill shall be based on pit measurements and the Contractor shall advise the Company, from time to time, of its intention to remove gravel fill from a pit which it shall designate and shall enable the employees or nominees of the Company to properly survey said pit both before and after any such gravel is removed therefrom by the Contractor. In the event the Contractor fails to enable the Company to perform any such survey or surveys, the Company shall be under no obligation to pay for gravel removed from the pit since the time a survey of

1960

FAUBERT AND WATTS v. TEMAGAMI MINING CO. LTD.

Kerwin C.J.

the pit was last made by the Company. Notwithstanding any other provision to the contrary, the Company shall not pay the Contractor for hauling gravel fill which is used in the construction of any part of said road from 0 + 0 to 264 + 00 on the grid laid out.

Prior to the agreement of October 9, 1956, the Contractor had entered into one dated September 13, 1956, with Geophysical Engineering & Surveys, Ltd., for the clearing of all trees, brush and other vegetation and the removal of all merchantable timber, windfalls and other fallen timber, fallen branches and other surface litter, on a location corresponding to that of the mining access road referred to in the agreement of October 9, 1956. As appears from clause (*b*) (iii) of this last mentioned agreement set out above, Geophysical Engineering & Surveys, Ltd. were the Company's engineers.

Disputes having arisen between the Contractor and the Company the former commenced arbitration proceedings in pursuance of Art. XII of the General Conditions. The procedure before the Board of Arbitration and what it did will be referred to later but it is first necessary to dispose of two points upon which we did not require to hear counsel for the respondent. The award dated April 1, 1958, was, according to the Contractor's factum, published and delivered to the solicitors for each party on April 2, 1958. According to the same factum, on May 15, 1958, the solicitors for the Contractor served a notice of motion asking for leave to enforce the said award, and on May 16, 1958, they were served with a notice of motion on behalf of the Company asking for an order extending the time for bringing a motion to set aside the award and for an order setting it aside on the grounds therein set forth. On May 20, 1958, the Company's motion was adjourned by consent and it was that motion which was heard by Landreville J. on June 16 and 17, 1958. That learned judge extended the time for bringing the motion pursuant to s. 30 of *The Arbitration Act*, R.S.O. 1950, c. 20:

30. (1) Unless by leave of the Court or a Judge, an application to set aside an award, otherwise than by way of appeal, shall not be made after six weeks from the publication of the award.

(2) Such leave may be granted before or after the expiration of the six weeks.

This was one of the matters as to which the Contractor cross-appealed to the Court of Appeal without success.

Mr. Varcoe agreed that Laidlaw J.A., with whom the other members of the Court of Appeal concurred, was correct in stating that he accepted the statement of counsel for the Company that the latter had made a mistake as to the date of publication of the award and the circumstances under which it became necessary to ask for an extension of time to set aside the award, but that Laidlaw J.A. was mistaken in stating that counsel for the Contractor therefore confined the cross-appeal to the submission "that a person who has accepted a benefit under an award is thereby precluded from applying to have it set aside". He did indeed make this latter submission before this Court but also contended that the Court can exercise its judicial discretion to extend the time for moving to set aside an award only if it can be shown that the applicant held a *bona fide* intention to move while the right to do so existed, that there were special circumstances which prevented him from so doing and that justice requires that leave be given. So far as that point is concerned we are all of opinion that no matter what the effect of the authorities to which counsel referred may be, the order of the Court of Appeal, affirming in that respect the order of the judge of first instance, was a discretionary order within s. 44 of the *Supreme Court Act* and that, therefore, no appeal lay unless leave be given by this Court under s. 41 and that under the circumstances leave would not be given.

The second point in the cross-appeal by the Contractor which was decided adversely to it by the Court of Appeal is as to the alleged approbation of the award. As to that we agree with Laidlaw J.A., speaking for the Court of Appeal, that while certain saleable timber left on the site of the work after the termination of the construction contract was found by the Board to be the property of the Company and while the Company transferred its right in the timber to one Roy Pacey in return for his clearing it from the right of way, there was a separate contract between the Contractor and the engineers for the clearing of the right of way. Any question as to the ownership of this timber arose under this separate contract and was in no way connected

1960

FAUBERT AND WATTS v. TEMAGAMI MINING CO. LTD.

Kerwin C.J.

with or dependent upon the terms of the construction contract, and there was no acceptance by the Company of any benefit under the award or acquiescence in it so as to preclude it from applying for an extension of time, or from applying to set aside the award itself.

The members of the Board of Arbitration were duly chosen; what might be called pleadings were then delivered,—"points of claim" by the Contractor, "points of defence and counter-claim" by the Company and "points of reply and defence to counter-claim" by the Contractor. In view of the award made by the Board it is important to note that after referring to the construction contract of October 9, 1956, para. 7 of the claim alleged that at the request of one Davidson, for and on behalf of the Company, the Contractor agreed to construct a road substantially different from that contemplated by the contract, the benefit of which had been accepted by the Company, and that "It was an implied term of the said agreement that the Defendant Company would pay to the Plaintiffs a reasonable remuneration on a *quantum meruit* basis for the construction of the said road. The said term is to be implied from the said request and the said acceptance by the Defendant Company. The Plaintiffs say that a reasonable remuneration for the construction of the said road would be the cost of construction incurred by the Plaintiffs plus ten per cent profit". These allegations were denied by para. 8 of the defence including a specific denial that there were implied terms of any agreement between the parties. Denial was also made that the Company had accepted as substantially complete the work done by the Contractor under the original construction contract and the Company maintained that the amending agreement of June 4, 1957, was entered into at the request of the Contractor for its financial benefit. Claims were also advanced by the Contractor as set out in the reasons of Laidlaw J.A. for damages under various heads.

The Board made this finding:—"We further find that the only means to settle the deeply involved dispute is to pay the Contractor the cost of the work, plus a percentage for profit", and then awarded the contractor the cost of the work plus ten per cent. "applied to the total cost of the

work after deducting therefrom the amount of equipment rentals". The Board also found that the contract was wrongfully terminated by the Company and therefore in addition to the cost of the work, plus ten per cent., awarded the Contractor $10,100 "as liquidated damages".

I find it unnecessary to refer to any of the other findings of the Board of Arbitration. It appears to me to be quite clear that there is error of law appearing upon the face of the award. The Board did not proceed to arbitrate the matters that were in dispute under the construction contracts but imposed their own view of what should be done and gave what they considered was a proper sum on a *quantum meruit* basis and furthermore allowed a large sum by way of "liquidated damages". The authorities are all mentioned in the 16th ed. of Russell on Arbitration but reference might be made particularly to the judgment of the House of Lords in *Absalom Ltd. v. Great Western (London) Garden Village Society Ltd.*[1]. Lord Russell with the concurrence of Lord Buckmaster and Lord Tomlin, at p. 607, points out that the authorities make a clear distinction between a case where disputes are referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him for decision. In the first, the Court can interfere if and when any error of law appears on the face of the award but in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one. Lord Warrington of Clyffe and Lord Wright came to a like conclusion for similar reasons. I read the relevant parts of the pleadings as indicating that no specific question of law was submitted by the parties to the Board and therefore I do not investigate the problem that would arise if this were not so as did LeBel J.A. with the concurrence of McGillivray J.A.

The appeal should be dismissed with costs. The formal judgment of the Court of Appeal set aside the order of Landreville J., but, as the latter extended the time within which the motion to set aside the award might be made, it

[1] [1933] A.C. 592.

1960

FAUBERT AND WATTS v. TEMAGAMI MINING CO. LTD.

Kerwin C.J.

would appear to be preferable if the affirmance of that part of the order of the judge of first instance were made clear in the judgment of this Court to be issued.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Varcoe, Duncan & Associates, Toronto.*

*Solicitors for the defendant, respondent: Lang, Michener & Cranston, Toronto.*

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TRADERS FINANCE CORPORATION LIMITED (*Plaintiff*) ..... APPELLANT;

AND

I. G. CASSELMAN (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Promissory note—Conditional sale contract—Transaction through agent—Transaction made in Saskatchewan and action brought in Manitoba—Endorsee of note with knowledge of want of consideration—Whether the Limitation of Civil Rights Act, R.S.S. 1953, c. 95, applicable—Whether procedural and not applicable to Manitoba action.*

The defendant C purchased a tractor-trailer from a dealer in Saskatchewan, but wished to make D appear to be the owner. Consequently, D went through the form of purchasing the equipment and made a down-payment with moneys supplied by C. In the conditional sale agreement, the dealer reserved title and D signed a promissory note for the unpaid balance. The agreement was assigned and the note endorsed to the plaintiff finance company, which knew who was the real owner. Subsequently D transferred the equipment to C, and this transfer agreement was concurred in by the plaintiff and the dealer. C then purported to give a promissory note for the unpaid balance to D. This note was endorsed by D to the dealer and then to the plaintiff, which sued upon it in Manitoba. The transfer agreement provided that this last mentioned note was collateral only to the original sale agreement and the note already held by the plaintiff. The trial judge maintained the action because s. 18 of *The Limitation of Civil Rights Act* was found to be *ultra vires*. The Court of Appeal dismissed the action. The plaintiff appealed to this Court and abandoned any argument against the validity of the legislation.

*Held:* The appeal should be dismissed.

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Martland and Judson JJ.

*Per* Kerwin C.J. and Taschereau, Cartwright, Fauteux, Martland and Judson JJ.: The submission that the Act was not applicable because the vendor had no lien for "all or part of the purchase price", failed. D was not the vendor to C but merely a nominee or agent of C executing formal documents for the purpose of putting the paper title in the person who was, from the beginning and to the knowledge of the plaintiff and the dealer, the real purchaser and equitable owner. There was, therefore, a reservation of a lien for all or part of the purchase price when the property was sold to D. The note given for that transaction was not enforceable under the Act because no debt existed to the knowledge of the payee and endorsee. The note given in the second transaction by the principal C to the agent D was in no higher position. Since there was a lien reserved there was no right of personal recovery under s. 18(1). The plaintiff held the note and sued upon it, knowing that it was given without consideration and without the existence of any personal obligation to pay.

The sections of the *Bills of Exchange Act* having to do with the rights of a holder in due course or the rights of a holder for value against an accommodation party, had no application.

The second submission to the effect that s. 18 was a procedural rule of the Courts of Saskatchewan and therefore inapplicable in an action brought in Manitoba, also failed. The section was in no way concerned with procedural rules for the enforcement of a right. It was concerned with substantive law.

It was unnecessary to deal with the validity of the statute since counsel for the plaintiff had abandonned any argument against it on constitutional grounds.

*Per* Locke J.: There was no consideration for the giving of the note, to the knowledge of the plaintiff who sued *qua* endorsee. The promise to pay, signed by D as the nominee of C, was, to the knowledge of the plaintiff, unenforceable by virtue of s. 18 of the Act, the rights of the promissee, in case of default, being limited to repossession. The note sued upon, being given as collateral security only for a non-existent debt, to the knowledge of all parties to the action, was thus without consideration and unenforceable at the suit of the plaintiff.

In the absence of consideration, the question as to whether s. 18 of *The Limitation of Civil Rights Act* was in conflict with the sections of the *Bills of Exchange Act,* dealing with the rights of holders for value or holders in due course, did not arise in this case.

Since the rights of a holder in due course or a holder for value to whom a note had been endorsed after maturity without knowledge of the lack of consideration, did not arise in this case, there was no necessity to pass on the question of the validity of s. 18 of the Act.

APPEAL from a judgment to the Court of Appeal for Manitoba[1], reversing a judgment of Monnin J. Appeal dismissed.

*J. L. McDougall, Q.C.,* for the plaintiff, appellant.

*H. B. Monk, Q.C.* and *G. A. Higenbottom,* for the defendant, respondent.

[1] (1959), 16 D.L.R. (2d) 183.

1960

TRADERS FINANCE CORPN. LTD. v. CASSELMAN

*L. A. Chalmers,* for the Attorney General of Canada.

*W. G. Doherty,* for the Attorney-General of Saskatchewan.

The judgment of Kerwin C.J. and of Taschereau, Cartwright, Fauteux, Martland and Judson JJ. was delivered by

JUDSON J.:—The appellant, Traders Finance Corporation Limited, sued the respondent, I. G. Casselman, as maker of a promissory note, which had been given in connection with the purchase of a tractor-trailer. The purchase was made in the Province of Saskatchewan, delivery of the property was taken there and all arrangements in connection with the transaction were made in that province. The proper law of these transactions is that of the Province of Saskatchewan but the action was brought in the Province of Manitoba and the main defence pleaded, and the only one that I propose to consider in these reasons, was based upon s. 18 of the Saskatchewan legislation known as the *Limitation of Civil Rights Act.* This section provides that "When an article, the selling price whereof exceeds $100, is hereafter sold, and the vendor, after delivery, has a lien thereon for all or part of the purchase price, the vendor's right to recover the unpaid purchase money shall be restricted to his lien upon the article sold, . . . ." This defence failed at the trial because of the conclusion of the learned trial judge that the legislation was beyond the provincial power and an infringement of the exclusive jurisdiction of Parliament under s. 91(18) of the *British North America Act* in so far as it purported to affect the liabilities of parties to bills of exchange and promissory notes. The Court of Appeal[1] reversed this conclusion, Adamson C.J.M. dissenting. On appeal to this Court, counsel for the plaintiff-appellant abandoned any argument against the legislation on constitutional grounds. It is, therefore, unnecessary to deal with the point further and I confine my reasons to a consideration of the only two grounds that were urged against the application of the legislation to the facts of this case. The first was that the legislation did not apply because of the peculiar form which the transaction took in this case, where the vendor according to the documents executed had no lien on

[1] (1959), 16 D.L.R. (2d) 183.

the property for "all or part of the purchase price." The second was that this legislation should be characterized as procedural and, in consequence, held to be inapplicable to an action brought on the note in the courts of the Province of Manitoba. I will deal with these submissions in turn.

The first submission makes it necessary to examine in some detail the form and substance of the transaction. The respondent Casselman wished to purchase a tractor-trailer from Transport Equipment Company Limited, a dealer carrying on business in the City of Regina. His intention was to incorporate a company which would own this vehicle and to have this company lease it to a transport company, Delarue Bros. Limited, which was engaged in the long distance haulage business between Regina and Toronto. Because the licensing regulations of the Province of Ontario did not permit operators to use leased equipment, to procure this licence it was decided to make Delarue Bros. Limited appear to be the owner. Therefore, Casselman caused Delarue Bros. Limited to go through the form of purchasing this equipment from the dealer with a substantial down-payment supplied by him. The usual conditional sale agreement was signed whereby the dealer reserved title. Attached to the agreement was the usual promissory note for the unpaid balance, which Delarue Bros. Limited signed. The agreement was then assigned and the note endorsed by the dealer to the appellant Finance company. All these transactions took place on September 30, 1952 and there is no doubt on the evidence that the Finance company knew that Delarue Bros. Limited was not the real purchaser and that Casselman Carriers Limited or Casselman personally was supposed to be in the background.

As the ostensible owner, Delarue Bros. Limited obtained a licence from the Province of Ontario and was then ready to transfer the equipment to the real owner and take a lease back. The transfer was made on October 14, 1952 by an agreement between Delarue Bros. Limited and Casselman Carriers Limited, concurred in by the Finance company and the dealer. Casselman Carriers Limited purported to give a new promissory note for the unpaid balance to Delarue

1960

TRADERS FINANCE CORPN. LTD. v. CASSELMAN

Judson J.

Bros. Limited, the apparent original purchaser. This is the note sued upon and it was endorsed by Delarue Bros. Limited to the dealer, and then to the Finance company.

The transfer agreement provides that it is not to disturb or affect in any way the security held by the Finance company on the equipment and that the new promissory note signed by Casselman Carriers Limited "shall not constitute payment of the Conditional Sale Contract and/or the promissory note given by the original Purchaser to the Dealer and now held by the Corporation (Traders Finance) and shall be collateral only to the said original Conditional Sale Agreement and the promissory note already held by the Corporation."

The new note was signed in this form: "Casselman Carriers Ltd. I. G. Casselman". The company, however, had not at that time been incorporated and both Courts have held that in the absence of other defences, a note so signed would have involved Casselman in personal liability. In this Court, counsel for Casselman did not question this finding and confined his argument to the other defences.

It is at once apparent that when Delarue Bros. Limited transferred this property to Casselman there was no reservation of title. Delarue Bros. Limited transferred all its right, title and interest, which was, of course, subject to the reservation of the legal title contained in the conditional sale agreement when Delarue became the apparent purchaser. If Delarue Bros. Limited had been an actual vendor of this equipment to Casselman the transaction would not be within s. 18 above mentioned because the vendor, in the words of the legislation, would, after delivery of the property, have no lien thereon for all or part of the purchase price. But Delarue Bros. Limited was not the vendor of this equipment to Casselman but merely a nominee or agent of Casselman executing formal documents for the purpose of putting the paper title in the person who was, from the beginning and to the knowledge of the Finance company and the dealer, the real purchaser and equitable owner. There was, therefore, a reservation of a lien for all or part of the purchase price when the property was sold to the known agent for Casselman. The note given for that transaction was not enforceable under the statute because no

debt existed to the knowledge of the payee and endorsee and the note given in the second transaction by the principal Casselman to the agent Delarue Bros. Limited and ultimately endorsed to the appellant Finance company is in no higher position. In spite of the form, this transaction was one between the dealer and Casselman through the intervention of an agent. It was done in two stages instead of one. There was a lien reserved and therefore there is no right of personal recovery. I have reached this conclusion on a consideration solely of s. 18(1). I do not regard the transaction as involving an agreement to make the provisions of the Act inapplicable and consequently null and void under s. 28. There was in fact no such agreement, either express or implied, for the form of the transaction was dictated solely by the determination to evade the licensing regulations of the Province of Ontario.

On this branch of the case, I therefore conclude that there was no debt between Casselman and Delarue Bros. Limited or between Casselman and the dealer because by the terms of the statute there could be no personal obligation to pay the unpaid balance in a transaction of this kind. The Finance company holds this note and sues upon it, knowing that it was given without consideration and without the existence of any personal obligation to pay. There is no suggestion here that Traders Finance was a holder in due course or a holder for value with Casselman as an accommodation maker. The sections of the *Bills of Exchange Act* having to do with the rights of a holder in due course or the rights of a holder for value against an accommodation party have no application and the action on the note fails unless it can be successfully argued that the legislation is a procedural rule of the Courts of Saskatchewan and inapplicable in an action brought in Manitoba.

The appellant, in my opinion, has set itself an impossible task in seeking to have this legislation characterized as procedural. The section takes away a personal right of action for the balance of the unpaid purchase price if a lien is reserved. It is in no way concerned with procedural rules for the enforcement of a right. Therefore, the fact that there is no equivalent legislation in the Province of Manitoba

1960

TRADERS FINANCE CORPN. LTD. v. CASSELMAN

Judson J.

does not help the appellant. This was undoubtedly a Saskatchewan cause of action, without a single element which might connect it with the Province of Manitoba. Even in the absence of persuasive authority it is difficult to see how the Manitoba Court could have done other than characterize the matter as one of substantive law. While it is true that the Manitoba Court must characterize this legislation by its own tests of what is procedure and what is substantive law and is not bound by what another jurisdiction may have done, there is no problem of conflicting characterization here because the Manitoba Court took the same view as that of the Saskatchewan Court of Appeal in *Canadian Acceptance Corporation Limited v. Matte*[1], where this very section was characterized as a matter of substantive law and not procedure. In that case the conditions were in reverse. The plaintiff sued on a Manitoba contract in the Courts of Saskatchewan. This statute was pleaded as a defence on the ground that it was a procedural rule of the forum. The judgment of the Court of Appeal was that the matter was one of substantive law and not of procedure and that this Saskatchewan legislation had no application to the Manitoba contract under litigation. I agree with this conclusion.

I would dismiss the appeal with costs. There should be no costs to or against the Attorney General of Canada or the Attorney-General for Saskatchewan.

LOCKE J.:—In my opinion the ground upon which this appeal should be dismissed is that, as it was found by Mr. Justice Coyne in the Court of Appeal[2], there was no consideration for the giving of the note, to the knowledge of the appellant who sues *qua* endorsee.

It was, no doubt, by reason of the fact that this defence was not clearly pleaded in the statement of defence and presumably not argued before Monnin J. that the question was not dealt with by him. While not raised expressly in the notice of appeal to the Court of Appeal, I judge that it was argued there, though the reasons delivered by Tritschler J.A.

[1] (1957), 22 W.W.R. 97, 9 D.L.R. (2d) 304.
[2] (1959), 16 D.L.R. (2d) 183.

do not mention the matter. The defence appears to me to be sufficiently raised by paras. 11 and 12 of the statement of defence.

I also agree with Coyne J.A. that, in the absence of consideration, the question as to whether subs. (1) and (4) of s. 18 of the *Limitation of Civil Rights Act* of Saskatchewan, R.S.S. 1953, c. 95, are in conflict with the sections of the *Bills of Exchange Act,* dealing with the rights of holders for value or holders in due course, does not arise in the circumstances of the present case. That the Province may validly restrict the rights of the vendor under the conditioned sale agreement in the manner described in the section is not questioned.

The evidence, in my opinion, supports the finding that the manager of the appellant company was aware at the time that, in entering into the agreement to purchase the equipment dated September 30, 1952, and in signing the promissory note bearing that date in which Transport Equipment Co. Ltd. was named as the payee, Delarue Brothers Ltd. acted simply as the nominee of Casselman, for the purposes explained in the evidence.

The conditional sale contract and the promissory note were assigned and endorsed respectively to the appellant and it was upon this security that the moneys were advanced by it to pay the purchase price of the equipment, apparently at or about the above mentioned date.

The undated transfer agreement, found by the learned trial judge to have been executed on October 14, 1952, was made with the consent of the appellant, and it was on that date that the promissory note sued upon was given by Casselman to Delarue Brothers Ltd. and negotiated by endorsement to the appellant.

While the conditional sale contract on the face of it obligated Delarue Brothers Ltd. to pay to the vendor by instalments the balance of the purchase price amounting to $20,391.35, the promise to pay was, to the knowledge of the appellant, unenforceable by virtue of the provisions of s. 18, the rights of the promisee, except in certain respects with which we are not concerned, being limited in case of default to repossessing the machinery.

1960

TRADERS FINANCE CORPN. LTD. v. CASSELMAN

Locke J.

The transfer agreement referring to the note then given by Casselman, so far as it needs to be considered, reads:

> The Dealer and Purchaser further agree that the new promissory note drawn by the Sub-Purchaser (Casselman) payable to the Purchaser (Delarue Brothers Ltd.) and by the Purchaser and the Dealer endorsed to the Corporation shall not constitute payment of the Conditional Sale Contract and/or the promissory note given by the original Purchaser to the Dealer and now held by the Corporation and shall be collateral only to the said original Conditional Sale Agreement and the promissory note already held by the Corporation.

The note sued upon, being given as collateral security only for a non-existent debt, to the knowledge of all of the parties to the action, was thus without consideration and unenforceable at the suit of the appellant.

While upon the argument before us counsel for the appellant stated that he did not contend that subs. (1) and (4) of s. 18 of the *Limitation of Civil Rights Act* were *ultra vires* and did not seek to support the judgment in the appellant's favour given at the trial on that ground, we would not, in my opinion, be relieved of our duty to deal with that question if the rights of a holder in due course or a holder for value to whom the note had been endorsed after maturity without knowledge of the lack of consideration were involved. The learned trial judge and the learned Chief Justice of Manitoba have both expressed the opinion that these portions of the section, in so far as they affect the rights of the holder of a negotiable instrument, are *ultra vires* the Province, while Coyne and Tritschler JJ.A., who constituted the majority in the Court of Appeal, have expressed the contrary opinion.

It is well that it be made clear that no such questions arise in this action. There is nothing in the reasons for judgment delivered in this Court in the case of *Attorney-General for Alberta and Winstanley v. Atlas Lumber Co. Ltd.*[1], which as between the original parties to the note affects the rights of the promissor to rely upon either the lack or a failure of consideration by way of defence.

I would dismiss this appeal with costs. I would make no order as to the costs of the Attorney General of Canada or of the Attorney-General of Saskatchewan.

*Appeal dismissed with costs.*

[1] [1941] S.C.R. 87, 1 D.L.R. 625.

1960

TRADERS FINANCE CORPN. LTD. v. CASSELMAN

Locke J.

*Solicitors for the plaintiff, appellant: Parker, Tallin, Kristjansson, Parker & Martin, Winnipeg.*

*Solicitors for the defendant, respondent: Monk, Goodwin & Higenbottam, Winnipeg.*

*Solicitor for the Attorney General of Canada: L. A. Chalmers, Ottawa.*

*Solicitor for the Attorney-General of Saskatchewan: R. S. Meldrum, Regina.*

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EVA KAUFFMAN (*Plaintiff*) .....APPELLANT;

1959

*Dec. 3, 4

AND

TORONTO TRANSIT COMMISSION (*Defendant*) ..... } RESPONDENT.

1960

Jan. 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Negligence—Passenger injured on escalator—Persons preceding victim scuffling and falling back on victim—Whether duty to provide attendant—Whether negligence in having metal-clad hand rail instead of rubber type—Absence of causality.*

The plaintiff, who was going up an escalator of the defendant, was preceded by a man and two youths ahead of the man. The two youths started pushing each other and fell on the man. All three fell on the plaintiff who was knocked down and carried up the escalator. The jury found negligence on the part of the defendant in that it (1) had installed an untested hand rail and (2) had failed to supply supervision. This verdict was set aside by the Court of Appeal on the grounds of absence of causality and of a duty to provide attendants. The plaintiff appealed to this Court.

*Held* (Cartwright J. *dissenting*): The appeal should be dismissed.

*Per* Kerwin C.J. and Judson J.: While the obligation upon carriers of persons is to use all due, proper and reasonable care and the care required is of a very high degree, such carriers are not insurers of the safety of these persons. On the first ground of negligence, the defendant has met the required standard of care to carry safely as far as reasonable care and forethought can attain that end. The fact that the hand rail used was round, corrugated and metal-clad, while the type in use in escalators in some other cities was oval in shape and made of black rubber, did not contribute to the accident. That hand rail was installed after a thorough investigation.

As to the second ground of negligence, the defendant did not owe the plaintiff a duty to supply supervision. What occurred was not a danger, usual or unusual, which the defendant knew or ought to have known. Moreover, the jury's finding was not justified by the evidence.

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

1960

KAUFFMAN v. TORONTO TRANSIT COMM.

*Per* Locke and Martland JJ.: There was no evidence in this case upon which a jury might be asked to find that there was a legal duty to preserve order among the passengers so that other passengers might not be injured. Construing the first finding of the jury as saying that the type of hand rail used was inadequate compared to a rubber type, it was apparent from the evidence that the nature of the grip upon the hand rail had nothing whatever to do with the accident.

Construing the jury's finding of lack of supervision as meaning a failure to have an attendant in the immediate vicinity of the escalator who could instantly stop it, the case of the plaintiff was not assisted. It could not be said that a reasonable person would contemplate injury to persons such as occurred in this case, or that the defendant was under a duty of maintaining an attendant at the foot of the escalator to avoid the consequences of disorderly conduct on the part of those using it.

*Per* Cartwright J., *dissenting*: The second answer of the jury should be construed as a finding that the defendant ought to have maintained such a system of supervision that the escalator could and would be promptly stopped in an emergency. There was evidence that some of the injuries would have been avoided if the escalator had been stopped promptly. There was a considerable body of evidence that in the case of many escalators, including some in several large stores in the city, there are employees in close proximity who are shown how to stop the escalator and instructed to stop it at once if an emergency arises. The jury was entitled to be guided by that evidence and to fix the standard of care accordingly.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a jury's finding on negligence. Appeal dismissed, Cartwright J. dissenting.

*J. J. Robinette, Q.C.*, and *I. W. Outerbridge*, for the plaintiff, appellant.

*Hon. R. L. Kellock, Q.C.*, and *D. J. Wright*, for the defendant, respondent.

The judgment of Kerwin C.J. and of Judson J. was delivered by

THE CHIEF JUSTICE:—This is an appeal against a judgment of the Court of Appeal for Ontario[1] allowing an appeal from the judgment of McLennan J. after the verdict of a jury and dismissing the action of the appellant, Eva Kauffman. About midnight on February 11, 1955, she and a companion, as paying passengers, alighted from a northbound subway train at the St. Clair Avenue station, all of which was part of the transportation system operated by the respondent, Toronto Transit Commission, in the City of Toronto. Together with a number of other people they

[1] [1959] O.R. 197, 18 D.L.R. (2d) 204.

made their way to an escalator upon which the appellant stepped first, followed by her companion. Immediately in front of the appellant was a man and in front of him two young men. The latter began scuffling and fell against the man who, as a result, was knocked back upon the appellant. Either these three or at least two of them rested upon the appellant and from the evidence it is undoubted that a great part of the severe injuries she sustained was as a result of her being in that position.

In the action brought by the appellant against the respondent the statement of claim alleged negligence on the part of the respondent as follows:

(*a*) It failed to provide an attendant who could stop the escalator, or in the alternative if an attendant was provided he failed to stop the escalator when he knew or ought to have known the Plaintiff had fallen.

(*b*) In designing the escalator it failed to take into consideration the danger inherent in its use, namely, that it would be subject to large crowds attempting to ride it at the same time and what might be expected to happen if someone above lost his balance and fell against those below.

(*c*) It failed to design a handrail adequate for the purpose, especially in the event passengers were jostled by those above.

(*d*) It failed to provide adequate supervision of its passengers to prevent them jostling each other while on the escalator.

(*e*) The ascent of the escalator was too steep and the speed too fast.

(*f*) It failed to erect signs showing the location of the emergency buttons so that those in the vicinity of the escalator could stop it readily.

The questions put to the jury and their answers are as follows:

1. Q: Was there any negligence on the part of the defendant which caused or contributed to the accident? Answer "Yes" or "No".
   A: Yes.
2. Q: If your answer to Question 1, is "Yes, of what did such negligence consist?" Answer fully.
   A: That the defendant, in acquiring an escalator of radical departure in handrail design, did not sufficiently test or cause to be tested by qualified experts, the co-efficient of friction and contour of the Peelle Motor Stair handrail.
   That the defendant failed to supply supervision.
3. Q: Irrespective of how you answer the other questions, at what amount do you assess the total damages of the Plaintiff?
   A: $35,000.00.

The allegation contained in (*e*) of the statement of claim was withdrawn at the trial and that in (*f*) must be taken to be negatived by the findings of the jury. As the amount

1960

KAUFFMAN v. TORONTO TRANSIT COMM.

Kerwin C.J.

claimed in the statement of claim was $25,000, judgment was entered for that sum. No question as to the amount of damages was raised in the Court of Appeal or in this Court.

The Court of Appeal was unanimous in setting aside the judgment. As to the first finding of negligence, the Court was of opinion that there was no evidence to justify a finding that the type of handrail in use at the St. Clair Avenue station was a contributing cause of the appellant's accident, and, as to the second ground, that it was not supported by the evidence and in any event was not part of the duty owing by the respondent to the appellant.

I take it that the respondent was a carrier of the appellant for hire but even on that assumption the appeal in my opinion fails. Construing the first finding of negligence, as did the Court of Appeal, in a manner most favourable to the appellant, I agree that the attack by her upon the handrail was with reference to its design. In the type of escalator upon which the accident occurred, known as the Peelle escalator, the handrail was round, corrugated and metal clad, while the type of handrail in use in escalators in some other cities was oval in shape and made of black rubber. Accepting the proposition that a person could secure with his hand a more secure grip upon the oval rubber rail than on the circular metal rail, evidence was given that accidents had been caused in other places because the hands of riders could not be disengaged as easily from the rubber rail as from the metal one at the point where the rail enters the newel post. Although it appears that a considerable saving was effected by the adoption of the Peelle escalator, that action was taken after a thorough investigation by the respondent and its advisers. The statement in the Privy Council in *Vancouver General Hospital v. McDaniel*[1], followed and applied in *MacLeod v. Roe*[2], that "a defendant charged with negligence can clear his feet if he shows that he acted in accord with general and approved practice" applies to an action by a passenger against the carrier. It should be pointed out, however, that the statement of Lord Dunedin in *Morton v. Dixon*[3], referred to in the reasons for

[1] (1934) 152 L.T. 56 at 57-8. [2] [1947] S.C.R. 420, 3 D.L.R. 241.
[3] [1909] S.C. 807 at 809.

judgment of the Court of Appeal and which, as pointed out in those reasons, was quoted and applied by Lord Normand in *Paris v. Stepney Borough Council*[1], must be read and applied with care. That statement is:

> Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.

The decision of the House of Lords in *Morris v. West Hartlepool Steam Navigation Co. Ltd.*[2], and particularly the remarks of Lord Cohen at p. 578 "that the use of the word 'folly' may lead to misconception of what the law is if it is read in the sense of 'ridiculous' ", indicate the futility of attaching too much importance to the words of an expression used in a judgment rather than to the reasons underlying it.

While the obligation upon carriers of persons is to use all due, proper and reasonable care and the care required is of a very high degree, *Readhead v. Midland Railway Co.*[3], such carriers are not insurers of the safety of the persons whom they carry. The law is correctly set forth in Halsbury, 3rd ed., vol. 4, p. 174, para. 445, that they do not warrant the soundness or sufficiency of their vehicles, but their undertaking is to take all due care and to carry safely as far as reasonable care and forethought can attain that end. Here the respondent has met that standard of care so far as the first ground of negligence found by the jury is concerned.

As to the second ground of negligence found by the jury, I agree with the Court of Appeal that such a finding is not justified by the evidence. Furthermore I find it impossible to say that the respondent owed the appellant the duty of supplying supervision. In view of the charge of the trial judge it may be taken that the jury meant by their second finding that in view of the fact that the respondent was using the Peelle installation at the St. Clair Avenue station,

[1] [1951] A.C. 367 at 382. [2] [1956] A.C. 552.
[3] (1869), L.R. 4 Q.B. 379.

1960

KAUFFMAN v. TORONTO TRANSIT COMM.

Kerwin C.J.

where crowds might be expected, someone on its behalf should have been on duty at all times to stop the escalator if some unexpected event, like that in question, occurred. To place such a duty upon the respondent is unjustified. What occurred was not a danger, usual or unusual, which the respondent knew or ought to have known.

The appeal should be dismissed with costs, if demanded.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J.:—The direct cause of the fall sustained by the appellant, as is made clear by the evidence, was the wrongful and grossly negligent conduct of two young men named Peters and Auchincloss who were standing ahead of the appellant and who commenced to wrestle on the escalator while it was ascending. In wrestling with each other they apparently fell backward against a third young man described by the appellant as a large man, and he in turn against and upon the appellant. From the scant description in the evidence of these three men whose combined weight was suddenly and without warning projected against the appellant, it may properly be inferred that their weight aggregated not less than 450 lbs.

In an attempt to engage the liability of the transit commission for the wrongful acts of these two men, one of the counts of negligence asserted in the statement of claim was that the respondent had "failed to provide adequate supervision of its passengers to prevent them jostling each other when on the escalator." It was apparently in respect of this head of negligence that the second answer of the jury was made, since it read:

The defendant failed to supply supervision.

The basis of this allegation would appear to be that a carrier of passengers for reward who invites them to use its premises for passing from one of its conveyances to another is under a legal duty to preserve order among them so that other passengers will not be injured. There is no evidence in the present matter upon which a jury might be asked to find that, in the circumstances, any such duty rested upon the respondent. There is nothing to suggest that these two men whose wrongful act resulted in the appellant being

thrown backward on the escalator had theretofore been guilty of any rowdy or disorderly conduct which would suggest that any injury to other passengers might be reasonably apprehended. While the names of these young men were obtained they were not called by either side as witnesses at the trial and they were not made parties to the action.

The liability, if there is such, must be based upon the other grounds and can be supported, if at all, only by the answer made by the jury to the second question which reads:

> The defendant, in acquiring an escalator of radical departure in handrail design did not sufficiently test or cause to be tested by a qualified expert the co-efficient of friction and contour of the Peelle Motorstair handrail.

The jury apparently adopted the expression "co-efficient of friction" from evidence given by some of the experts in the course of the hearing. This refers in its context to the adhesive qualities of the material of which the handrail was made and a great deal of time was taken up at the trial in demonstrating what appears to require no demonstration, that a handrail having a rubber covering is more easily gripped and has greater adhesive qualities than one with a surface of metal. According to some of the witnesses, the difference is slight but, in the view I take of the matter, the point is of no moment.

The language of a jury in explaining the reasons for its verdict ought not to be construed too narrowly: *Pronek v. Winnipeg, Selkirk and Lake Winnipeg Railway Company*[1]. Adopting this view, the answer, giving it the most favourable interpretation from the standpoint of the appellant, may be construed as a finding that the handrail of the Peelle escalator was inadequate for the purpose for which it was intended, in that it was more difficult to grip firmly than the handrail used by the Otis-Fenson Elevator Company and the Westinghouse Company, which were at the time the largest suppliers of such equipment in Canada and the United States.

The appellant is a lady of some sixty years of age and, on the evening of the accident in company with a Mrs. Mathewson, entered the escalator en route from a station

[1] [1933] A.C. 61 at 66, 1 D.L.R. 1, 40 C.R.C. 102.

1960

KAUFFMAN v. TORONTO TRANSIT COMM.

Locke J.

of the underground to a street car in the street above, to complete her journey home. She was wearing woollen gloves and says that she gripped the handrail with her right hand as the escalator moved up and that, when it was about one-third way to the top, she heard the noise of a scuffle ahead of her and was immediately thereafter knocked backwards. The person whom she described as the large man fell on top of her and the two young men on top of him.

It is perfectly apparent from the evidence that the nature of the grip upon the handrail had nothing whatever to do with the accident. It is impossible to suggest seriously that when the weight of three men amounting to approximately 450 lbs. was projected suddenly from above against this elderly lady she would not have fallen backwards, whatever the nature of the grip upon the handrail. There is no evidence in this record to suggest otherwise, as is pointed out by Mr. Justice Morden. The case appears to have been presented to the jury as if it were a contest as to whether a passenger upon the escalator would not have a firmer grip upon a handrail covered with rubber than upon the metal handrail of the Peelle escalator, without considering whether in the circumstances described in the evidence it would have made the slightest difference. It is obvious that it would not have.

Unless the nature of the covering of the handrail either caused or contributed to the accident, the material of which it was made is in the present matter of no moment. These considerations are sufficient to dispose of this appeal in so far as it involves the issue of liability for the appellant's fall backwards upon the escalator, since the respondent is not liable for the wrongful act of Peters and Auchincloss.

There is some evidence in this record upon which a jury might properly find that, in addition to the injuries sustained by the appellant when she fell backwards and the three men fell upon her, further injury was occasioned thereafter by reason of the fact that the escalator was not stopped. Though the respondent is not liable for any injuries caused by the fall itself, it might have been contended that a duty rested upon it to instantly stop the escalator when

the fall occurred. Thus, to the extent that the injuries were increased during this interval, it might be said that the respondent was liable.

This aspect of the matter was not put to the jury as a distinct issue, the appellant's position throughout having been that the respondent was liable for the fall itself by reason of the insufficiency of the handrail. Sub-para. (*a*) of para. (4) of the statement of claim, which contained the counts of negligence, alleged that the respondent had "failed to provide an attendant who could stop the escalator, or in the alternative if an attendant was provided he failed to stop the escalator when he knew or ought to have known the plaintiff had fallen."

There was evidence that, in a booth or compartment occupied by a ticket collector some 80 feet distant from the foot of the escalator, there was a button which would enable the collector to bring the escalator to a stop immediately.

The ticket collector had died before the trial and his evidence had not been taken *de bene esse*. This count of negligence was explained to the jury in the judge's charge but nothing was said as to the extent of the liability of the respondent for the appellant's injuries if it was not liable, for such that resulted from the fall itself and the falling of the three men on top of her, and the learned trial judge was not asked to instruct the jury upon this aspect of the matter.

As I have pointed out, one of the counts of negligence alleged in terms the negligence to be a failure to provide adequate supervision, and it is only in this count that the word "supervision" appeared. Accordingly, the answer finding a failure to supply supervision should, in my opinion, be held to refer to the alleged failure to supply adequate supervision of the passengers. If there had been any doubt upon the matter, the jury might have been asked when they returned to clarify this answer but no such request was made on behalf of the appellant and a motion for judgment was made upon the findings as they were made. In the judgment of the Court of Appeal, however, Morden J.A. has treated the matter as if the answer referred to the count made in sub-para. (*a*) of para. 4 above quoted.

1960

KAUFFMAN v. TORONTO TRANSIT COMM.

Locke J.

If the matter be thus considered, it is to be noted that the ticket collector was an attendant who could stop the escalator by using the button in the ticket booth and there is no finding of negligence on the part of the ticket collector for failing to do so. Both the specific charges in sub-para. (*a*) are accordingly negatived unless the finding of lack of supervision be construed as meaning a failure to have an attendant in the immediate vicinity of the escalator who could instantly stop it if an accident such as this occurred.

I would not so construe the finding but, if this is to be taken as its meaning, the case of the appellant is not, in my opinion, assisted.

The evidence given on behalf of the respondent at the trial shows that the Peelle escalator was chosen for use in the subways in Toronto on the advice of Charles DeLeuw, a consulting engineer of very wide experience in such matters, and of W. H. Patterson, the chief engineer of the respondent, who investigated the various available escalators before it was decided to install the escalators in question. Escalators of the same kind and employing the same type of handrail had been theretofore installed in the New York bus terminal in considerable numbers and had been found satisfactory, and there is nothing in the evidence to suggest that from a mechanical standpoint the escalator in question had not worked perfectly since its installation and was not operating properly on the night in question. I find nothing in this evidence, therefore, to suggest that, due to any apprehension of anything going wrong mechanically, there was any ground for imposing upon the transit commission any obligation to have an attendant at the place in question other than the collector who had the means at hand to stop the operation instantly. It cannot be said, in my opinion, that a reasonable person would contemplate injury to persons using the escalator such as occurred in the present matter, or that the respondent was under a duty of maintaining an attendant at the foot of the escalator to avoid the consequences of disorderly conduct on the part of those using it.

In *Glasgow Corporation v. Muir*[1], Lord Macmillan said in part:

> The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question . . . The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen.

In my opinion this appeal fails and should be dismissed with costs if they are demanded.

CARTWRIGHT J. (*dissenting*):—The facts out of which this appeal arises are stated in the reasons of other members of the Court and in those of Morden J.A., who delivered the unanimous judgment of the Court of Appeal[2].

In approaching the question whether the jury's verdict was rightly set aside it is necessary to bear in mind certain well settled principles, which are sufficiently stated in the following three quotations:

In *Jamieson v. Harris*[3], Nesbitt J., speaking for the majority of the Court, said:

> We fully recognize the principle that if the verdict could fairly be supported upon any evidence upon which reasonable men might come to a conclusion in its favour that it should not be set aside because the appellate court did not agree with the conclusions reached. We also fully agree that answers by a jury to questions should be given the fullest possible effect, and, if it is possible to support the same by any reasonable construction, they should be supported.

In *C.N.R. v. Muller*[4], Duff C.J.C., speaking for the majority of the Court, said:

> We premise that it is not the function of this Court, as it was not the duty of the Court of Appeal to review the findings of fact at which the jury arrived. Those findings are conclusive unless they are so wholly unreasonable as to show that the jury could not have been acting judicially. In construing the findings, moreover, one must not apply a too rigorous critical method; if, on a fair interpretation of them, they can be supported upon a reasonable view of the evidence adduced, effect should be given to them.

[1] [1943] A.C. 448 at 457.
[2] [1959] O.R. 197, 18 D.L.R. (2d) 204.
[3] (1905), 35 S.C.R. 625 at 631.
[4] [1934] 1 D.L.R. 768 at 769, 41 C.R.C. 329.

1960

KAUFFMAN v. TORONTO TRANSIT COMM.

Cartwright J.

In *Sigurdson v. B.C. Electric Railway Co. Ltd.*[1], Lord Tucker, delivering the reasons of the Judicial Committee, said:

> Before turning to examine the summing-up in the light of these criticisms it may be well to observe that the issues involved in this and other similar cases turn upon questions of fact and that when a jury is the tribunal of fact to which those issues are committed their findings—subject to questions of misdirection or misreception of evidence—cannot be set aside unless they are of such a nature that having regard to the evidence no reasonable men could have arrived thereat. It is not for an appellate court however much it may differ from the conclusions reached by the jury to substitute its own findings for those of the jury.

I, of course, do not suggest that these principles were absent from the minds of the learned Justices of Appeal. It was by virtue of their application that, in dealing with the jury's second finding of negligence, Morden J.A. said:

> The second ground of negligence found by the jury was that "the defendant failed to supply supervision". Counsel for the appellant made a vigorous attack upon this finding. He submitted that if it meant the defendant should have provided attendants whose duty it would be to prevent passengers jostling (as pleaded in paragraph 4(*d*)) then it was not a good finding in law. The respondent's counsel submitted that the jury meant the failure of the defendant to have an attendant immediately beside the escalator whose duty it would have been to stop the escalator at the time the riders fell. (Paragraph 4(*a*)). There was evidence that the plaintiff suffered the greater part of her injuries after her fall and as she was being carried up the escalator lying under the bodies of two or three persons. For the purpose of this appeal, I am prepared to construe liberally this finding of the jury and accept the interpretation the respondent's counsel places on it.

In my view, read in the light of the evidence and of the full and careful charge of the learned trial judge, this answer of the jury should be construed as a finding that the defendant ought to have maintained such a system of supervision of its escalator that it could and would be promptly stopped if an emergency arose calling for such action.

The question then is whether, so construed, the answer of the jury supports the verdict.

I agree with the view implicit in the passage from the reasons of Morden J.A., quoted above, that there was evidence upon which it was open to the jury to find that the greater part of the appellant's injuries would have been avoided if the escalator had been stopped with reasonable promptitude after her fall.

[1] [1953] A.C. 291 at 298-9, [1952] 4 D.L.R. 1, 69 C.R.T.C. 149.

The mechanical means provided for stopping the escalator consisted of a red button at the top and a similar one at the bottom of the escalator and a third in a collector's "cage" situated some 75 or 80 feet from the bottom of the escalator and from which it was said the employee stationed there would have a view of the escalator. The employee who was on duty in this "cage" at the time of the accident died prior to the trial and his evidence had not been taken *de bene esse*. It is undisputed that the escalator was not stopped at any time. When the appellant was knocked down she was about one third of the way up the escalator. The time taken to carry a passenger from the bottom to the top was about twenty seconds.

It is clear that when the three men ahead of her and the appellant herself fell there must have been a visible state of emergency; it is also clear that there were screams from the appellant and her friend; but nothing was done by anyone to stop the escalator. No explanation was forthcoming as to why the employee in the "cage" did nothing. If an explanation was required the onus of furnishing it rested upon the respondent whose employee he was and in whose knowledge the explanation, if any, must have lain.

In these circumstances it was, I think, open to the jury to find that the respondent was on the horns of a dilemma; either it had not instructed its employee to stop the escalator at once if an emergency arose or if it had given adequate instructions its employee had disregarded them.

There was evidence that some escalators in this country and in the United States are operated without attendants, but there was also a considerable body of evidence that others have properly instructed attendants stationed by them. Notably, it was shown that in several large stores in the city of Toronto there are either attendants stationed at the escalators or clerks, in much closer proximity thereto than was the employee of the respondent in this case, who are shown how to stop the escalator and instructed to stop it at once if an emergency arises.

1960

KAUFFMAN v. TORONTO TRANSIT COMM.

Cartwright J.

The following passage from Phipson on Evidence, 9th ed., p. 116, was cited with approval in this Court in *Fagnan v. Ure et al.*[1]:

> On questions involving negligence, reasonableness, and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, and even the general practice of the community, or in some cases of the particular individuals, are admissible as affording a measure by which the conduct in question may be gauged. Such evidence does not, of course, bind the jury as a fixed legal standard; it is merely one, amongst other circumstances, by which they may be guided,

as was also the following statement of Holmes J. in *Texas and Pacific Railway Company v. Behymer*[2]:

> What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

The duty owed by the respondent to the appellant was, as is pointed out in the reasons of the Chief Justice, to use all due, proper and reasonable care, and the care required is of a very high degree. It is of a higher degree, in my opinion, than that owed to their customers by those storekeepers who were shown in the evidence to have taken the precautions I have described above.

In a case such as this where the precautions to be taken are not prescribed by statute "the standard of duty must be fixed by the verdict of a jury", to use the words of Lord Wright in *Lochgelly Iron and Coal Co. v. M'Mullan*[3].

In my view, the learned trial judge could not properly have withdrawn this issue from the jury; there was evidence, notably that of the established practice in other Toronto buildings, to support their findings.

In *McCannell v. McLean*[4], Duff C.J.C., in delivering the judgment of the Court, said:

> There being some evidence for the jury, that is to say, the evidence being of such a character that the trial judge could not properly have withdrawn the issue from the jury, the question whether, in such circumstances, a jury, considering the evidence as a whole, could not reasonably arrive at a given finding may be, it is obvious, a question of not a little nicety; and the power vested in the court of appeal to set aside a verdict as against the weight of evidence in that sense is one which ought to be

[1] [1958] S.C.R. 377 at 381, 13 D.L.R. (2d) 273.
[2] (1903), 189 U.S. 468 at 470.
[3] [1934] A.C. 1 at 23.
[4] [1937] S.C.R. 341 at 345, 2 D.L.R. 639.

exercised with caution; it belongs, moreover, to a class of questions in the determination of which judges will naturally differ, and, as everyone knows, such differences of opinion do frequently appear.

In this case I have the misfortune to differ from the opinion of the learned Justices of Appeal and that of other members of this Court. I do not think it can be affirmed that no jury acting reasonably could have found as they did on the second ground. I do not find it necessary to consider the other ground on which they based their verdict.

I would allow the appeal and restore the judgment at the trial with costs throughout.

*Appeal dismissed with costs if demanded,* CARTWRIGHT J. *dissenting.*

*Solicitors for the plaintiff, appellant: Haines, Thomson, Rogers, Howie & Freeman, Toronto.*

*Solicitor for the defendant, respondent: J. W. H. Day, Toronto.*

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIAL, CONSTRUCTION AND FUEL TRUCK DRIVERS, LOCAL NO. 213, VANCOUVER, BRITISH COLUMBIA, A.F. OF L. (*Defendant*) .....APPELLANT;

1959
*May 13, 14

1960
Jan. 26

AND

HENRY THERIEN (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Labour—Liability of union for tort—Illegal threats to picket company employing independent contractor—Whether contractor has cause of action against union—The Labour Relations Act, 1954 (B.C.), c. 17, ss. 4, 5, 6, 7—The Trade-unions Act, R.S.B.C. 1948, c. 342.*

The plaintiff, an independent contractor, operated a trucking business. He drove one truck and hired drivers to operate the others. The firm which for years had engaged his services entered into a closed shop

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Martland JJ.

1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN

agreement with the defendant, a trade union within the definition of that expression in the *Labour Relations Act*. The plaintiff agreed to hire only union members, but refused to join the union himself, presumably because he could not lawfully do so. The union threatened to put his truck off the job and to picket the firm. Finally, the firm discontinued doing business with him. The trial judge maintained the action for damages and granted an injunction restraining the union from interfering with the plaintiff in the operation of his business. This judgment was affirmed by the Court of Appeal. The union appealed to this Court and contended that it was not a legal entity which could be found liable in tort, and that the evidence did not disclose a cause of action.

*Held:* The appeal should be dismissed.

*Per* Curiam: The plaintiff, being a trade union certified as a bargaining agent under the *Labour Relations Act*, was a legal entity which could be made liable in name for damages either for breach of a provision of the Act or under the common law. The granting by the Legislature, of rights, powers and immunities to trade unions was quite inconsistent with the idea that it was not intended that they should be constituted legal entities exercising these powers and enjoying these immunities as such. *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, applied; *Orchard v. Tunney*, [1957] S.C.R. 436; *Society Brand Clothes v. Amalgamated Clothing Workers of America*, [1931] S.C.R. 321; *International Ladies Garment Workers Union v. Rothman*, [1941] S.C.R. 388, distinguished.

The evidence disclosed a cause of action. By threatening to picket the jobs, instead of resorting to the grievance procedure in the agreement, the union was in breach both of the terms of the agreement and of s. 21 of the *Labour Relations Act*. This resulted in the injurious termination of the plaintiff's arrangement with the firm. The plaintiff was asserting a common law cause of action and to ascertain whether the means employed were illegal inquiry could be made both at common law and of the statute law.

*Per* Kerwin C.J. and Cartwright J.: Assuming, without deciding, that the wrongful act committed by the union was "in connection with a trade or labour dispute", s. 2 of the *Trade-unions Act* did not assist the union in the circumstances of this case. The issue as to whether the Act had been authorized by the union was not raised either on the pleadings or in the evidence.

The argument that the union did not intend to ignore the grievance procedure in the agreement, failed on the facts.

*Per* Taschereau and Locke JJ.: While it was alleged before this Court that the wrongful acts were not authorized or concurred in by the union, the point was not argued. If it was intended to raise such a defence, the facts relied upon should have been pleaded.

Section 2 of the *Trade-unions Act* had no bearing upon the matter. The threats were not done in connection with any trade or labour dispute within the meaning of the Act, which contemplates disputes between employers and employees.

*Per* Martland J.: There was, in this case, no trade or labour dispute within the meaning of s. 2 of the *Trade-unions Act*. A difference of view between an employer and employees on the interpretation of a collective agreement, in the circumstances of this case, did not constitute "a trade or labour dispute" within the section.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Clyne J. Appeal dismissed.

*J. L. Farris, Q.C.*, and *V. L. Dryer, Q.C.*, for the defendant, appellant.

*J. J. Robinette, Q.C.*, and *G. Ladner*, for the plaintiff, respondent.

THE CHIEF JUSTICE:—I am in substantial agreement with the reasons of Locke J. on the two main questions, i.e., that the appellant is an entity which can be sued and that it committed an actionable wrong.

As to the first, the point is raised at p. 7 of the appellant's factum, where it is stated "The Union is not a suable entity: .....(*c*) under the Trade Unions Act." This is expanded at p. 19 of the factum where s. 2 of the *Trade-unions Act*, R.S.B.C. 1948, c. 342, is set out in para. (1) of (*c*), and at p. 20 the following appears:

(2) It is submitted that this section does not make a trade union a legal entity. It bears no resemblance to the trade union legislation that was before the Courts in the *Taff Vale Case*, 1901 A.C. 426.

(3) It is further submitted that section 2 of The Trade Unions Act prohibits the imposition of liability in this case, because there is no evidence that the members of the appellant union or its governing body authorized or concurred in any wrongful act.

The point was not considered in the Courts below and certainly it is not mentioned in any of the reasons for judgment, but, for the reasons given by Cartwright J., I am of opinion that the point fails. Like him, I am assuming that the wrongful act committed by the appellant was "in connection with any . . . trade or labour dispute", but I am expressing no opinion as to whether or not that is so.

On the second point as to whether it should be found that the appellant did not intend to ignore the "grievance procedure" referred to in cl. 16 of the Collective Agreement

[1] (1959), 16 D.L.R. (2d) 646, 27 W.W.R. 49.

1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN

Kerwin C.J.

between the appellant and City Construction Company, Limited, I agree with Cartwright J. that the argument fails on the facts.

The appeal should be dismissed with costs.

The judgment of Taschereau and Locke JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia[1] which dismissed the appeal of the present appellant, the defendant in the action, from a judgment of Clyne J. By that judgment the respondent recovered general damages in the sum of $2,500, special damages for loss of profit for a named period, and was granted an injunction restraining the appellant from interfering with the plaintiff, his agents or servants or any of them, in the operation of his business by endeavouring to induce or coerce the plaintiff to join the defendant union or from negotiating or dealing with any person, firm or corporation in any way to induce or coerce the plaintiff to join the said union.

For some years prior to the month of September 1956 the respondent was the owner and operator of a contracting and trucking business in Vancouver and at the time in question owned a tractor and four trucks. He had for years supplied trucks to the City Construction Co. Ltd., a company carrying on its business in British Columbia, together with drivers employed by him, and a truck which he himself operated, these vehicles being used by the construction company in connection with their operations, in consideration of an agreed payment to the respondent. In this arrangement the position of the respondent was that of an independent contractor and the truck drivers employed by him acted as his servants and were paid by him. There was no written contract between the parties but the evidence shows that the services rendered were satisfactory to the construction company and would have been continued for an indefinite period of time but for the events complained of.

[1] (1959), 16 D.L.R. (2d) 646, 27 W.W.R. 49.

The appellant is a trade union, as that expression is defined in the *Labour Relations Act,* 1954 (B.C.), c. 17, s. 1. Local no. 213, the appellant in these proceedings, is an organization forming part of an international union which has its headquarters in the United States.

On September 28, 1955, the appellant had entered into an agreement as to wages and working conditions with the City Construction Co. Ltd. as the bargaining agent of the truck drivers employed by that company and which covered all construction work undertaken by it in the province. While no evidence was given upon the point, it appears to have been assumed throughout that the union had been certified as the bargaining agent of these employees under the provisions of the *Labour Relations Act* and was, accordingly, empowered to contract in writing on their behalf in regard to their working conditions, rates of pay and other matters commonly forming part of a collective agreement.

Clause 10 of this agreement read:

> When Truck Drivers are required, competent Union men, members of Local No. 213, shall be hired. When competent Local No. 213 Union men are not available, then the employer may obtain Truck Drivers elsewhere, it being understood that they shall join the Union within thirty (30) days or be replaced by competent Union tradesmen when available. It is the prerogative of the employer to hire and discharge employees. It shall not be the duty of the employer to induce non-members to join the Union.

Clause 16, which dealt with what was described as grievance procedure, provided in part that, if during the term of the agreement any dispute should arise as to the carrying out of its terms or its interpretation, each party should appoint three persons to be members of a committee to examine the difficulty in an endeavour to find a solution. If this failed the clause provided that an arbitration board should be constituted and its decision should be final.

The facts, as found by the learned trial judge, are as follows:—During the summer of 1956 one Carbonneau, a business agent of the union, called at the premises of the City Construction Co. Ltd. to make certain that the truck drivers employed belonged to the union. There he saw Therien and told him that he must join the union as well as the other drivers of his trucks. Therien, presumably having in mind the provisions of the *Labour Relations Act,*

1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN

Locke J.

refused to join the union but agreed that he would employ union drivers for his other trucks and thereafter did so. Carbonneau admitted that in June 1956 he knew that Therien was himself an employer of labour: nevertheless, he told Therien that if he did not join the union they would "placard" the company and have his truck put off the job. Thereafter Carbonneau and another union representative had several conversations with the despatcher of the construction company and told him that if the company continued to use Therien's truck they would "placard" the various places where the company was doing work. Smith referred the matter to the general manager of the company, C. W. Bridge, and Carbonneau told the latter that Therien must not only employ the union drivers but must be a member of the union himself and that if Therien continued to drive a truck the company's job would be placarded. The learned trial judge found that by this term the union officials meant, and were understood to mean, that they would, by means of a picket line carrying placards, take such steps as would have the effect of interfering with and obstructing the operations of the company and of making it appear to the public and other labour unions that the company had broken its contract with the defendant union, or was indulging in unfair labour practices.

In consequence of these threats, Bridge wrote to the respondent informing him that the construction company would no longer be able to hire the truck driven by himself after that date. The letter read in part:

> as we have been threatened with picket lines, etc., should you be seen operating on any of our jobs, even though you own your own vehicle and employ Union personnel on your other trucks, I find it necessary to refrain from hiring you as several of our jobs have completion dates and must be finished without interference from Union disputes.

The respondent continued for a few days longer supplying trucks, including the one driven by himself, to the Construction Company, but on September 24, 1956, he was finally told that the company could no longer do business with him.

Subsection (1) of s. 4 of the *Labour Relations Act* reads in part:

> No employer or employers' organization, and no person acting on behalf of an employer or employers' organization, shall participate in or interfere with the formation or administration of a trade-union or contribute financial or other support to it.

Section 6 of the Act reads:

> No trade-union, employers' organization, or person shall use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing any person to become or refrain from becoming, or to continue or to cease to be, a member of a trade-union.

In *Morrison v. Yellow Cab Co. Ltd.*[1], Clyne J. had held that an employer in a position similar to that of the present respondent was precluded by subs. (1) of s. 4 from becoming a member of a trade-union in the province, a conclusion with which I respectfully agree. Notwithstanding the provisions of the section, the secretary-treasurer of the union said in evidence at the trial that, in spite of the fact that he was an employer, the union would accept him into its membership.

That damage to the respondent resulted from these actions cannot be disputed. By way of defence to the action the appellant says, firstly, that it is not a legal entity which may be found liable in tort, and secondly, that the evidence does not disclose a cause of action, either at common law or under the *Industrial Conciliation and Arbitration Act.*

The first of these questions is not determined in the appellant's favour by the decision of this Court in *Orchard v. Tunney*[2]. In that case the action was originally brought against Orchard and six other members of the Executive Committee of Local Union No. 119 of the International Brotherhood of Teamsters Union. By an interlocutory order made by the Court of Appeal after the judgment at the trial, a representation order was made and the style of cause amended to indicate that these individual defendants were sued on their own behalf and on behalf of all other members of the labour union except the plaintiff. The proceedings in the matter do not indicate whether the collective agreement signed by the union with Tunney's employers had been made after the union had been certified as the

[1] (1956), 18 W.W.R. 593, 1 D.L.R. (2d) 607.
[2] [1957] S.C.R. 436, 8 D.L.R. (2d) 273.

1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN

Locke J.

bargaining agent under the provisions of the *Labour Relations Act,* R.S.M. 1948, c. 27, and, as the action was not brought against the union, the question as to whether it was in law an entity which might be made liable in tort was not considered, either at the trial by Williams C.J. or in the Court of Appeal or argued in this Court. There was, accordingly, no issue in this Court as to the legal status of the labour union. Accordingly, what was said by Rand J. in delivering the judgment of the majority of the Court and by me in delivering the judgment of our late brother Nolan and myself, which really merely consisted in restating what had been said earlier in this Court by Duff J. (as he then was), Anglin J. (as he then was) and Brodeur J. in *Local Union v. Williams*[1], cannot be taken as deciding that in Manitoba a trade union certified as bargaining agent under the Manitoba Act (which closely resembles that of British Columbia) is not an entity which may be held liable in tort. A case is only authority for what it actually decides.

The question as to whether a trade union certified as a bargaining agent by a statute in the terms of the *Labour Relations Act* of British Columbia may be made liable in an action, either in tort or contract, has not heretofore been considered by this Court.

In *Taff Vale Railway v. Amalgamated Society of Railway Servants*[2], the action was brought against a trade union registered under the *Trade Union Acts* of 1871 and 1876 for an injunction restraining the union, its servants and agents and others acting by their authority from watching or besetting the Great Western Railway Station at Cardiff. A motion made on behalf of the union before Farwell J. to strike out the name of that defendant on the ground that it was neither a corporation nor an individual and could not be sued in a quasi-corporate or any other capacity was dismissed.

It appears to me to be clear that, had it not been that the trade union was registered under the *Trade Union Act,* the action against it by name would not have been maintained. Provision was made by the Act of 1871 for the registration of trade unions and they were given power,

[1] (1919), 59 S.C.R. 240, 49 D.L.R. 578.
[2] [1901] A.C. 426.

*inter alia,* to purchase property in the names of trustees designated by them and to sell or let such property. The trustees of any registered union were empowered to bring or defend actions touching or concerning the property of the union and might be sued in any court of law or equity in respect of any real or personal property of the union. The union was also required to have a registered office and to make annual returns to the Registrar appointed under the Act yearly, and any trade union failing to comply with the provisions of the Act and every officer of the union so failing was made liable to a penalty.

Farwell J. said that the fact that a trade union is neither a corporation nor an individual or a partnership between a number of individuals did not conclude the matter. After pointing out that the Acts legalized the usual trade union contracts, established a registry of trade unions giving to each an exclusive right to the name in which it was registered and authorized it through the medium of trustees to own a limited amount of real estate and unlimited personal estate, said in part (p. 429):

> Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature. . . .
>
> Now, the Legislature in giving a trade union the capacity to own property and the capacity to act by agents has, without incorporating it, given it two of the essential qualities of a corporation—essential, I mean, in respect of liability for tort, for a corporation can only act by its agents, and can only be made to pay by means of its property. The principle on which corporations have been held liable in respect of wrongs committed by its servants or agents in the course of their service and for the benefit of the employer—qui sentit commodum sentire debet et onus—(see *Mersey Docks Trustees v. Gibbs* (1886) L.R. 1 H.L. 93) is as applicable to the case of a trade union as to that of a corporation. . . . The proper rule of construction of statutes such as these is that in the absence of express contrary intention the Legislature intends that the creature of the statute shall have the same duties, and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. It would require very clear and express words of enactment to induce me to hold that the Legislature had in fact legalised the existence of such irresponsible bodies with such wide capacity for evil.

1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN

Locke J.

The order dismissing the motion was set aside by the Court of Appeal but restored in the House of Lords. Halsbury L.C. said that he was content to adopt the judgment of Farwell J. with which he entirely concurred and added (p. 436):

> If the Legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a Court of Law for injuries purposely done by its authority and procurement.

Lord Macnaghten, Lord Shand and Lord Brampton were agreed in adopting the judgment of Farwell J. and the reasoning upon which it proceeded. Lord Lindley, after saying that he had no doubt that, if the trade union could not be sued in its registered name, some of its members could be sued on behalf of themselves and the other members of the society and an injunction and judgment for damages could be obtained in an action so framed, said that the question in the litigation was of comparatively small importance but that the Act appeared to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes, and that the use of the name imposed no duty and altered no rights but was only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used.

It was, undoubtedly, as a result of the judgment in the *Taff Vale* case that the *Trade Disputes Act* of 1906 (c. 47) which amended the *Trade Union Acts* of 1871 and 1876 was passed. That Act did not alter the law as declared by the House of Lords as to registered trade unions being entities which might be held liable in tort, but declared the rights of persons on behalf of trade unions to carry on what has now become to be known as peaceful picketing, and further declared that an action against a trade union or any members or officials thereof on behalf of themselves and all other members of such union in respect of any tortious act alleged to have been committed by or on behalf of the union should not be entertained by any court.

It was clearly, I think, in consequence of the *Taff Vale* decision that the Legislature of British Columbia enacted the *Trade Union Act* of 1902 (c. 66). This Act declared that

no trade union or the trustees of any such union shall be liable for damages for any wrongful act or omission or commission in connection with any strike, lock-out or trade or labour dispute, unless the members of such union or its council or other governing body shall have authorized, or shall have been a concurring party in such wrongful act: that no such trade union nor any of its servants or agents shall be enjoined, nor its funds or any of such officers be made liable for communicating to any person facts respecting employment or hiring or in persuading or endeavouring to persuade by fair or reasonable argument any workman or person to refuse to continue or become the employee or customer of any employer of labour. Section 3 of that Act further declared that no trade union or its agents or servants shall be liable in damages for publishing information with regard to a strike or lock-out or for warning workmen or other persons against seeking employment in the locality affected by any strike, lock-out or labour trouble or from purchasing, buying or consuming products produced by the employer of labour party to such strike.

It will be seen that the British Columbia Act, by its reference to trade unions as such, as well as to the servants and agents of such unions restricting their liability in tort to the extent defined, recognized the fact that a trade union was an entity which might be enjoined or become liable in damages for tort.

It may be said in passing that there was no such statute in force in the Province of Manitoba when the cause of action arose in *Orchard's* case. In *Cotter v. Osborne*[1], the action to restrain and recover damages for the acts of certain members of a trade union in the course of a trade dispute was brought against the individuals and a representation order made by Mathers J. As in *Orchard's* case the question as to whether the union might have been sued or enjoined by name was not raised.

By the *Labour Relations Act*, s. 2, a trade union as defined includes a local branch of an international organization such as the appellant in the present matter. Extensive rights are given to such trade unions and certain prohibitions declared which affect them. The Act treats a trade union as

[1] (1909), 18 Man. R. 471.

1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN

Locke J.

an entity and as such it is prohibited, *inter alia,* from attempting at the employer's place of employment during working hours to persuade an employee to join or not to join a trade union, from encouraging or engaging in any activity designed to restrict or limit production or services, from using coercion or intimidation of any kind that could reasonably have the effect of compelling any person to become or refrain to become a member of a trade union and from declaring or authorizing a strike until certain defined steps have been taken. By s. 7 if there is a complaint to the Labour Relations Board that a union is doing or has done any act prohibited by ss. 4, 5 or 6, the Board may order that the default be remedied and, if it continues, the union may be prosecuted for a breach of the Act. By s. 9 all employers are required to honour a written assignment of wages by their employees to a trade union. A union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining is entitled to apply to the Labour Relations Board for certification as the bargaining agent of such employees and, when certified, to require the employer to bargain with it and, if agreement is reached, to enter into a written agreement with it which is signed by the union in its own name as such bargaining agent. Throughout the Act such organizations are referred to as trade unions and thus treated as legal entities.

The question as to whether a trade union such as the present appellant is an entity which might be proceeded against by name in proceedings under the *Industrial Conciliation and Arbitration Act,* 1947, (c. 44) was considered by the Court of Appeal in *In re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union Local No. 1*[1]. The provisions of that statute, which was repealed by the *Labour Relations Act,* in so far as they affect the present consideration, appear to me indistinguishable from the latter Act. Proceedings had been taken in the Police Court against the union named, for an alleged breach of the provisions of the Act in authorizing a strike of the employees before a conciliation board had been appointed to endeavour to bring about an agreement. It was only necessary in the case to determine whether a trade union, acting as a bargaining

[1] [1947] 2 W.W.R. 510, 63 B.C.R. 493, 4 D.L.R. 159.

agent, could be proceeded against under the Act, but the broader question as to whether the union had, by reason of the Provisions of the *Trade Union Act* and the *Industrial Conciliation and Arbitration Act,* been constituted an entity in law was discussed in the reasons delivered by O'Halloran and Robertson JJ.A. Both of these learned judges expressed the view that such a union was by virtue of these statutes of the province an entity distinct from its members or, as expressed by Robertson J.A., adopting what had been said by Scott L.J. in *National Union of General and Municipal Workers v. Gillian*[1], a *persona juridica.*

In a later case: *Vancouver Machinery Depot v. United Steel Workers of America*[2], the Court held that an international union which had not been actually appointed a bargaining agent under the *Industrial Conciliation and Arbitration Act,* 1947, was none the less a legal entity against which an action for damages might be maintained. Sidney Smith J.A., with whom Sloan C.J. and O'Halloran J.A. agreed, said in part (p. 328):

> It seems to me that it would lead to all sorts of anomalies if a union's legal status under the Act was conferred merely by its being chosen to represent a group of workers. The matter of the status of a union as a legal entity, either at large or limited in purpose, depends upon the recognition and definition by the legislature of its capacity.

Were it not for the provisions of the *Trade-unions Act* and the *Industrial Relations Act* if the union was simply an unincorporated association of workmen, it would not, in my opinion, be an entity which might be sued by name, and what was said by Duff J. and by Anglin J. (with whom Brodeur J. agreed) in *Local Union v. Williams* above referred to would apply. Such an unincorporated body not being an entity known to the law would be incapable of entering into a contract: *Canada Morning News Co. v. Thompson*[3]. That, however, is not the present case.

I agree with the opinions expressed by the learned judges of the Court of Appeal in the cases to which I have above referred. The granting of these rights, powers and immunities to these unincorporated associations or bodies is quite inconsistent with the idea that it was not intended that they

[1] [1946] 1 K.B. 81 at 85.
[2] [1948] 2 W.W.R 325, 4 D.L.R. 518.
[3] [1930] S.C.R. 338, 3 D.L.R. 833.

1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN

Locke J.

should be constituted legal entities exercising these powers and enjoying these immunities as such. What was said by Farwell J. in the passage from the judgment in the *Taff Vale* case which is above quoted appears to me to be directly applicable. It is necessary for the exercise of the powers given that such unions should have officers or other agents to act in their names and on their behalf. The legislature, by giving the right to act as agent for others and to contract on their behalf, has given them two of the essential qualities of a corporation in respect of liability for tort since a corporation can only act by its agents.

The passage from the judgment of Blackburn J. delivering the opinion of the judges which was adopted by the House of Lords in *Mersey Docks v. Gibbs*[1], referred to by Farwell J. states the rule of construction that is to be applied. In the absence of anything to show a contrary intention—and there is nothing here—the legislature must be taken to have intended that the creature of the statute shall have the same duties and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. *Qui sentit commodum sentire debet et onus.*

In my opinion, the appellant is a legal entity which may be made liable in name for damages either for breach of a provision of the *Labour Relations Act* or under the common law.

The decisions of this Court in *Society Brand Clothes Ltd. v. Amalgamated Clothing Workers of America*[2], and *International Ladies Garment Workers Union v. Rothman*[3], do not conflict with this conclusion. When those actions were instituted there was no legislation in the Province of Quebec similar to the *Trade Union Act* of 1902 and the *Labour Relations Act* of British Columbia above referred to.

There remains the question as to whether the evidence discloses a cause of action. The appellant says that what was done by its servants was nothing more than to insist upon compliance by the City Construction Co. Ltd. with the terms of cl. 10 of the collective agreement.

[1] (1866), L.R. 1 H.L. 93 at 110, 11 E.R. 1500.
[2] [1931] S.C.R. 321, 3 D.L.R. 361.
[3] [1941] S.C.R. 388, 3 D.L.R. 434.

No doubt there was coercion exercised by Carbonneau in threatening the respondent that if he did not join the union he would have him put off the job, and it is equally clear that for Therien to join the union was legally impossible. It was not, however, this wrongful act which was the cause of the injury complained of, and if there is a cause of action it must be found elsewhere.

In addition to ss. 4 and 6 of the *Labour Relations Act* which are above quoted, ss. 21 and 22 are to be considered. Section 21 reads:

> Every person who is bound by a collective agreement, whether entered into before or after the coming into force of this Act, shall do everything he is required to do, and shall refrain from doing anything that he is required to refrain from doing, by the provisions of the collective agreement, and failure to do so or refrain from so doing shall be an offence against this Act.

Section 22, so far as relevant, reads:

> (1) Every collective agreement entered into after the commencement of this Act shall contain a provision for final and conclusive settlement without stoppage of work, by arbitration or otherwise, of all differences between the persons bound by the agreement concerning its interpretation, application, operation, or any alleged violation thereof.

The appellant and the City Construction Company Ltd., in compliance with this requirement, had provided for the settlement of disputes as to the interpretation of the agreement by cl. 16 above referred to.

The evidence shows that the employer wished to continue its arrangement with the respondent in his capacity as an independent contractor and that Therien rightly took the attitude that he would not join the union, presumably because the Act forbade him to do so.

Clause 3 of the contract provided that its terms should apply to all sub-contractors or sub-contracts let by the employer and it might perhaps be contended that this applied to an independent contractor supplying trucks and services such as did the respondent. The learned trial judge held that cl. 10 did not apply to an independent contractor such as the respondent who drove his own truck. The employer was apparently of this opinion and the matter was one which should have been dealt with accordingly under the grievance procedure clause of the contract. The appellant, however, without resorting to this, threatened to

1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN

Locke J.

placard jobs upon which the employer was engaged which, as found by the learned trial judge, meant that the union would, by means of a picket line carrying placards, take such steps as would have the effect of obstructing the operations of the company and making it appear to the public and other labour unions that the company had broken its contract with the defendant union or was indulging in unfair labour practices. This conduct was a breach both of the terms of the agreement and of s. 21 of the *Labour Relations Act*. That the decision of the City Construction Co. Ltd. to terminate its longstanding arrangement with the respondent resulted from these wrongful acts is undoubted.

As it was said by Lord Dunedin in *Sorrell v. Smith*[1], in summarizing what had been decided in *Mogul Steamship Company v. M'Gregor*[2], *Allen v. Flood*[3] and *Quinn v. Leathem*[4], even though the dominating motive in a certain course of action may be the furtherance of your own business or your own interests, you are not entitled to interfere with another man's method of gaining his living by illegal means.

I agree with Sheppard J.A. that in relying upon these sections of the Act the respondent is asserting, not a statutory cause of action, but a common law cause of action, and that to ascertain whether the means employed were illegal inquiry may be made both at common law and of the statute law.

While in the concluding paragraph of the appellant's factum it is said that the action was barred by the terms of s. 2 of the *Trade Unions Act*, R.S.B.C. 1948, c. 342, since there is no evidence that the members of the union or its governing body authorized or concurred in the wrongful act counsel for the appellant did not argue the point before us. If it was intended to raise any such defence, the facts relied upon should have been pleaded for the reasons stated by my brother Cartwright. Since no mention is made of the matter in the reasons for judgment delivered by the trial judge and in the Court of Appeal, it is apparent that the question was not argued in either Court.

[1] [1925] A.C. 700 at 718-9.
[2] [1892] A.C. 25.
[3] [1898] A.C. 1.
[4] [1901] A.C. 495.

Section 2 of the Act, as it appears in c. 342 of the Revised Statutes, with slight changes which do not affect the present question, reproduces that section in the statute of 1902 which I have above referred to. In my opinion, it has no bearing upon the present matter. There was here no strike or lock-out or trade or labour dispute within the meaning of those expressions in the Act. The disputes there referred to are, in my opinion, those commonly so described arising between employers and employees as to wages, working conditions, hours of employment and other like matters. The wrongful act of the business agent in bringing about by unlawful threats the severing of business relations between an employer and an independent contractor, to the detriment of the latter, was not done in connection with any such dispute.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—The facts out of which this appeal arises are stated in the reasons of my brother Locke.

Two main questions are raised. It is said, first, that the appellant is not an entity which can be sued and, secondly, that in any event its conduct, of which complaint is made, did not constitute an actionable wrong.

On both of these questions I am in substantial agreement with the reasons of my brother Locke. I wish, however, to add a few observations as to two matters.

The first is as to the effect of s. 2 of the *Trade-unions Act*, R.S.B.C. 1948, c. 342. This section reads as follows:

> 2. No trade-union nor any association of workmen or employees in the Province, nor the trustees of any such trade-union or association in their representative capacity, shall be liable in damages for any wrongful act of commission or omission in connection with any strike, lockout, or trade or labour dispute, unless the members of such trade-union or association, or its council, committee, or other governing body, acting within the authority or jurisdiction given such council, committee, or other governing body by the rules, regulations, or directions of such trade-union or association, or the resolutions or directions of its members resident in the locality or a majority thereof, have authorized or have been a concurring party in such wrongful act.

The predecessor of this section was first enacted in 1902 by s. 2 of c. 66 of the Statutes of British Columbia for that year. The minor verbal differences between that section and the present one are of no significance. As has already been pointed out by my brother Locke, it would be surprising

1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN

Cartwright J.

that a section should be passed to provide that a trade-union should not be liable in damages for a wrongful act in connection with certain matters unless certain conditions existed if it were the view of the Legislature, as the appellant contends, that a trade-union cannot be sued in tort under any circumstances. I propose, however, to examine the question whether the section affects the right of action to which, in the Courts below, the plaintiff has been found to be entitled.

This question is raised in the appellant's factum in the following paragraph:

> It is further submitted that section 2 of The Trade Unions Act prohibits the imposition of liability in this case, because there is no evidence that the members of the appellant union or its governing body authorized or concurred in any wrongful act.

The wrongful act for which the appellant has been found liable is, by the use of illegal means, inducing the City Construction Company Limited to act in such a manner as to cause damage to the respondent.

In its statement of defence the appellant does not plead the *Trade-unions Act,* but it was not required to do so; see s. 23(7) of the *Interpretation Act,* R.S.B.C. 1948, c. 1:

> (7) Every Act shall, unless by express provision it is declared to be a private Act, be deemed to be a public Act, and shall be judicially noticed by all Judges, Magistrates, and others, without being specially pleaded:

The statement of claim contains an allegation that the wrongful act complained of was that of the appellant and that the threat which has been held to constitute the illegal means referred to above was uttered "by or on behalf of" the appellant. In my opinion this was a sufficient allegation that the act attributed to the union was authorized in the manner described in s. 2 of the *Trade-unions Act.* In cases to which the section applies, such authorization is made a condition precedent to the existence of liability on the part of the union and, on the assumption that the section is applicable in the case at bar, an averment of the performance or occurrence of the condition is implied in the statement of claim under Marginal Rule 210 (order 19, r. 14) of the Supreme Court Rules of British Columbia which reads:

> 14. Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant (as the case may be); and, subject thereto, an

averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

If the appellant intended to contest the existence of the authorization contemplated by s. 2 of the *Trade-unions Act* this should have been distinctly specified in its statement of defence. Had the issue been raised on the pleadings, it would have been necessary to consider whether the onus of disproving authorization would not have rested upon the appellant as being a matter peculiarly within its knowledge; but, in my opinion, the issue was not raised. It further appears that nowhere in the evidence or in the course of the trial did the appellant suggest that what was done by its officers was not duly authorized by it. The theory of the appellant's defence was that the actions of its officers were justified or, at all events, were not unlawful. The appellant sought throughout not to repudiate the acts of its officials but to vindicate them. If this point was taken in the Courts below it would appear to have been rejected as there is no mention of it in any of the reasons delivered.

In his reasons the learned trial judge makes no reference to any argument based upon s. 2, but he does say:

> The acts of the union officials were the acts of the union, and as they were wrongful the union is responsible to the plaintiff in damages.

While the notice of appeal to the Court of Appeal contained 6 paragraphs and 22 sub-paragraphs, the question of authorization under s. 2 is not mentioned. However, as the point is set out in the appellant's factum I have expressed my views upon it. I am of opinion that in the circumstances of this case s. 2 of the *Trade-unions Act* does not assist the appellant. In dealing with this point I have assumed, without deciding, that the wrongful act committed by the appellant was "in connection with a trade or labour dispute", but I wish to make it clear that I am expressing no opinion as to whether or not it should be so regarded.

The second matter to which I wish to refer is the appellant's argument that on the evidence it should have been found that the appellant did not intend to ignore the "grievance procedure" provided in cl. 16 of the collective agreement between the appellant and the City Construction Company Limited.

1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN

Cartwright J.

This argument fails on the facts. The learned trial judge does not refer to it expressly but it is implicit in his findings of fact that the threat made to the City Construction Company Limited was that its jobs would be placarded unless the respondent's services were dispensed with, and that it was neither said nor understood that the placarding would not take place unless and until the "grievance" and arbitration procedure had been resorted to and had resulted in a decision in favour of the union.

While Davey J.A. did not find it necessary to express a final opinion on this point, he examined it and I find his reasons for rejecting the appellant's submission convincing and wish to adopt them, particularly the following passages:

> The union threatened to picket the Company's jobs without having recourse to arbitration proceedings provided by clause 16 of the agreement as required by Section 22 of the Act, for final and binding settlement of all disputes concerning, inter alia, the interpretation and carrying out of the collective agreement.
>
> * * *
>
> The union's remedy was not to picket but to invoke arbitration to determine whether or not the Company was observing clause 10.
>
> The union's witnesses say in effect that the Company was told that picketing would only be resorted to after exhausting the grievance procedure, but the learned trial judge, understandably, has made no express finding on that qualification. In the light of the meagre information before me, I completely fail to understand that qualification, or the need at that stage of threats to picket, or to picket at all after recourse to arbitration, because there is nothing to suggest that the company would not have observed an award in favour of the union. Failure to obey the award would have exposed the company to prosecution under the Act. On the other hand, if the arbitrators took the same view of clause 10 as the learned Judge did the union's demands would collapse because it, in turn, would be bound by the award.
>
> As I see it at the moment, the union's threat to picket was not justified as a measure to protect its contractual rights under the collective agreement, but on the contrary was a repudiation and violation of clause 16 of the agreement providing for a final binding settlement of disputes by arbitration.

For the reasons so expressed I would reject this argument of the appellant.

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

MARTLAND J.:—I agree with the reasons of my brother Locke and merely wish to make some observations regarding the effect of s. 2 of the *Trade-unions Act*, R.S.B.C. 1948, c. 342. That section, subject to some slight changes which are here immaterial, is the same as the section which first

appeared in c. 258, Statutes of British Columbia, 1902, which was probably passed in consequence of the decision of the House of Lords in *Taff Vale Railway v. Amalgamated Society of Railway Servants*[1]. Its purpose was to limit the circumstances in which trade unions could be made liable in damages by reason of acts done in connection with a strike, lockout, or trade or labour dispute.

In the present case, there was no strike or lockout. Was there a trade or labour dispute? To constitute such a dispute, there must be, I think, a dispute between an employer and his employees or, perhaps, as between the employees themselves, respecting the terms or conditions of their employment. To constitute a trade or labour dispute there would have to be a dispute between City Construction Company Ltd. and its employees. A dispute between the respondent, who was not an employee, and the appellant, the certified bargaining agent of those employees, was not a trade or labour dispute.

In considering the question as to whether there was a trade or labour dispute as between City Construction Company Ltd. and its employees, I think it is necessary to take into consideration the relationship which had been established between them by reason of the collective agreement made on behalf of the employees by the appellant, as their bargaining agent, and the application of the provisions of the *Labour Relations Act*, 1954 (B.C.), c. 17, to that relationship.

That Act has established a method of collective bargaining between employers and employees. Once a trade union has been certified as a bargaining agent for a unit of employees the employer can be required by law to bargain collectively with that agent. In the present case, this was apparently done and a collective agreement resulted. In so far as a disagreement as to the meaning of a provision of a collective agreement is concerned, s. 22(1) of the Act provides as follows:

> 22. (1) Every collective agreement entered into after the commencement of this Act shall contain a provision for final and conclusive settlement without stoppage of work, by arbitration or otherwise, of all differences between the persons bound by the agreement concerning its interpretation, application, operation, or any alleged violation thereof.

[1] [1901] A.C. 426.

1960

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN

Martland J.

The collective agreement in this case contained such a provision.

The effect of the collective agreement which was made pursuant to the *Labour Relations Act* was to govern by contract the terms and conditions of employment of the company's employees. The result is that all those matters which, at the time of the *Trade-unions Act* was enacted, might have become the subject of a trade or labour dispute had been provided for by contract. The only question which might arise was as to the proper interpretation of the collective agreement itself, and, even in that case, the agreement provided an obligatory arbitration procedure. I do not think that a difference of view between an employer and employees as to the interpretation of a collective agreement, in such circumstances, constitutes a "trade or labour dispute" within the meaning of that expression as it is used in the *Trade-unions Act*.

*Appeal dismissed with costs.*

*Solicitors for the defendant, appellant: Ellis, Dryer & McTaggart, Vancouver.*

*Solicitor for the plaintiff, respondent: G. B. Laaner, Vancouver.*

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1959

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1960

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HER MAJESTY THE QUEEN .....APPELLANT;

AND

RAYMOND JOHN DENNIS .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Criminal law—Summary conviction—Plea of guilty—Whether right to appeal—Conditions precedent for appeal—Whether accused bound by plea on trial de novo—Whether right to appeal to Court of Appeal—Criminal Code, 1953-54 (Can.), c. 51, ss. 708, 719, 720, 722(1)(a), 723, 727, 743(1)(a).*

The accused pleaded guilty to a charge of impaired driving and was summarily convicted by a magistrate. He appealed to the County Court, and, on preliminary objection taken to the sufficienty of his grounds

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

for appeal, the County Court judge dismissed his appeal without hearing evidence or taking any plea. It was held that the grounds did not disclose a sufficient degree of particularity to comply with s. 722(1)(*a*) of the Code. The Court of Appeal allowed his appeal and referred the matter back to the County Court. The Crown was granted leave to appeal to this Court.

*Held:* The appeal should be dismissed.

The taking of a plea from the accused forms no part of the hearing of the trial *de novo* by way of appeal from a summary conviction pursuant to s. 727 of the Code. Compliance with s. 722 is all that is required to found jurisdiction. Consequently, the failure of the County Court judge, in this case, to take a plea did not deprive him of jurisdiction. Although an accused, after pleading guilty in the first instance, is bound by such plea in the trial *de novo,* nevertheless he is not debarred from changing his plea upon showing proper grounds for so doing. *Thibodeau v. The Queen,* [1955] S.C.R. 646, applied.

The allegation, made in the present case, that "there was no legal evidence to support the conviction" was a proper and sufficient ground of appeal to comply with s. 722 of the Code on an appeal under that section from a summary conviction.

The accused had a right of appeal to the Court of Appeal when the County Court judge dismissed his appeal, as he did in this case, on preliminary objections, without a trial *de novo,* by virtue of s. 743(1)(*a*).

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Remnant Co. Ct. J. and referring the matter back to the County Court. Appeal dismissed.

*J. J. Urie,* for the appellant.

*R. R. Maitland,* for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—In the present case the respondent, having been convicted and sentenced under Part XXIV of the *Criminal Code* by W. G. Harris, Esq., a Police Magistrate in and for the District of Powell River, for driving a motor vehicle whilst his ability to do so was impaired, appealed such conviction to the County Court of Vancouver on the following grounds:

1. The said conviction was against the law and the weight of evidence.
2. The said conviction was contrary to law.
3. There was no legal evidence to support the said conviction.

[1] 124 C.C.C. 95, 30 C.R. 339, 28 W W.R. 385.

1960

THE QUEEN v. DENNIS

Ritchie J.

Preliminary objection having been taken to the sufficiency of these grounds, the learned County Court judge dismissed the said appeal without hearing evidence or taking any plea, holding that the said grounds did not disclose a sufficient degree of particularity to comply with the requirements of s. 722(1)(*a*) of the *Criminal Code*.

From this decision the respondent gave notice seeking leave to appeal to the Court of Appeal of British Columbia, and upon such leave having been granted the appeal was duly heard and allowed and the matter was referred back to the County Court by order of the said Court of Appeal[1].

From this latter order the appellant sought leave to appeal to this Court, and by order dated June 25, 1959, such leave was granted upon the following grounds:

1. Did the Court of Appeal of British Columbia err in holding that the Notice of Appeal under section 722 of the *Criminal Code* of the respondent from his conviction by the magistrate to the County Court of Vancouver set out the grounds of appeal in sufficient particularity?
2. Did the failure of the County Court to take a plea deprive it of jurisdiction?
3. Was there a right of appeal by the respondent to the Court of Appeal when the County Court had dismissed the appeal to it on preliminary objections without a trial *de novo*?

Although the first of these grounds was virtually abandoned by the appellant at the argument before this Court and counsel for the appellant found himself in agreement with the decision of the Court of Appeal giving a negative answer to the question raised by the second ground, this Court was nonetheless invited to express its views concerning the nature of the right of appeal for which provision is made in ss. 720 to 726 inclusive of the *Criminal Code* and the type of trial contemplated by the provisions of s. 727. It is, therefore, desirable to make some general observations before dealing specifically with the particular questions raised in this appeal.

Section 720 of the *Criminal Code* reads in part as follows:

> Except where otherwise provided by law,
>
> (*a*) the defendant in proceedings under this Part may appeal to the appeal court
>
> (i) from a conviction or order made against him, or
>
> (ii) against a sentence passed upon him; and

[1] 124 C.C.C. 95, 30 C.R. 339, 28 W.W.R. 385.

(b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court
(i) from an order dismissing an information, or
(ii) against a sentence passed upon a defendant . . . .

The Appeal Court referred to in this section means one of the Courts specified in s. 719. In the case of the Province of British Columbia this means the "County Court of the County in which the cause of the proceedings arose". In my opinion, the provisions of this section, unless cut down by some other provisions of the *Criminal Code,* accord a right of appeal to any "defendant in proceedings under this Part [Part XXIV]" irrespective of the nature of the plea taken in the Court of first instance and limited only by the necessity of complying with the following conditions:

722. (1) Where an appeal is taken under section 720, the appellant shall
(a) prepare a notice of appeal in writing setting forth
(i) with reasonable certainty the conviction or order appealed from or the sentence appealed against, and
(ii) the grounds of appeal; . . . .

As is indicated by Fauteux J., speaking on behalf of the majority of the Court in *Dennis v. The Queen*[1], compliance with these provisions is not only a condition precedent to the exercise of the right of appeal under s. 720 but it is the very foundation upon which the jurisdiction of the Appeal Court must and does rest as can be seen from the opening words of s. 723 which read as follows:

723. (1) Where an appellant has complied with section 722, the appeal court or a judge thereof shall set down the appeal for hearing at a regular or special sittings thereof and the clerk of the appeal court shall post, in a conspicuous place in his office, a notice of every appeal that has been set down for hearing and notice of the time when it will be heard.
(2) No appeal shall be set down for hearing at a time that is less than ten days after the time when service was effected upon the respondent of the notice referred to in paragraph (b) of subsection (1) of section 722, unless the parties or their counsel or agents otherwise agree in writing.

As is noted by Sheppard J.A., in the course of the decision rendered by him on behalf of the Court of Appeal, it is well to appreciate the significance of the last quoted section, requiring as it does that the Appeal Court or a judge thereof "shall set down the appeal for hearing" upon being satisfied that s. 722 has been complied with. Such power to "set down the appeal for hearing" presupposes jurisdiction to hear it

[1] [1958] S.C.R. 473 at 482, 121 C.C.C. 129.

1960

THE QUEEN v. DENNIS

Ritchie J.

and in my view compliance with s. 722 is all that is required to found jurisdiction in the Appeal Court and the "plea" which, if it were required, would be taken at a later stage forms no part of the material upon which the jurisdiction of the Court is based.

The nature of the hearing of an appeal under Part XXIV of the *Criminal Code* is described in s. 727 and conflict of opinion has been expressed between the Courts of last resort in some of the provinces of Canada as to the effect of the following provisions of subs. (1) of that section:

> 727. (1) Where an appeal has been lodged in accordance with this Part from a conviction or order made against a defendant, or from an order dismissing an information, the appeal court shall hear and determine the appeal by holding a trial *de novo*, and for this purpose the provisions of sections 701 to 716, insofar as they are not inconsistent with sections 720 to 732, apply, *mutatis mutandis*.

The difficulty which has given rise to much of the conflict is centered about the question of whether the words "appeal by holding a trial *de novo*" are intended to describe "an appeal" in the sense of a review of the proceedings and decision in the Court of first instance as in the case of an appeal to a provincial Court of Appeal from conviction for an indictable offence or whether they are more descriptive of a "new trial" such as that which is held pursuant to order of the Court of Appeal after a conviction has been quashed.

As was said by Hogg J.A. in *R. v. Crawford*[1], the outstanding distinction between the trial *de novo* contemplated by s. 727 and the new trial which may be ordered by the Court of Appeal is that in the latter case the conviction has been *quashed* before the new trial starts whereas in the former the conviction remains outstanding, subject, however, to being reversed by the Appeal Court on evidence called afresh or indeed on entirely new evidence. In the one case, the conviction has gone while in the other it is under review by fresh eyes in the light of fresh evidence.

On the other hand, the distinction between "an appeal by holding a trial *de novo*" and an appeal to the provincial Court of Appeal is that although the object of both is to determine whether the decision appealed from was right or wrong, in the latter case the question is whether it was right

[1] [1955] O.R. 866 at 872, 113 C.C.C. 160.

or wrong having regard to the evidence upon which it was based, whereas in the former the issue is to be determined without any reference, except for purposes of cross-examination, to the evidence called in the Court appealed from and upon a fresh determination based upon evidence called anew and perhaps accompanied by entirely new evidence. It is to be borne in mind, of course, that under the provisions of s. 727(2) the Appeal Court may, under the circumstances therein specified, treat the evidence of any witness in the Court below as having the same force and effect as if the witness had given evidence before the Appeal Court. This can be done by consent of both the appellant and the respondent or if a witness cannot be reasonably obtained or if the evidence is purely formal or the Court is otherwise satisfied that this procedure will not prejudice the opposite party. When this procedure is followed, the evidence so introduced is to be treated by the Court of Appeal in all respects as if it were being actually given for the first time before that Court and all objections are available to either party in the same way that they would be if the evidence was being given *vivâ voce* for the first time.

A further difficulty which has given rise to some conflict is the question of whether the accused should be required to plead at a "trial *de novo*". This difficulty has been occasioned by the fact that s. 708 which in terms requires that the defendant "shall be asked" to plead is included in the group of sections (701 to 716) which apply to a trial *de novo* "insofar as they are not inconsistent with sections 720 to 732" (see s. 722).

While this point is not directly raised in the grounds specified in this appeal, it forms such an integral part of the whole question that it is as well to consider it here.

There can be no trial in the strict sense of that word until issue has been joined and as issue is not joined in a criminal case until the plea is entered the meaning of "trial" as used in the phrase "trial *de novo*" in s. 727 would seem both logically and grammatically to indicate the proceedings after the entry of the plea. This is the meaning which was attributed to its use in the other sections of Part XXIV which were under consideration in *The Queen v. Larson*[1],

[1] [1958] S.C.R. 513 at 516, 121 C.C.C. 204

1960

THE QUEEN v. DENNIS

Ritchie J.

*per* Abbott J., and it should, therefore, be construed as connoting "the hearing alone" exclusive of the plea and arraignment. A consideration of proceedings on trial by jury brings to mind the fact that the trial proper does not start until the accused is given in charge to the jury which stage is, of course, not reached until after the plea has been taken and the adoption of this more restricted meaning of the word "trial" has been widely accepted in our own Courts for many years. See *In re Walsh*[1], approved in *Giroux v. The King*[2], *per* Anglin J., and *Clement v. The Queen*[3]. This is also the effect of what was said by Hogg J.A. in *R. v. Crawford, supra.* That the same connotation of the word "trial" applies to its use in relation to proceedings before a magistrate in England may be seen from the decision of Lord Goddard in *R. v. Craske*[4], and it is also to be noted that the plea is not required when a new trial is held on appeal from a conviction of an indictable offence. See *Welch v. The King*[5], *per* Fauteux J.

This interpretation is borne out by a consideration of the anomaly which would be created if an accused were *required* to plead to a charge in respect of which he had already been convicted in the course of a proceeding taken for the purpose of bringing such conviction into question and throughout the whole of which the conviction entered upon the earlier plea remains outstanding. These considerations seem to indicate that the procedure for taking a plea which is outlined in s. 708 is indeed inconsistent with the provisions of s. 727 and, therefore, inapplicable to the hearing for which provision is made in the latter section. This does not mean that an accused who has pleaded guilty in the Court of first instance is debarred from changing his plea upon showing proper grounds for so doing. He stands before the Appeal Court in exactly the same position procedurally as he stood before the magistrate after having made his plea and he may be allowed to change that plea. See *Thibodeau v. The Queen*[6], *per* Cartwright J. at 653 and Fauteux J. at 657.

[1] (1914), 48 N.S.R. 1 at 13, 23 C.C.C. 7, 16 D.L.R. 500.
[2] (1917), 56 S.C.R. 63 at 77, 29 C.C.C. 258, 39 D.L.R. 190.
[3] (1955), 22 C.R. 290, [1955] Que. Q.B. 580.
[4] [1957] 3 W.L.R. 308 at 312.
[5] [1950] S.C.R. 412 at 427, 97 C.C.C. 177, 3 D.L.R. 641.
[6] [1955] S.C.R. 646.

As to the first ground of appeal specified in the order granting leave to appeal to this Court, counsel for the appellant stated during the argument that after more mature consideration he had concluded, with respect to this ground, that the third ground of the respondent's original notice of appeal to the County Court was a proper one, namely, "There was no legal evidence to support the conviction". I am in entire agreement with this conclusion as were the learned judges of the Court of Appeal of British Columbia and no further comment is necessary on this phase of the matter in this case.

The second ground of appeal to this Court, "Did the failure of the County Court to take a plea deprive it of jurisdiction?" is in somewhat the same category as the first because in this regard counsel for the appellant agrees with the conclusion reached by the learned judges of the Court of Appeal with which conclusions, as can be seen, I am also in agreement for the reasons above stated which are substantially the same as those expressed by Sheppard J.A., speaking on behalf of the majority of that Court.

The third ground of appeal was fully argued and involves a consideration of the meaning to be attached to the words used in s. 743(1)(*a*) of the *Criminal Code*. These words are:

> 743. (1) An appeal to the court of appeal, as defined in section 581 may, with leave of that court, be taken on any ground that involves a question of law alone, against
>
> (a) a decision of a court in respect of an appeal under section 727 . . . .

It was argued on behalf of the appellant that when an Appeal Court, within the meaning of s. 719, has decided that it has no jurisdiction to hear an appeal under s. 727 because the notice of appeal required by s. 722 is inadequate, it has not, by so doing, made a decision "in respect of an appeal under section 727" at all, but rather one in respect of s. 722 from which there is no provision for appeal, and that the only remedy lies in a writ of *mandamus*. It seems to me that the time for making such a decision is the time when the appeal is to be set down for hearing as required by s. 723, and the nature of the decision to be made at this time is whether or not all formalities have been complied with so as to make it necessary to "set down the appeal for hearing

1960

THE QUEEN v. DENNIS

Ritchie J.

at a regular or special sittings" of the Appeal Court. The "hearing" there referred to is obviously a hearing under s. 727, and the decision as to whether or not the Court will hear an appeal under that section certainly seems to me to be "a decision of a court in respect of an appeal under section 727". As was indicated by Fauteux J. at the hearing of this appeal, this construction is borne out by the French version of s. 743(1)(*a*) which reads as follows:

> 743. (1) Un appel à la cour d'appel, telle qu'elle est définie dans l'article 581, peut, avec la permission de cette cour, être interjeté, pour tout motif qui comporte une question de droit seulement,
>
> (*a*) de toute décision d'une cour relativement à *un appel prévu par l'article 727* . . .

In view of all the above, it will be seen that I am of opinion that the notice of appeal of the respondent from his conviction by the magistrate set out the grounds of appeal in sufficient particularity, that the failure of the County Court to take a plea did not deprive it of jurisdiction, that the respondent had a right of appeal to the Court of Appeal when the County Court dismissed his appeal on preliminary objection and that this appeal should be dismissed.

*Appeal dismissed.*

*Solicitor for the appellant: G. D. Kennedy, Victoria.*

*Solicitor for the respondent: R. R. Maitland, Vancouver.*

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1959

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Jan. 26

HER MAJESTY THE QUEEN .....APPELLANT;

AND

HARRY P. BAMSEY .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Criminal law—Summary convictions—Plea of guilty—Whether right to appeal—Conditions precedent for appeal—Whether accused can change plea on trial de novo—Whether grounds of appeal must be stated with particularity—Criminal Code, 1953-54 (Can.), c. 51, ss. 708(2), 722, 723, 726, 727.*

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

The accused pleaded guilty to a charge of impaired driving and was summarily convicted by a magistrate. His appeal was heard and allowed by a County Court judge notwithstanding the preliminary objections of the Crown that the notice of appeal was not sufficient. The Crown applied for leave to appeal to the Court of Appeal, which considered the merits of the case and ruled that "the said leave and the appeal be and the same are hereby dismissed". On the Crown's application for leave to appeal to this Court, the accused argued that the judgment of the Court of Appeal was not a "final judgment" within the meaning of s. 41(1) of the *Supreme Court Act,* since that Court had not dismissed the appeal but only the application for leave to appeal.

*Held:* The judgment of the Court of Appeal should be treated as one dismissing the appeal and leave should be granted.

*Held further:* The appeal should be allowed and the conviction restored.

If an accused who has pleaded guilty before a magistrate at his summary trial is able to comply with the requirements of s. 722, then his appeal by way of trial *de novo* under s. 727 "shall be set down for hearing before the Appeal Court", and when he enters the latter Court he may change his plea if he can satisfy the Appeal Court that there are valid grounds for his being permitted to do so.

In the present case, the grounds of appeal were not set forth in such manner as to comply with s. 722. The grounds that "the magistrate did not apply the principle as to reasonable doubt as to the evidence" and that the "conviction was contrary to the evidence and to the weight of the evidence", were irreconcilable with the accused's plea of guilty. Far from the conviction being contrary to law, it was the verdict which the law required the magistrate to enter after the plea of guilty. The setting forth of the grounds for appeal is a condition precedent to jurisdiction, and there is no right to a trial *de novo* under s. 727 upon grounds which are frivolous or apparently lacking in substance, as was the case here.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a decision of Hanna Co. Ct. J. Appeal allowed.

*J. J. Urie,* for the appellant.

*K. E. Eaton,* for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—The respondent herein, having pleaded guilty, was convicted by G. W. Scott, Esq., Deputy Police Magistrate in and for the City of Vancouver, on the charge that he unlawfully drove his motor vehicle on a highway

[1] 124 C.C.C. 95, 30 C.R 339, 28 W.W.R. 385.

1960

THE QUEEN v. BAMSEY

Ritchie J.

while his ability to drive was impaired and thereupon filed and served a notice of appeal to the County Court of Vancouver wherein he specified the following grounds of appeal:

(*a*) That the said conviction is contrary to law in that the magistrate did not apply the principle as to reasonable doubt as to the evidence adduced at the said trial;

(*b*) That the said conviction is contrary to the evidence and to the weight of the evidence.

Upon the appeal coming on to be set down for hearing before His Honour, Judge Hanna, Judge of the County Court of Vancouver, counsel for the Crown raised the following preliminary objections:

(*a*) That no grounds of appeal were in fact disclosed;

(*b*) That the accused, having pleaded guilty in the court below, was bound by such plea unless the grounds of appeal set out special circumstances;

(*c*) That the said grounds were not reasonable, certain, adequate or sufficient as required;

(*d*) That the principle as to reasonable doubt in connection with the evidence adduced at the trial before the learned magistrate could not apply because of the plea of guilty accepted from the accused by the learned magistrate.

Notwithstanding these objections, the learned County Court judge heard and allowed the appeal, and in due course counsel for the Attorney-General of British Columbia made application for leave to appeal to the Court of Appeal of British Columbia upon the following grounds:

1. That the learned County Court judge was in error in permitting and accepting a plea of not guilty on the trial *de novo* after the respondent had pleaded guilty before the magistrate.
2. That the learned County Court judge was in error in holding that the grounds set out in the respondent's Notice of Appeal were reasonable, certain, adequate or sufficient or were grounds of appeal at all.

This appeal was considered by the Court of Appeal of British Columbia[1] at the same time as two others in which kindred questions were raised and a perusal of the decisions of Sheppard J.A. and Davey J.A. clearly indicates that the merits of this case were considered by that Court, and the concluding words of Mr. Justice Sheppard's decision in relation thereto are:

However, for the reasons given, the grounds of error assigned by the Crown should not succeed and the appeal should be dismissed.

[1] 124 C.C.C. 95, 30 C.R. 339, 28 W.W.R. 385.

Some doubt and difficulty has, however, arisen as a result of the wording of the final clause of the formal order for judgment granted herein by the Court of Appeal which reads as follows:

> THIS COURT DOTH ORDER AND ADJUDGE that the said leave to appeal and the appeal be and the same are hereby dismissed.

Upon application being made for leave to appeal to this Court, which application was adjourned to the October sittings thereof, it was argued on behalf of the respondent that the judgment sought to be appealed from did not dismiss the appeal but rather dismissed the application for leave to appeal to the British Columbia Court of Appeal, and that as such it was not "a final or other judgment of the highest court of final resort in a province . . . in which judgment can be had in the particular case sought to be appealed . . . ." within the meaning of s. 41(1) of the *Supreme Court Act* and that leave should accordingly be refused.

It is true that the final paragraph of the formal judgment of the Appeal Court of British Columbia quoted above is not entirely clear in that it purports to dismiss both the application for leave to appeal and the appeal itself, but if there be any doubt as to whether or not this constitutes an order dismissing the appeal then it is permissible to consider the reasons of the Court to see what was actually done, and it then becomes apparent that the appeal was heard on its merit and dismissed.

I am of opinion that the judgment from which leave to appeal is now sought should be treated as one dismissing the Crown's appeal to the Appeal Court of British Columbia and that such leave should be granted.

The grounds raised by the present application are:

1. That the Court of Appeal erred in holding that having pleaded guilty before the magistrate the accused had an appeal as of right from his conviction.
2. That the Court of Appeal erred in holding that the Notice of Appeal to the County Court judge set forth the grounds of appeal with sufficient particularity as required by s. 722 of the *Criminal Code*.

As to the first ground, I agree with what has been said by the learned judges of the Court of Appeal to the effect that the words of s. 720(*a*) of the *Criminal Code* "the

1960

THE QUEEN v. BAMSEY

Ritchie J.

defendant in proceedings under this Part may appeal to the Appeal Court" include a defendant who has pleaded "guilty" in the summary conviction Court, but it must be borne constantly in mind that no defendant can have his appeal set down for hearing until "he has complied with section 722", and this includes the preparation of a notice setting forth the grounds of appeal. As will be seen from what I have said in this Court in the case of *Regina v. Dennis*[1], I agree with the learned judges in other Courts (see *R. v. Crawford*[2] and *R. v. Tennen*[3]), who have held that the "trial *de novo*" for which provision is made in s. 727 is to be treated as a "trial" in the restricted sense of that word which does not include either arraignment or plea, but I do not agree with those who consider that this construction precludes a defendant who has pleaded guilty from asserting an appeal. In my view, if a man who has entered a guilty plea before the magistrate is able to comply with the requirements of s. 722, then his appeal "shall be set down for hearing before the Appeal Court", and when he enters that Court he is in exactly the same position procedurally as he was immediately after pleading "guilty" before the magistrate and before he had been convicted. This being so, he may change his plea if he can satisfy the Appeal Court that there are valid grounds for his being permitted to do so. See *Thibodeau v. The Queen*[4].

A discussion of the question raised by the second ground follows logically from what has just been said because if the grounds of appeal are not set out in such manner as to comply with s. 722 then the appeal cannot be set down for hearing under s. 723.

The relevant portion of s. 722 reads as follows:

> Where a Notice of Appeal is taken under section 720, the appellant shall
>
> (*a*) prepare a Notice of Appeal in writing setting forth
>
> (i) with reasonable certainty the conviction or order appealed from or the sentence appealed against; and
>
> (ii) the grounds of appeal; . . . .

[1] Ante p. 286. [2] [1959] O.W.N. 75, 123 C.C.C. 14.
[3] [1959] O.R. 77, 122 C.C.C. 375. [4] [1955] S.C.R. 646.

There has been considerable conflict of judicial opinion as to the nature of "grounds of appeal" required by this section, and in this regard Sheppard J.A., summarizing the view of the Court of Appeal in this case, has said:

> Hence, while in compliance with section 722 grounds of appeal are to be given, nevertheless by reason of the nature of the review, the grounds would not appear to be required to be stated with the same particularity as in appeals in indictable offences where the Appeal Court is restricted to the record of the proceedings in the lower Court and where counsel for the respondent is entitled to know specifically the grounds on which the conviction or dismissal is attacked.

It is true that the grounds of appeal referred to in s. 722(1)(*a*)(ii) need not be "stated with the same particularity as in appeals in indictable offences . . .". but it must be remembered that the setting forth of these grounds is one of the acts required to be done as a condition precedent to the jurisdiction of the Appeal Court and although they require neither nicety of pleading nor expert draftsmanship in their preparation it should not be possible to obtain the trial *de novo* for which s. 727 provides upon grounds which are frivolous or apparently lacking in substance.

To appeal as the respondent did in this case from a conviction founded on a plea of "guilty" on the grounds that the magistrate did not comply with the principle as to reasonable doubt in connection with the evidence and that the verdict was contrary to the evidence and the weight of evidence is to present the Appeal Court with a self-evident contradiction in terms.

Far from the conviction being contrary to law, it was the verdict which the law required the magistrate to enter after the plea of "guilty" (see s. 708(2)), and there is, therefore, no room for the application of the principle of reasonable doubt and it is idle for a defendant to complain that the conviction was contrary to the evidence and to the weight of evidence because the conviction was not based on evidence but on the "guilty" plea.

Such grounds are not unacceptable by reason of lack of particularity but because they are irreconcilable with the plea in the Court below which is a part of the material to be kept by the clerk of the Appeal Court with the records of that Court in accordance with the provisions of s. 726(1).

1960

THE QUEEN v. BAMSEY

Ritchie J.

The plea of "guilty" entered in the summary conviction Court concluded against the respondent the issues raised by the information and after the filing of the notice of appeal in this case the Court of Appeal was faced with an outstanding plea of "guilty" without any reason having been put forward to support an application for its withdrawal and without any question of law having been raised to cast doubt on its effect.

The following observations of Sidney Smith J.A. in *R. v. Sanders*[1], although made with reference to the old Code, seem most pertinent to the circumstances of this case:

> On the face of it, there would seem something anomalous in the law if it allowed an accused person, with full understanding, to plead "guilty" before a magistrate and then, because he found the sentence unexpectedly heavy, or had unexpected consequences, or for some other reason having nothing to do with the merits, allowed him to appeal to the county court and, *without explanation,* blandly plead "not guilty," and thus obtain a full trial on the merits. That seems to be playing fast and loose with the administration of justice.

(The italics are mine.)

With the greatest respect, it seems to me that the proceedings before the County Court judge in the present case constitute an example of the type of procedure to which this quotation applies.

After an extensive argument had been presented to the County Court judge and after the proceedings had been adjourned for consideration of the questions as to whether the accused was entitled to a trial *de novo* after a plea of "guilty" and as to the validity of the grounds set forth in the notice of appeal, the following exchange is reported as having taken place in the County Court:

> The COURT: On the objection raised by Crown counsel before the adjournment that the grounds of appeal were not disclosed in the notice of appeal, I am holding that clause 1 of the notice of appeal is sufficient statement of grounds in this particular appeal and I am not making that as a precedent. I understand the matter is before the Court of Appeal now—another one—but that is my present decision. I take it that plea is the same as the Court below?
>
> Mr. DEAN (for the accused): There will be a plea of not guilty here.
>
> The COURT: What was it in the Court below?
>
> Mr. DEAN: It was a plea of guilty in the Court below. Should be another plea taken here.
>
> The COURT: You will waive the reading of the information and plead not guilty?

[1] (1953), 8 W.W.R. 656, 106 C.C.C. 76.

Mr. DEAN: Yes.

The COURT: Where is your client?

Mr. DEAN: Right here. Stand up, please.

The COURT: This is for impaired driving.

Mr. MACKOFF (for the Crown): May it please your honor, the Court of Appeal in a decision handed down just last week in the case of Baumer ruled that on these appeals apparently the reading of the information is a prerequisite now.

The COURT: Is a what?

Mr. MACKOFF: It is required to have a reading of the charge.

The COURT: In spite of the waive?

Mr. MACKOFF: In spite of the waive. Apparently that is a decision of the British Columbia Court of Appeal.

The COURT: Well, this is under the Criminal Code, is it not?

Mr. MACKOFF: Yes, your honor, section 223.

The COURT: He should be in the box. Read the charge.

The accused was accordingly arraigned and permitted to plead "not guilty" without any reason being given to support his change of plea. This quotation indicates that the learned County Court judge erred in determining the validity of the notice of appeal without any reference to the nature of the plea in the summary conviction Court with the result that he upheld the validity of a ground of appeal alleging that a conviction made pursuant to the mandatory provisions of s. 708(2) of the *Criminal Code* and without taking evidence was contrary to law in that the principle of reasonable doubt was not applied in connection with the evidence.

From all the above it will be seen that I am of opinion that the Court of Appeal did not err in holding that the accused had an appeal as of right from his conviction subject to compliance with s. 722, but that I have concluded that the same Court did err in holding that the notice of appeal to the County Court judge in this case set forth "the grounds of appeal" as required by s. 722(1)(*a*)(ii) of the *Criminal Code*.

I would accordingly allow the appeal and set aside the judgments of the Court of Appeal and of the County Court of Vancouver.

1960

THE QUEEN v. BAMSEY

Ritchie J.

The result is that the conviction entered by the learned magistrate is restored.

*Appeal allowed; conviction restored.*

*Solicitor for the appellant: G. D. Kennedy, Victoria.*

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

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1959

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Jan. 26

ESTHER TENNEN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law—Summary convictions—Plea of guilty—Whether right to appeal—Trial de novo—Whether right to withdraw plea—Discretion of County Court Judge—Conviction for non-payment of sales taxes—Criminal Code, 1953-54 (Can.), c. 51, ss. 720, 727—The Excise Tax Act, R.S.C. 1952, c. 100.*

The accused, the registered owner of a business, was summarily convicted and fined by a magistrate on her plea of guilty to a charge of failing to pay sales tax. The County Court judge dismissed her appeal and refused to strike out the plea of guilty on the accused's affidavit that she was only the nominal owner of the business which was under the complete control and operation of her husband. The Court of Appeal dismissed her further appeal and she appealed to this Court.

*Held:* The appeal should be dismissed.

An accused who has pleaded guilty in a summary conviction Court has the same right to apply for leave to change such plea on his appeal by way of a trial *de novo* under s. 727 of the Code as he would have had in the Court below before sentence. However, the decision as to whether or not permission to withdraw the plea of guilty should be given is a matter of discretion for the tribunal, and where, as here, such discretion was exercised judicially, it should not be interfered with.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the conviction of the Appellant. Appeal dismissed.

*E. R. Murray,* for the appellant.

*G. W. Ford, Q.C.,* for the respondent.

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*PRESENT: Taschereau, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

[1] 122 C.C.C. 375, 29 C.R. 379.

The judgment of the Court was delivered by

RITCHIE J.:—Two informations were laid against the appellant "carrying on business under the name and style of Majestic Lamp Company" for failing to pay the sales tax imposed by Part VI of the *Excise Tax Act*, R.S.C., 1952, c. 100, and upon these matters coming on for hearing before S. A. Williamson, Esq., a Justice of the Peace in and for the County of York, the appellant did not appear personally but was represented by duly authorized counsel who pleaded "guilty" on her behalf whereupon she was duly convicted of both offences and sentenced in respect of one information to a fine of $466.93 or thirty days in jail and in respect of the other information to a fine of $746.30 or alternatively to thirty days in jail.

In the proceedings before the magistrate and after the pleas of "guilty" had been entered, the evidence of a collection officer of the Department of National Revenue was called on behalf of the Crown, in the course of which it was proved that the taxes referred to in the two informations had not been paid to date and that the appellant was the sole owner of the Majestic Lamp Company.

In due time the appellant filed and served one notice of appeal in respect of both offences to the County Court of the County of York upon the grounds following:

1. The learned magistrate erred in his finding that the information disclosed an offence;
2. The learned magistrate erred in failing to apply correctly the law and the relevant provisions of the *Excise Tax Act*, the *Bankruptcy Act*, and the *Criminal Code* to the facts of this case;
3. The learned magistrate erred in finding that the accused had failed to comply with the said Act;
4. The learned magistrate lacked jurisdiction to order the accused to pay the arrears of sales tax herein.

Upon the appeal coming on for hearing before His Honour, Judge Shea, there was filed with the Court an affidavit of the appellant setting forth that while she was the registered owner of Majestic Lamp Company she had never at any time operated or exercised any control of the said business nor drawn any salary or profits nor taken any interest in the said business which was under the complete control and operation of her husband. In this affidavit she also stated that she had never been aware of the payment

1960

TENNEN
v.
THE QUEEN

Ritchie J.

or non-payment of any sales tax until she received the summonses and that a month or two before the date of the informations her husband had informed her that the business was failing and that she was bankrupt. She stated also that her husband had advised her that the sales tax had not been paid and that she should plead "guilty", and further that she never realized that she would have to pay any money or be subject to a jail sentence, believing that the money would have to be collected out of the bankrupt estate. The affidavit concludes by stating that the appellant was at all times up to and including the time of her conviction totally ignorant of the whole procedure and completely under the influence of her husband and that she had been advised that she had a good defence in law and on the merits and that she was not guilty of the offences.

In the course of the hearing before the learned County Court judge, there was a lengthy argument between counsel, and conflicting decisions were cited as to whether an appeal lay in this case under the provisions of ss. 720 to 727 of the *Criminal Code,* and in the course of these submissions counsel on behalf of the appellant made the following statement:

> The facts they are not in dispute; the evidence was put in by the crown at the magistrate's court proceedings; we do not quarrel with that, as far as the facts go, and I do not think they are in dispute. The sole question is whether the conviction itself is bad in law.

The learned County Court judge, having the aforesaid affidavit before him and having heard what was said by the appellant's counsel, made the following statement:

> . . . I do not think it will be necessary to have this plea of guilty renewed; there is no exceptional circumstance here. This woman has pleaded guilty, and then she found out that she might be called on to pay money and that is something else.
>
> That is the whole point; and not only was she represented by counsel at the trial,—anyway, she pleaded guilty.
>
> I decline to strike out the plea of guilty. . . . .

The learned County Court judge saw no merit in the other grounds of appeal and the appeal was accordingly dismissed. The appellant appealed from this decision to the Court of Appeal for Ontario[1] upon the following grounds:

> 1. The learned County Court Judge erred in holding that the Appellant was precluded from her right to appeal by reason of her having pleaded guilty before the Magistrate.

[1] 122 C.C.C. 375, 29 C.R. 379.

2. The learned County Court Judge erred in refusing to hear evidence on the ground that the Appellant was precluded from adducing evidence by reason of her having pleaded guilty before the Magistrate.
3. The learned County Court Judge misdirected himself with respect to the right of the Appellant to change her plea on a trial de novo.
4. The learned County Court Judge erred in holding in effect that the plea of guilty was not only an admission as to fact but as to law.
5. The learned County Court Judge erred in refusing the Appellant the right to argue that the Crown had no right to proceed against the Appellant notwithstanding her plea of guilty.

On this appeal two identical notices of appeal were prepared respecting the two offences of which the appellant had been convicted, and the appeals having been heard together Roach J.A. rendered the decision of the Court dismissing both appeals. It is from this decision and the order made pursuant thereto that the appellant now appeals to this Court upon the following grounds:

(*a*) That the proceedings in the County Court of the County of York were a nullity because the accused was not arraigned on the charges or asked to plead to same;
(*b*) That the learned County Court judge erred in refusing to hear evidence on the ground that the appellant was precluded from adducing evidence by reason of her having pleaded guilty before the Magistrate;
(*c*) That the learned County Court judge misdirected himself with respect to the right of the appellant to change her plea on a trial de novo;
(*d*) Such further and other grounds as counsel may advise and which this Honourable Court may deem sufficient grounds for appeal.

After reading the transcript of the proceedings before the County Court judge which are included in the appeal book in the present case, I am satisfied that the second and third of the above grounds disclose a misunderstanding of what took place in the County Court.

As to the first ground, it will appear from what has been said in the cases of *Regina v. Dennis*[1] and *Regina v. Bamsey*[2] that I am of opinion that the arraignment and plea form no essential part of the trial *de novo* contemplated by s. 727 of the *Criminal Code*, but that an accused who has pleaded

[1] Ante p. 286. [2] Ante p. 294.

1960

TENNEN
v.
THE QUEEN

Ritchie J.

guilty in the summary conviction Court has the same right to apply for leave to change his plea before the Appeal Court as he would have had in the Court below before sentence.

As to the second and third of the above grounds, it is enough to say that the record of the proceedings in the County Court does *not* disclose that the learned County Court judge either precluded the appellant from adducing evidence or misdirected himself respecting her right to change her plea.

The learned County Court judge, having read the appellant's affidavit and heard the argument, exercised his discretion by declining to strike out the plea of guilty. That he was entitled to follow this course is made apparent by what was said by Cartwright J., speaking on behalf of the majority of the Court, in *Thibodeau v. The Queen*[1]:

> . . . it may first be observed that it is clear that at any time before sentence the Court has power to permit a plea of guilty to be withdrawn. As to this it is sufficient to refer to the following cases; *R. v. Plummer*, (1902) 2 K.B. 339, *The King v. Lamothe*, 15 C.C.C. 61, *R. v. Guay*, 23 C.C.C. 243 at 245-246, and *R. v. Nelson*, 32 C.C.C. 75. These cases make it equally clear that the decision whether or not permission to withdraw a plea of guilty should be given *rests in the discretion of the Judge to whom the application for such permission is made and that this discretion, if exercised judicially, will not be lightly interfered with.*

(The italics are mine.)

As I have indicated, I am of opinion that the learned County Court judge in no way exceeded his jurisdiction and that his reasons and decisions in refusing to allow the appellant to change her plea disclose no error in law.

I can see no other grounds for allowing this appeal and in fact none were seriously urged at the argument. The appeal must, therefore, be dismissed.

*Appeal dismissed.*

*Solicitors for the appellant: Freedman, Cohl, Murray & Osak, Toronto.*

*Solicitor for the respondent: G. W. Ford, Toronto.*

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[1] [1955] S.C.R. 646.

THE CORPORATION OF THE CITY OF TORONTO AND F. E. WELLWOOD (*Defendants*) ..... APPELLANTS;

AND

OUTDOOR NEON DISPLAYS LIMITED (*Plaintiff*) ..... RESPONDENT.

1959
*Oct. 15, 16, 19

1960
Jan. 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Municipal corporations—Building by-law—Erection and location of signs—Permit required from building inspector—Whether inspector has discretion to refuse when by-law requirements met—Whether delegation of power to inspector—Validity of by-law.*

Building by-law No. 9868 of the City of Toronto, passed in 1923, deals, *inter alia,* with the erection and location of signs on private property and prescribes the standards required to obtain a permit to erect such signs. It places upon the building inspector the duty of ascertaining that these standards are met. The by-law further provides that a permit will not be issued until the location of the sign has been approved by the building inspector; and that the erection of the sign shall not be commenced until a permit has been obtained from him. The trial judge dismissed the plaintiff's application for an order directing the defendants to issue a permit for the erection of a neon display sign on the roof of a building in Toronto. The Court of Appeal directed the permit to be issued on the ground, *inter alia,* of illegal delegation of power to the inspector. The municipality appealed to this Court.

*Held:* The appeal should be dismissed and the permit issued.

On its proper construction, the by-law does not confer any uncontrolled discretion upon the inspector. If he is satisfied that all the requirements are fulfilled and that there is no applicable prohibitory by-law, he has no discretion to refuse to approve the location of the sign and so refuse a permit. The by-law states with sufficient particularity the grounds on which the approval of the proposed location is to be granted or withheld. Consequently, as the appeal was argued on the footing that all the requirements had been fulfilled, it followed that the permit should be issued.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Treleaven J. Appeal dismissed.

*Hon. R. L. Kellock, Q.C.,* and *F. A. A. Campbell, Q.C.,* for the defendants, appellants.

*PRESENT: Cartwright, Fauteux, Abbott, Martland and Ritchie JJ.

[1] [1959] O.R. 26, 16 D.L.R. (2d) 624.

1960

CITY OF TORONTO *et al.* *v.* OUTDOOR NEON DISPLAYS LTD.

*J. T. Weir, Q.C.*, and *A. M. Austin*, for the plaintiff, respondent.

*W. R. Jackett, Q.C.*, and *T. B. Smith*, for the Attorney General of Canada.

*E. J. Houston*, for the Attorney-General of Ontario.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing an appeal from a judgment of Treleaven J. and directing the appellant Wellwood forthwith to issue a building permit to the respondent to permit it to erect a neon display sign on the roof of the building known as 131 Front Street West in the city of Toronto.

On January 31, 1958, the respondent made application to the appellants for a building permit for the erection of the sign in question. By letter dated March 21, 1958, the appellant Wellwood advised the respondent that the Board of Control had instructed him to withhold the permit and enclosed a copy of the Board's direction. This direction is dated March 14, 1958, and is signed by the City Clerk; it reads:

> On March 12, 1958, Controller Newman advised the Board of Control that application has been made for a permit to erect an illuminated sign facing University Avenue on the roof of the building at No. 131 Front Street West.
>
> Controller Newman stated that the University Avenue By-law does not cover this location.
>
> The Board decided to request the City Solicitor to draft a By-law and present same to the Committee on Property on March 19, to prohibit the erection of the aforesaid sign and other signs which may be similarly located in full view of University Avenue.
>
> The Board also decided to request the Commissioner of Buildings to withhold the permit for the above-mentioned sign.

The "University Avenue By-law" referred to in this direction prohibits the erection of, *inter alia*, electric signs on any building or land fronting or abutting on either side of University Avenue between Front Street and College Street. It is not argued that the proposed location of the sign with which we are concerned falls within this prohibition.

[1] [1959] O.R. 26, 16 D.L.R. (2d) 624.

We were informed by counsel that no by-law such as that suggested in the third paragraph of the direction has been passed.

In the course of his cross-examination on an affidavit filed the appellant Wellwood put forward two additional reasons for refusing the permit:

(i) that he had not approved the location of the sign as provided in paragraph 3 of chapter 31 of the building by-law of the Corporation of the City of Toronto being by-law number 9868, and

(ii) that the property known as 131 Front Street West is leased by the City of Toronto to Petrie's Parking Place Limited by a written lease dated March 21st, 1945, that the said lease provides that the lessee will not assign or sub-let without leave, and that the agreement between Petrie's and the respondent permitting the latter to erect the sign was a breach of the covenant not to sub-let.

As to the last mentioned ground (ii), the Court of Appeal were unanimously of opinion that it afforded no answer to the respondent's claim, and on this point I am in full agreement with the reasons of Roach J.A.

The learned judge of first instance gave no written reasons for his decision.

Counsel agree that the following passage in the reasons of Roach J.A. correctly states the footing on which the appeal was argued:

The appeal was argued on the footing that the proposed sign complied with all the standards set forth in By-law No. 9868, that the application to the Building Commissioner was in proper form and that the applicant had complied with every prerequisite required of it in connection with its application for the permit.

By-law no. 9868 was passed by the Council of the Corporation of the City of Toronto on December 10, 1923; it is entitled "A By-law to Regulate the Erection and Provide for the Safety of Buildings"; it is both lengthy and comprehensive, consisting of upwards of 250 printed pages divided into more than 40 chapters.

Chapter 31 is entitled "Signs". The by-law has been frequently amended but the only amendments made to chapter 31 were passed in April 1936. This chapter prescribes

1960

CITY OF TORONTO *et al.* *v.* OUTDOOR NEON DISPLAYS LTD.

Cartwright J.

in detail what is to be filed in support of the application for a permit to erect a sign located wholly or partly on private property, including:

2. (2) A block plan, showing the street lines or other boundaries of the property upon which it is proposed to erect such sign or advertising device and the location of the sign or advertising device upon the property in relation to other structures upon such property or upon the premises immediately adjoining thereto.

(3) Complete drawings and specifications covering the construction of the sign and its supporting framework.

(4) Drawings of, and such other information with respect to, any building upon which it is proposed to locate the sign or advertising device, as may be necessary to determine whether the structure of such building will carry the additional loads and stresses imposed thereon by the erection of such sign or advertising device without exceeding the stresses specified in this By-law. Such drawings shall in all cases have marked thereon, in figures, the height of such building.

The chapter deals, *inter alia,* with the strength of buildings on which it is proposed to erect signs, the height of such buildings, the height above roof of partly wooden signs and of all-metal signs; ground signs; maintenance; the repair or removal of dangerous or defective signs; and the location of signs as more particularly set out hereafter. In regard to allowable stresses, live loads and wind pressures on buildings it contains cross-references to other chapters of the by-law.

In addition to section 2(2) quoted above, the following sections of chapter 31 refer particularly to the locations of signs:

Section 5. Clearances.

(1) Every sign or advertising device erected upon the roof of any building shall be so located as to maintain a clear space of at least three feet between the top of the roof or parapet wall of such building and the bottom of such sign.

(2) No sign or advertising device shall be so located upon any building as to obstruct any window, door, scuttle, skylight or fire escape, so as to prevent the free access of firemen to any part of the building in case of fire.

Section 13. Ground Signs.

(3) No such sign or advertising device shall be located adjacent to any dwelling, apartment house or church or so located that the rear part of same is or will be exposed to any street.

The section of chapter 31 which gives rise to the chief difficulties in this appeal is section 3, which reads as follows:

3. Permit.

(1) A permit shall not be issued by the Inspector of Buildings for the erection of any sign or advertising device located wholly or partly upon private property, until the location of such sign or advertising device has been approved by him.

(2) The erection or installation of any sign or advertising device located wholly or partly upon private property, shall not be commenced until a permit therefor has been obtained from the Inspector of Buildings.

The members of the Court of Appeal were unanimous in construing this section as giving to the Inspector of Buildings an uncontrolled discretionary power to approve or disapprove the proposed location of any sign and to grant or refuse a permit for its erection accordingly. Roach J.A., who wrote the judgment of the majority, dealt with the matter as follows:

The Building Commissioner and the Municipal Corporation now take the position which was supported by their counsel on this appeal, that by virtue of Section 3(1) of By-law No. 9868, the Building Commissioner has the power to refuse a permit if the location of a proposed sign, quite apart from matters of construction, does not meet with his approval and that the location of this particular sign does not meet with his approval. I now deal with that contention without for the time being, taking into consideration, Section 3(1) of the City of Toronto Act, 1939, and the order of the Municipal Board dated February 25th, 1942.

By-law No. 9868 leaves the approval of the location of a proposed roof sign in any area in the absolute discretion of the Building Commissioner. It contains no indicia to be applied by him in reaching his conclusion either to approve or disapprove. If in his uncontrolled and unqualified discretion he thinks it inappropriate that a sign, though complying with every requirement of the By-law, should be erected at a proposed location he may refuse a permit for it. This is an illegal delegation to the Commissioner of a power exercisable only by the Municipal Council. Whether or not, as a matter of civic planning, a sign in a given area should or should not be permitted, is a matter on which the Municipal Council as the governing body of the Municipality, must apply its own judgment; it cannot delegate that function to a municipal official.

Having so construed this section of the by-law the Court of Appeal went on to consider the effect of s. 3 of *The City of Toronto Act,* 1939 (Ont.), 3 Geo. VI, c. 73. Subsection (1) of that section reads as follows:

(1) The Ontario Municipal Board may approve by-law No. 9868 passed by the council of the said corporation entitled "A By-law to regulate the erection and provide for the safety of buildings" and any by-law passed by the said council amending such by-law or containing provisions

1960

CITY OF TORONTO *et al.* v. OUTDOOR NEON DISPLAYS LTD.

Cartwright J.

regulating the erection or providing for the safety of buildings, and upon such approval being given any such by-law shall be deemed to have been validated and confirmed.

On February 25, 1942, the Ontario Municipal Board made an order "under and in pursuance of Section 3 of the City of Toronto Act 1939" that By-law no. 9868 as amended by 68 specified by-laws be approved. Of the 68 amending by-laws, 61 were passed before and 7 after the enactment of the *City of Toronto Act*, 1939.

Laidlaw J.A., who dissented, was of the view that s. 3(1) of the *City of Toronto Act*, 1939 was valid legislation and that the combined effect of that section and of the order of the Municipal Board was to give statutory validity to By-law no. 9868, at all events as regards section 3 of chapter 31 which had not been amended at any time. The majority reached the conclusion that s. 3(1) of the *City of Toronto Act*, 1939 was *ultra vires* of the Provincial Legislature, that consequently section 3 of chapter 31 of the by-law had not been validated, that since, as they had construed it, it purported to give to the Building Inspector an uncontrolled discretionary power to refuse an application which complied with every requirement of the by-law it was beyond the powers of the council to enact it, and accordingly ordered that the permit should issue.

The first question is as to the true construction of the by-law and particularly section 3 of chapter 31.

The by-law must be construed as of the date when it was enacted, some 16 years before the passing of the statute which purports to give the Municipal Board power to validate it. In 1923, the rule concisely stated by Middleton J.A. in *Forst v. City of Toronto*[1], had long been the established law in Ontario. I refer particularly to the following passage:

> When the municipality is given the right to regulate, I think that all it can do is to pass general regulations affecting all who come within the ambit of the municipal legislation. It cannot itself discriminate, and give permission to one and refuse it to another and, *a fortiori*, it cannot give municipal officers the right, which it does not possess, to exercise a discretion and ascertain whether as a matter of policy permission should be granted in one case and refused in another.

[1] (1923), 54 O.L.R. 256 at 278-9.

It is not suggested that the Court of Appeal laid down any new rule in that case; it applied well settled rules to the by-law there in question.

It is a rule of construction that if the words of an enactment so permit they shall be construed in accordance with the presumption which imputes to the enacting body the intention of limiting the operation of its enactments to matters within its allotted sphere. I agree with the following statement in McQuillin on Municipal Corporations, 3rd ed., vol. 9, at p. 138:

> Furthermore, licensing ordinances will be construed, if possible, as not vesting legislative power or absolute discretion in enforcement officials with respect to the grant or issuance of a license.

When section 3 of chapter 31 of the by-law is read, as it must be, in the context of the rest of the chapter and of the whole by-law, I am unable to construe it as conferring any uncontrolled discretion upon the Inspector.

Chapter 1 of the by-law is entitled "General Provisions"; it contains cross-references to other chapters including chapter 31; it provides by section 1:

> The Commissioner of Buildings, shall be the Inspector of Buildings, whose duty it shall be to see that the provisions of this By-law are carried out.

Chapter 2 provides in part:

> For the purpose of this By-law,
>
> PERMIT, when issued by the Commissioner, shall mean certification by him to the effect that the plans and specifications submitted for examination and approval, comply, or have been made to comply, with the requirements of this By-law.

As already indicated, chapter 31 deals in several places with the location of signs. In my view, on its true construction it places upon the Inspector the duty of ascertaining that the plans, drawings and specifications filed in support of an application for a permit to erect a sign not only comply with all relevant provisions of the by-law as to method of construction, loads, stresses and so forth, but also show that its proposed location is in accordance with the

1960

CITY OF TORONTO *et al.* *v.* OUTDOOR NEON DISPLAYS LTD.

Cartwright J.

provisions of sections 5(1), 5(2) and 13(3) of chapter 31 quoted above; the purpose of requiring the applicant to file the material required by section 2(2) of chapter 31 is to enable the Inspector to certify as to these matters. No doubt the Inspector would also have to consider whether there was in existence any by-law such as the "University Avenue By-law" referred to above prohibiting the erection of signs in the area in which the sign is proposed to be located.

In my opinion, if the Inspector is satisfied that all the requirements of the by-law are fulfilled and that there is no applicable prohibitory by-law, he has no discretion to refuse to approve the location of the sign and so refuse a permit. The by-law states with sufficient particularity the grounds on which the approval of a proposed location is to be granted or withheld.

As the appeal was argued on the footing set out in the passage from the reasons of Roach J.A. quoted above, it follows that, in my opinion, the order of the Court of Appeal directing the permit to be issued was right and should be affirmed, and it becomes unnecessary to consider the question of the constitutional validity of s. 3(1) of the *City of Toronto Act,* 1939 since, construed as I think it ought to be, section 3 of chapter 31 of the by-law was passed in due exercise of the powers conferred on the council by the *Municipal Act* and required no statutory validation.

Counsel for the appellants and for the Attorney General of Ontario invited the Court to express an opinion as to the validity of the 1939 statute even if it should not become necessary for us to do so; but I do not think that we ought to do this. In view of the construction I have placed upon the provisions of the by-law with which we are concerned, anything said as to the constitutional validity of the *City of Toronto Act,* 1939 would be *obiter.* The dismissal of the appeal, of course, does not constitute an affirmation of the view of the majority in the Court of Appeal on the constitutional point.

I would dismiss the appeal with costs. There should be no order as to costs of the Attorneys-General who intervened.

*Appeal dismissed with costs.*

*Solicitor for the defendants, appellants: W. G. Angus, Toronto.*

*Solicitors for the plaintiff, respondent: McDermott, McMahon, Rogers & Mingay, Toronto.*

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GARTLAND STEAMSHIP COMPANY AND ALBERT P. LABLANC (*Defendants*) APPELLANTS; 1959 *Mar. 9, 10, 11, 12, 13, 16; 1960 Jan. 26

AND

HER MAJESTY THE QUEEN (*Plaintiff*) RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Shipping—Ship colliding with Crown owned bascule bridge—Bridge failing to rise due to mechanical defect—Whether excessive speed—Whether warning—Conflicting evidence—Whether agony of collision—Negligence of bridge operator and ship Master—Whether contributory negligence—Recovery on basis of Ontario Negligence Act—Whether liability restricted by ss. 649 and 651 of the Canada Shipping Act, 1934 (Can.), c. 44.*

A ship owned by the defendant company collided with and destroyed the north span of a Crown owned bascule bridge, which crossed the Burlington Channel, when the bridge failed to rise due to a mechanical failure. The action for damages instituted by the Crown was maintained by the trial judge who held that the accident was solely due to the negligence of the ship in failing to keep a proper look-out and in proceeding at an excessive speed. The damages awarded included the value of the bridge, the cost of erecting a temporary replacement and loss of use of this highway bridge and channel facilities. However, the damages were limited pursuant to the provisions of the *Canada Shipping Act*. The ship appealed to this Court and the Crown cross-appealed as to the limited liability under the Act.

*Held* (Locke and Martland JJ. dissenting): The appeal should be allowed in part.

*Per Curiam:* The cross-appeal should be dismissed. The trial judge was right in permitting the amount of recovery to be limited in accordance with ss. 649 and 651 of the *Canada Shipping Act*.

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*PRESENT: Taschereau, Cartwright, Locke, Martland and Judson JJ.

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

*Per* Taschereau, Cartwright and Judson JJ.: The bridge operator and the Master of the ship were both negligent; the former for failing to give timely and adequate warning that the bridge could not be raised, and the latter for failing to stop short of the bridge. The degrees of fault should be apportionned two-thirds to the bridge operator and one-third to the ship.

This was not a case for the application of the rule in *Bywell Castle* (1879), 4 P.D. 219, dealing with the agony of collision.

As this was a common law action for damages within s. 29(d) of the *Exchequer Court Act*, the Crown, as plaintiff—there being no counterclaim—was entitled to judgment for one-third of its loss under the *Ontario Negligence Act*. There was no recovery at common law by reasons of the contributory negligence, and the *Canada Shipping Act*, incorporating the contributory negligence provisions of the *Maritime Conventions Act*, 1911, had no application to a collision between a ship and a structure on land. *T.T.C. v. The King*, [1949] S.C.R. 510, applied.

The damages awarded by the trial judge for loss of use of the channel and the bridge facilities should be disallowed. There was no monetary loss to the Crown with respect to this item which was really public inconvenience rather than loss of use. *The Greta Holme*, [1897] A.C. 596; *The Mediana*, [1900] A.C. 113; *The Marpessa*, [1907] A.C. 241; *Admiralty Commissioners v. S.S. Chekiang*, [1926] A.C. 637, distinguished.

*Per* Locke and Martland JJ., *dissenting:* The trial judge's findings of fact, based on his appreciation of the credibility of the witnesses, that the accident was caused by the sole negligence of the ship and that there was no contributory negligence on the part of the bridge operator, should not be disturbed. His assessment of the damages, including the award for loss of use of the bridge facilities, should also not be disturbed. The Crown was deprived of its right to use these facilities in which very large sums of public moneys had been invested, and was entitled to recover for such deprivation although the operation of the bridge was a source of continuous expense and not of profit. *The Greta Holme, supra*, and *Admiralty Commissioners v. S.S. Chekiang, supra*, applied.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada maintaining an action by the Crown for damages arising from the collision of a ship with a Crown owned bascule bridge. Appeal allowed in part, Locke and Martland JJ. dissenting.

*F. O. Gerity* and *G. R. Mackay*, for the defendant, appellant, Gartland Steamship Co.

*P. B. C. Pepper*, for the defendant, appellant, Albert P. LaBlanc.

*C. F. H. Carson, Q.C., J. B. S. Southey* and *P. M. Troop*, for the plaintiff, respondent.

The judgment of Taschereau, Cartwright and Judson JJ. was delivered by

JUDSON J.:—This accident happened early in the afternoon on April 29, 1952, in the Burlington Channel, which is the approach to the Port of Hamilton, when the S.S. *W. E. Fitzgerald* collided with and totally destroyed the north span of the highway bridge which crosses the channel. The weather was clear and the wind light. The channel runs east and west and the *Fitzgerald* was travelling from the lake into the harbour, that is, from east to west. The channel is protected by two piers on the Lake Ontario side. The total distance from the outer end of these piers to the highway bridge is 1,679 feet. A ship approaching the Port of Hamilton from Lake Ontario and passing through this channel has to pass two bridges, first a railway bridge and then the highway bridge. The railway bridge pivots on a concrete abutment, which is in the centre of the channel, and the Lake Ontario end of this abutment is 444 feet from the highway bridge. A ship approaching from Lake Ontario would normally expect to pass these bridges on the north side. No question arises about the railway bridge. It was opened in plenty of time for the ship to pass. The north span of the highway bridge never did open because of a mechanical failure. At some stage of the ship's progress down the channel the south span did open.

The theory of this accident, put forward by the Crown as plaintiff in the action and accepted in full by the learned trial judge, is, first, that this ship entered the channel at an excessive speed and was unable to stop before coming into collision with the north span of the highway bridge; second, that the ship came down the centre of the channel until its bow was about one ship's length from the easterly end of the concrete abutment which supports the railway bridge and at that point changed course so as to pass to the north of the abutment; and third, that the ship struck the north span notwithstanding the fact that from the time the ship entered the channel there was a steady red light on the north span conveying a warning that this span would not or could not be raised to permit the passage, and that, on the other hand, the south span was opened in plenty of time to permit the passage. In my opinion, this theory is a serious

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Judson J.

over-simplification of the explanation for the accident and is based upon a rejection of evidence that should not have been rejected.

The learned trial judge found that when the ship entered the channel between the piers, its speed was greatly in excess of 5 miles per hour and probably at least 7 miles per hour. This conclusion is based upon the evidence of three steamship captains, each of long experience in navigating these waters, who would have reduced to half speed not later than Burlington buoy, which is well out in the lake, and to slow speed not later than half way in and to dead slow at the outer end of the piers if the bridge had not started to rise. The trial judge also found that it was not in accordance with good seamanship to enter the channel at even 5 miles per hour when neither span of the bridge had commenced to open, unless prompt steps were taken to reduce speed further and, if necessary, to stop before reaching the bridge.

As to the signal lights on the bridge, the finding was that when the *Fitzgerald* was not more than a ship's length in the channel, the south span began to rise and that immediately before this the flashing red light on the north span had been changed to a steady red light. The flashing red light is a signal that preparations are being made to raise the span. The steady red light conveys a warning of danger that the span will not be raised. The evidence of the bridge-tender, Hockridge, is the basis for this second finding of fact. When he failed in his efforts to raise the north span, because of some still unexplained mechanical failure, he says that he pressed the button to change the flashing red light on that span to a steady red light and then turned his attention to the south span, pressing the button to change the light on this span from a steady red to a flashing red. He himself could not see the lights. At this time, he says, the ship was just entering the channel and the south span immediately began to rise and was at its full height within a minute.

Another witness, Charles Coleman, was on the bridge with Hockridge. He saw the *Fitzgerald* coming in and he says that the south span started to rise when the ship was about its own length in the channel. He saw no change of

course which would indicate an attempt to get into the south channel and no slackening of speed until the anchors were dropped. He has nothing to say about the lights on the bridge.

On this evidence and the conclusion that follows from it, there was no excuse for the ship in colliding with the north span, with weather conditions as they were and with a distance of 1,235 feet from the outer end of the pier on the Lake Ontario side to the easterly end of the abutment on which the railway bridge pivots, and with a further distance of 444 feet from this point to the north span.

The decisive questions are whether there ever was any change of light from flashing red to steady red and what was the position of the ship when the south span began to rise. On these questions the evidence of one Rowarth, the bridge-tender on the railway bridge, directly contradicts the evidence of Hockridge. He says that there was still a flashing red light on the north span when the bow of the ship passed the centre of the railway bridge. The ship was then about 200 feet from the highway bridge. He also says that when it was at the position marked "R.1" on Exhibit K, which is very close, about one-third of the ship's length, to the Lake Ontario end of the abutment on which his bridge pivots, he looked around and saw that the south span was just starting up or had just started up. It is at once obvious that this evidence describes a very different kind of accident from the one described by Hockridge. Rowarth had been employed as bridge-tender on this railway bridge for a period of twenty-eight years and had been the senior man in charge since 1946. We know his precise point of observation. He was in his cabin in the centre of his bridge and he had the best point of observation of any eye witness. He watched the *Fitzgerald* come in. The light on the north span of the highway bridge was flashing red after he had opened his railway bridge. The ship was then half way between the buoy and the pier and coming in slowly, in his opinion, judging from the bow wave. His next observation was when the *Fitzgerald* was well in the channel with her bow in line with the centre of the pier on which the railway bridge pivots. At this time his observation was that there was a flashing light on the north span, but that the span had not

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Judson J.

gone up. His next observation was that the ship was heading into the north channel. At this point he says he was wondering why the bridges were not going up. Neither span had moved and at this time the light on the north span was still flashing red and the light on the south span was a steady red. The bow of the ship then rubbed against his pier. There was still a flashing red light on the north span and the south span was then going up. He heard the noise of the anchor chain just before the boat rubbed on his pier. When the bow of the ship was opposite his cabin it was coming very slowly and his estimate is that the south span was by that time completely up but the flashing red light on the north span was still on. This was the last signal he saw on the north span because the ship in passing obscured his vision.

The learned trial judge rejected this evidence in its entirety. He described the evidence as very vague and containing to some extent contradictory estimates. He did not suggest that he was an untruthful witness but came to the conclusion that his recollection had become blurred by lapse of time to such an extent that his "very indefinite estimates were not to be relied on". From the written record I cannot find any indication of this vagueness or indefiniteness in estimates. This witness is clear on two points on which he was not shaken in any way. The first is that there never was a steady red light on the north span and the second is that the south span did not begin to rise until the ship was no more than a third of a length from the centre abutment. How can evidence of this kind be rejected? There was no better evidence anywhere. There was no better point of observation. If he was an honest witness, and there is no suggestion that he was not, he could not be mistaken on either point and his evidence strongly supports the evidence of the master and all the members of the crew who gave evidence on these two points.

Another independent witness, Mrs. Van Cleaf, gave evidence for the defence. She is the wife of the lighthouse keeper. She observed the *Fitzgerald* round the buoy out in the lake and heard it whistle for the bridge as it came in. She saw the ship as it entered the channel between the piers and describes its speed at that point as slow. She also heard

the ship give another blast at the entrance to the channel and wondered what was wrong. She left her house and went on the pier. When she got outside, the ship, she says, was about 90 feet from the railway bridge abutment and the south span was just beginning to go up. She heard the anchor drop at this point. She made no observation of the lights on the span.

The evidence of this witness was rejected on the ground of bias and certain other discrepancies, which to me are of no significance in determining where the ship was when the south span began to rise. Her estimate of 90 feet from the railway bridge abutment may be wrong. The railway bridgemaster says it was about one-third of a ship's length. But her evidence on this point is entirely consistent with that of the railway bridgemaster, and that of the ship's master and crew that the south span did not begin to rise until the ship was close to the railway bridge abutment. The bias assigned for the rejection of this evidence is to me very unconvincing and I do not think that the evidence should have been rejected on this ground without testing it by comparison with that of an admittedly truthful witness, who was held to be mistaken. One was said to be biased and the other mistaken but they both testified to the same essential fact of the proximity of the ship to the bridge when the south span began to rise.

There was only one witness, apart from Hockridge, who testified that the light on the north span was steady red, one W. R. Love who was an employee of the Department of Public Works, engaged in keeping a tally of the loads of fill being delivered to a work site behind the north pier. He says that he was stationed at a point marked "L" on Exhibit 14, which is about half way between the end of the pier and the highway bridge. There is some evidence that he was considerably closer to the bridge. I say this because he was within speaking distance of a man called Williams and there is evidence that the work site where he was was actually closer to the bridge than he estimated. He did not pay any attention to the approach of the *Fitzgerald*. He was working on his tallies. His attention was first drawn to the ship by the fact that its propellor was running in reverse. There is evidence that the propellor did run in reverse at one point

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Judson J.

after the captain had tried to enter the south channel and had failed because he was too close. I will deal with this attempt later. He also heard the noise of the anchor immediately after his first observation. His evidence therefore begins at the point where the propellor was going astern and the ship was letting go the anchor. This witness does say that the light on the north span was a steady red at this point. One immediately wonders how this witness, beginning his observations at this point, could possibly say "in comparison to any other boat I had seen going through I would say it was quite faster than any other ship I had seen going through". How could he possibly justify a statement of this kind with the observation that he made and how could the learned trial judge prefer this evidence to that of the C.N.R. bridgemaster with all his experience with shipping through this canal and his ability to judge and analyse a dangerous situation? There is no comparison between the respective testimonial abilities of Rowarth and Love based upon experience in observation, a precise identification of the point of observation, and knowledge of the movements of the ship.

In my opinion, there was error in rejecting the evidence of Rowarth and Mrs. Van Cleaf for the reasons given by the learned trial judge. The evidence as to the lights on the bridge and the position of the ship seems to me to be overwhelmingly in favour of the defence and I think that in a case where the trial is completed in February 1955 and a reserved judgment delivered in January 1958, the initial advantage of the trial judge who heard and saw the witnesses has largely disappeared.

I also think that there was error in the judgment of the learned trial judge when he held that the ship made no attempt to get into the south channel. The master did describe such an attempt when he was in the position marked "R. 1", described by Rowarth as about one-third or one-half a ship's length from the centre pier. The south span, the master says, was then opening and in an attempt to enter the south channel he turned hard left on the wheel and went full speed ahead. When he found that he was unable to get in, he reversed his engines and dropped his anchor. This attempt, he says, is what caused him to rub

on the centre pier when entering the north channel. Now, Rowarth says that the bow did rub on the centre pier when entering the north channel. Could Rowarth be mistaken in a physical fact such as this? Rowarth's evidence strongly confirms that of the master on this point. If the learned judge's finding is accepted that there was no attempt to get into the south channel, the inference is that this master not only sailed his ship into a closed span showing a red light when there was an alternative open course, but sailed it in such a way that his bow rubbed on the centre pier for no reason whatever. To me this is a glaring improbability and I cannot draw an inference of such incredible negligence from this evidence.

On the other hand, I think that the bridgemaster, Hockridge, was guilty of very serious negligence in failing to sound five short blasts of the bridge whistle to indicate his inability to raise the north span. His explanation is that there was plenty of time for the ship to get into the south channel and there might be some possible excuse for this neglect if the ship were actually in the position in which he says it was when he began to raise the south span. I have already indicated that my conclusion is that the ship was much nearer to danger when the south span did begin to rise. But quite apart from this, I cannot conceive of any more dangerous situation than failure of this span to work. When the ship was approaching and the bridgemaster knew that the north channel was the one which the ship would normally take, why not stop the ship at once by giving the danger signal? The man on the bridge alone knew that there had been a dangerous mechanical failure on the north span and he had no knowledge, at this time, that he could raise the south span. This is not an accident of a routine character. If it is true that the north span would not work and the south span was still untested, there was a situation of extraordinary emergency, a situation which in my opinion was very flippantly disregarded by the bridgemaster even if one accepts his evidence in full.

The Burlington Channel regulations read:

> 3. (1) The Master of every vessel approaching the bridges of the Burlington Channel and desiring passage through shall sound three long blasts of a whistle or horn to indicate to the bridgemaster that the bridges be opened.

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Judson J.

(2) If for any reason the bridgemaster is not able to immediately open the bridges he shall signal the approaching vessel by five short blasts of the bridge whistle.

(3) No liability shall be incurred by the Crown in the event of failure of the bridgemaster or staff to signal the approaching vessel when unable to open the bridge immediately.

4. (1) A vessel shall not attempt to pass the Burlington Channel bridges until both bridges are in a fully open position on the side of the Channel on which the vessel is approaching and the bridges are showing green lights.

(2) Every vessel when approaching a bridge which is not in a fully open position shall be kept at such speed and under such control that the vessel may at any time be stopped well clear of the bridge.

The interpretation put upon regulation 3(2) by the learned trial judge that there was no obligation to sound the warning blasts unless there was inability to open both spans seems to me to be a very narrow one. This ship expected to pass through the north channel, the normal and expected course of passage for a ship entering from the lake. The bridgemaster knew this and yet he deliberately made no attempt to give the warning signal that this passage would not be available. Reading regulations 3 and 4 together, I cannot regard them as supporting the position taken by the bridgemaster that he was under no obligation to sound the danger blast unless both his spans failed to work, for regulation 4, when speaking of both bridges being open on the same side, must be referring to the railway bridge and the highway bridge. Quite apart from any regulation and what it may mean, in this extraordinary emergency and with a whistle available it seems nonsense to me for the bridgemaster to say that no warning was necessary, even if the ship was where the bridgemaster says it was. I think that this ship was lured into a dangerous position by the failure to warn and by the continuing invitation in the form of the flashing red light that the north span would be raised.

The Crown is the plaintiff in this action, seeking to recover damages for the destroyed north span. There is no counterclaim by the ship owner for there was little or no damage to the ship. The Crown must prove negligence against the master and its claim is met not only by a denial of negligence but also by a plea of contributory negligence on the part of the Crown's servant, the bridgemaster. In my opinion

this plea of contributory negligence is established. The bridgemaster should have given the warning blasts when the ship was entering the channel, for, according to his own story, he had the time and opportunity to do this and he alone knew of the mechanical failure. I am also of the opinion that he never did change the flashing signal to the steady red signal and that he allowed the ship to advance too far in the face of his invitation before he made any attempt to raise either span.

I am not satisfied that the learned trial judge's finding as to the speed of the ship is the correct one. He finds that the ship entered the channel at a speed between five and seven miles per hour. His theory of the accident was that this was too high a speed to permit the ship to stop short of the bridge. This theory is based on the inference drawn from the evidence that the ship sailed straight up to the bridge. I am satisfied that this is not the correct inference to draw from the evidence and that the ship did make an effort to get into the south channel and that it did rub the centre pier. In spite of all this, the ship was virtually stopped when it nosed into the bridge. It was not a heavy impact. The expert evidence introduced by the Crown, if it is to be accepted, demonstrates that the ship even at 7 miles per hour when entering the channel could have stopped short of the bridge. It also demonstrates that if the captain executed the manoeuvres that he said he did in his attempt to get into the south channel and then to extricate himself, his ship would rub its bow on the centre pier and would have sufficient momentum to reach and collide with the north span. This expert evidence, to me, is strongly corroborative of the account of the accident given by the defence. Nevertheless, the obligation imposed on the ship by regulation 4 is clear. It must not attempt to pass "until both bridges are in a fully open position on the side of the Channel on which the vessel is approaching and the bridges are showing green lights." This must mean, in this case, the railway bridge and the north span. "Both bridges on the side of the Channel on which the vessel is approaching" cannot refer to the north and south spans of the highway bridge. Further, the ship must be under such control that it "may at any time be stopped well clear of the bridge."

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Judson J.

The appellant submits that it should be relieved from liability under the *Bywell Castle*[1] rule or, in the alternative, that this is a case of contribution. The *Bywell Castle* rule is appealed to on the ground that the master of the ship was put in a dilemma by the errors and omissions of the bridgemaster by delay at his work and in failing to warn of the danger by blast and lighting and that the attempt to get into the south channel at the last moment was made under real apprehension of danger and was, in the circumstances, a reasonable course of conduct. The master says that it was this attempt that gave his ship the momentum that carried it into the bridge and that if this dilemma had not arisen he would have been able to stop. While I am satisfied, for the reasons I have given, that the attempt to get into the south channel was actually made and that a situation did arise which involved a choice between two unpleasant and unsatisfactory alternatives, I do not think that this is a case for the application of the *Bywell Castle* rule. At some point in his progress through the channel the master should have decided that he had to do something to stop short of the bridge rather than go ahead on the invitation of the flashing red light in the expectation that the north span would be raised. In my opinion he postponed that decision too late. This is the negligence that I would find against him. I think the master should have done in the first place what he did in the second. Instead of going hard to the left and giving the order for full speed, he should have dropped his anchor and reversed his engines. He was too close to the abutment of the railway bridge to do what he did. The case, in my opinion, is one for apportionment of fault.

I would apportion the fault two-thirds to the bridgemaster and one-third to the ship. The next question is whether the plaintiff can recover anything in these circumstances. Apart from statute this action would be dismissed. With a plea of contributory negligence established as in this case, the plaintiff fails because he does not prove that the

[1] (1879), 4 P.D. 219, 41 L.T. 747.

defendant caused the damage: *T.T.C. v. The King*[1]. The *Canada Shipping Act,* incorporating the *Maritime Conventions Act* 1911, has no application to a collision between a ship and a structure on land. The choice is between no recovery at all and a recovery under the Ontario *Negligence Act*. This is a common law action for damages within s. 29(*d*) of the *Exchequer Court Act,* R.S.C. 1952, c. 98, and in my opinion the Crown, as plaintiff, is entitled to the advantage of the Ontario Act: *T.T.C. v. The King, supra.* It should have judgment for one-third of its loss.

The learned trial judge's assessment of the damages amounts to $367,823.49. This includes $215,073.52 for the value of the destroyed span, $30,000 for removal of the wreckage and $60,280.18 for a new temporary fixed span. In addition, assessments were made for numerous smaller items of damage. I would not interfere with any of these assessments although I have serious doubt whether more allowance should not have been made for obsolescence in the computation of the value of the destroyed span. But, in addition, the learned trial judge allowed $30,000 for loss of use of the channel and the facilities as they existed before the accident. I would disallow this item in full. There is no evidence that any ship has been unable to get through the channel because of this accident. The south channel was always open. The north channel is closed to shipping until the temporary span is replaced by a moveable span. This has not yet been done and I am not unaware of the fact that a new high-level bridge has been built with the intention of carrying most of the highway traffic which formerly travelled over the damaged bridge.

To me this item of damage for which the Crown seeks compensation is better described as public inconvenience rather than loss of use. For a short time, until the so-called temporary span was put in, pedestrian and vehicular traffic suffered inconvenience but the Crown suffered no monetary loss. The same may be said of loss of use of the north channel. If it had been thought wise to replace the span, the work would have taken one year. There was, therefore, a theoretical loss of use of the north channel for shipping during this period. But the loss of use is again really public

[1] [1949] S.C.R. 510, 515, 3 D.L.R. 161, 63 C.R.T.C. 289.

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Judson J.

inconvenience and not monetary loss to the Crown. I do not think that *The Greta Holme*[1], *The Mediana*[2], *The Marpessa*[3] and *Admiralty Commissioners v. S. S. Chekiang*[4], where damages were awarded for loss of use of dredgers, a lightship and, in the last case, a warship, can have any application to the facts of this case. The Crown has been fully compensated for all its loss without this item.

I would therefore reduce the learned trial judge's assessment from $367,823.49 by this item of $30,000, making the total amount of damage proved $337,823.49. Of this the Crown is entitled to judgment for one-third or $112,607.83. In accordance with these reasons, I would vary the judgment under appeal and direct that judgment be entered for $112,607.83 and costs of the trial and other proceedings prior to appeal. The appellant should have the costs of the appeal.

The formal judgment of the learned trial judge provided that the plaintiff recover from the defendants $367,823.49 but that the defendant Gartland Steamship Company was entitled to limit its liability to an amount not exceeding $184,383.50. The respondent cross-appealed against that part of the judgment which declared the defendant entitled so to limit its liability. For the reasons given by my brother Locke, I would dismiss the cross-appeal with costs.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J. (*dissenting*):—This is an appeal from a judgment of the Exchequer Court delivered by Cameron J. by which damages were awarded against the present appellants in respect of an accident which occurred on April 29, 1952 when the ship "W. E. Fitzgerald", owned by the appellant company and in charge of the appellant LaBlanc as master, came into collision with and damaged the northerly span of a bascule bridge, the property of the Crown, which traversed the Burlington Ship Canal near Hamilton.

The Burlington Ship Canal is an artificial waterway constructed by the Crown upon its own property for the purpose of providing the means of access for shipping from

[1] [1897] A.C. 596.
[2] [1900] A.C. 113.
[3] [1907] A.C. 241.
[4] [1926] A.C. 637.

Lake Ontario to and from the harbour of Hamilton. The width of the channel between the boundary walls is 298 ft., the total length is 2,720 ft. and it was dredged to a depth of 26 ft. In the centre of the channel there is a pier 503 ft. in length, the eastern extremity of which is 1,235 ft. west of the eastern extremity of the channel. This pier divides the main channel into two channels of approximately 130 ft. in width and provides support for the pivot of a Canadian National Railway bridge and the off shore edges of the two span bascule bridge which at the time of the accident afforded the means of crossing the channel to vehicles and pedestrians travelling upon the Queen Elizabeth highway. The pivot of the railway bridge is approximately 190 ft. west of the eastern end of the centre pier and 1,425 ft. from the eastern extremity of the channel. The bascule bridge is about 240 ft. west of the pivot of the railway bridge close to the western extremity of the pier. A bascule bridge is a draw bridge balanced by a counterpoise which rises or falls as the bridge is lowered or raised, and the counterpoises for the spans of this bridge were on the north and south shores of the channel. When the span was raised to permit the passage of a vessel, the floor was elevated to an almost vertical position. Each span was equipped with lights of the nature described in the Notice to Mariners of March 7, 1951, hereinafter quoted.

At a distance of about a mile from the easterly end of the channel, there is a buoy referred to as the Burlington Traffic Buoy.

The bridge is maintained and operated by the Department of Public Works of Canada. By P.C. 2294 of May 9, 1949, regulations were made under the provisions of the *Navigable Waters Protection Act,* R.S.C. 1927, c. 140, defining in certain respects the manner in which shipping should be operated when approaching and passing through the channel. These, so far as they are relevant, were as follows:

1. The maximum speed for vessels navigating the Burlington Channel shall be as follows:
   (*a*) for vessels not exceeding an over-all length of 260 feet—8 miles per hour;
   (*b*) for all other vessels—a minimum speed consistent with the safety of the vessel and the bridges.

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Locke J.

3. (1) The Master of every vessel approaching the bridges of the Burlington Channel and desiring passage through shall sound three long blasts of a whistle or horn to indicate to the bridge-master that the bridges be opened.

(2) If for any reason the bridgemaster is not able to immediately open the bridges he shall signal the approaching vessel by five short blasts of the bridge whistle.

(3) No liability shall be incurred by the Crown in the event of failure of the bridgemaster or staff to signal the approaching vessel when unable to open the bridge immediately.

4. (1) A vessel shall not attempt to pass the Burlington Channel bridges until both bridges are in a fully open position on the side of the Channel on which the vessel is approaching and the bridges are showing green lights.

(2) Every vessel when approaching a bridge which is not in a fully open position shall be kept at such speed and under such control that the vessel may at any time be stopped well clear of the bridge.

6. Any person violating any of these Regulations shall be liable, upon summary conviction, to a penalty not exceeding fifty dollars and costs, or to imprisonment for a term not exceeding ten days, or to both fine and imprisonment.

A further regulation was made and notice of it given to mariners dated March 7, 1951, which read:

> Additional signal lights have been installed on the highway bridge in Burlington Channel, at the top centre of each of the two bascule spans. These are in addition to the navigation lights at the centre floor level of each span, which shows steady Red or no signal when the span is closed and steady Green when it is open to passage of a vessel.
>
> Vessels requiring passage shall be governed by the following signals located on this bridge.
>
> Steady Red or no signals indicate that the bridge is not ready. A flashing Red signal on top of either span indicates that that span is being made ready for passage of a vessel. A vessel requiring passage shall then alter course if necessary and prepare to pass on the same side of the Centre Pier as that on which the flashing signal is given.
>
> After either span is completely raised, discontinuation of the flashing Red signal and a steady Green signal from the floor of the span, together indicate that that span is ready for passage of a vessel.
>
> *Note:* Navigation lights on the Canadian National Railway bridge, on the lakeward side of the highway bridge, remain as heretofore.

The case for the Crown, as pleaded, was that the impact of the ship with the span and the resulting damage was caused by the negligence of the defendant LaBlanc in the navigation or operation of the ship, in the course of his

employment as a servant of the appellant company. Particulars of the negligence pleaded were that he had caused the ship to approach, or failed to prevent it from approaching the north span, at an excessive rate of speed: that he had failed to keep or cause to be kept a proper look-out: that he had attempted to pass the bridge with the ship before the span was in an open position and showing green lights, contrary to subs. (1) of s. 4 of the Burlington Channel Navigation Regulations, and failed to keep the said ship at such a speed and under such control when approaching the north span to enable it to be stopped well clear of the bridge, contrary to subs. (2) of s. 4 of the said Regulations.

The defendants filed separate defences, each of which, in so far as the issue of liability was concerned, denied the allegations of negligence and of excessive speed, alleged that the control apparatus and machinery were not in good operating order and condition, that the accident occurred by reason of the negligence of the bridge tender in failing to give sufficient warning of the failure of the bridge machinery and its control system, in failing to manipulate the light signals so as to indicate that the bridge would not or could not open, and to sound an alarm signal to give warning to the ship of his inability to open the north span.

On the day in question the *Fitzgerald* was bound from Toronto to the Port of Hamilton, part laden with a cargo of sand. The ship is 428 ft. in length and of 52 ft. beam. According to the log, it arrived at the Burlington Buoy at about 1.18 p.m. and it is common ground that at that time the lights on the north span were flashing red, indicating, as required by the Regulations, that that span was being made ready for the passage of the vessel. Captain LaBlanc said that the ship had sounded three long blasts, as required by the Regulations, when it was about half way between the buoy and the entrance of the channel, and, apart from this, it was shown by the evidence that the bridge tender Hockridge had seen the vessel before it reached the buoy and intended to cause the north span to be opened to permit its passage. It is also common ground that, due to some failure either in the electrical power or in the mechanism with which the span was equipped, it failed to operate when

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Locke J.

Hockridge attempted to open the span. While the most diligent inquiries were made after the event to determine the cause of this failure, it was not ascertained. The ship, after rounding the buoy, proceeded into the main channel and, at some point the determination of which is a matter of controversy, the southern span was raised to permit the passage of the vessel. The captain, however, had directed it into the north half of the channel and, despite going hard astern and dropping two of the ship's anchors, was unable to stop it before it struck the north span. The force of the blow was sufficient to wreck the span and as an operating unit it became a total loss.

The facts relating to the movements of the ship after rounding the buoy are reviewed with such clarity and in such detail in the reasons for judgment of the learned trial judge that it is sufficient to summarize them.

Hockridge, the bridge tender who was in charge at the time, had long experience in the operation of the mechanism which raised the spans of the bridge. Earlier on the day in question the north span had been opened to permit the passage of a vessel. Hockridge said that he saw the *Fitzgerald* well out in the lake about half an hour before the collision and, when it was at the buoy, he started to take the preliminary steps necessary for the opening of the north span and put on the flashing red light on that span, to indicate that he was preparing to raise it. When the vessel was 4 or 5 lengths from the eastern end of the channel, he followed the procedure necessary to clear the bridge of traffic and to prevent further traffic on the highway but when he operated the controls to raise the north span it did not move. After making three attempts, the bridge failing to rise, he reset the lights on the north span, changing the flashing red light back to a steady red light, and pressed the button which changed the steady red light showing on the east side of the south span to a flashing red light, to indicate to the ship that he was preparing that span to be raised. He said that he then looked to see where the ship was, it being in plain view from the place where the controls were situated, and that it was just then entering the east end of the channel or, as he estimated, its bow had just entered the channel. He then moved the throttle for the

south span which began immediately to rise and within a minute, according to him, it was raised to its full height. As the entrance to the channel was some 1,235 ft. to the east of the centre pier, if Hockridge's evidence was true, the bow of the ship at that time was at least 1,000 ft. to the east of the easterly extremity of the centre pier and, as the weather was clear, the change in the lights and the movement upward of the south span were in plain view from the ship.

According to LaBlanc, however, the light on the north span which was flashing red when the ship rounded the buoy continued to do so right up to the time the vessel struck the bridge. He said that his attention was drawn to the fact that the south span was being lifted by Erickson, the man at the wheel, when the bow of his ship was only some 200 ft. distant from the centre pier. Thereupon he claimed that he first attempted to change the course of his ship to the south channel but, realizing that that was impossible, he directed it to starboard and, while the two bow anchors were dropped and the propellers were put hard astern, it was found impossible to halt the vessel before it collided with the bridge.

There was also a wide divergence between the evidence tendered by the Crown, as to the speed of the ship as it approached the entrance to the channel and at which it proceeded thereafter, and that given by the ship's captain and other members of the crew. According to LaBlanc, the speed of the ship approximated 12 miles per hour as it rounded the buoy and this was maintained until it was half way to the entrance of the channel, at which time it would be a half mile distant, when it was reduced to half speed. He said that the speed as it entered the channel was from $4\frac{1}{2}$ to 5 miles per hour and that this speed was reduced to slow immediately after the entrance had been made. He estimated the speed of the vessel at the time it was one length east of the centre abutment as being between 3 and 4 miles an hour.

LaBlanc's evidence as to the speed at the time the ship reached the entrance of the channel was corroborated by Van Deuren, the second mate. As opposed to this evidence, Captain Alexander Wilson, the Commodore of the Canada

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Locke J.

Steamship Lines Fleet having more than forty years' experience on the Great Lakes, when called for the plaintiff said that, in his opinion, the *Fitzgerald* should have changed to half speed at the Burlington Buoy and to slow half way in from the buoy to the entrance and that if this had been done its speed would have been from 3 to 4 miles per hour, which he considered a proper speed, when entering the channel. Based upon his experience, he said that the ship proceeding at full speed from the buoy to a point half distant from the entrance would have been going easily 7 miles per hour at the entrance.

S. T. Mathews, a naval architect with the National Research Council, had made a series of tests with a small scale model at the request of the Crown. His qualifications and the nature of the tests made with this model 1/25th the size of the *Fitzgerald* in a tank 120 ft. in length which reproduced the material physical features of the channel, are described in the reasons for judgment of Cameron J. Accepting the figures furnished by the captain as to the number of revolutions per minute of the propeller at full speed, half speed and slow, Mathews said that, assuming the ship was at full speed half way from the buoy to the channel entrance, the speed when entering would be 7 miles per hour if its maximum speed was 21.1 miles per hour when loaded as she was at the time. Mathews had computed the maximum speed of the vessel from the entries made in the ship's log of the voyage from Toronto and found her maximum speed to have been 12.35 miles per hour. However, accepting the lesser figure, his tests, which were accepted as being accurate by the learned trial judge, showed that, assuming a speed of 7 miles per hour at the entrance and that the ship was handled thereafter in the manner stated by LaBlanc, the speed, when one ship's length distant from the centre pier, would have been 5.59 miles per hour.

It was made clear in the evidence of Captain Wilson and the two other experienced captains called to give evidence for the Crown that, in their opinion, such a speed at the entrance was excessive unless the bridge was up at the time the ship entered the channel, and Captain Scarrow, called

to give evidence for the defence, admitted that at a speed between 6 and 7 miles per hour at the entrance the ship would have no chance of stopping before hitting the bridge.

Upon the issue as to the speed of the vessel, the learned trial judge, after reviewing the evidence, found as a fact that the speed at the time the ship entered the channel was greatly in excess of 5 miles per hour and was probably at least 7 miles per hour, and that when LaBlanc made the first attempt to stop the ship it was travelling at a speed in excess of 5 miles per hour.

It will be remembered that, according to LaBlanc, the light on the north span which was flashing red continued to do so up to the time of the impact. A witness, W. R. Love, called for the Crown, was working at the time for the Department of Public Works at a point on the north side of the channel some 800 ft. west of the entrance. When his attention was first called to the ship, he said that it had proceeded about 350 ft. into the channel and when the bow was directly opposite to him he saw the starboard anchor drop. Love said that at that time there was a fixed red light on the north span and the south span was then up, or pretty close to its maximum height. At that point the bow of the vessel would be some 850 ft. from the north span.

Charles Coleman, a bridge man employed by the Crown who was on duty at the north end of the bridge, said that when the south span started to rise the ship was about its own length in the channel, or possibly a little more.

Mrs. Donna Cochran, whose husband was employed by the Crown as a radio operator and who lived in a house close to the channel, said that as the south span was raised the light on it was flashing red.

The evidence of LaBlanc was supported in part by the evidence of Van Deusen, the second mate, who said that the light was flashing on the north span almost up to the time the ship struck it, that he did not see the south span commence to rise, that he got the captain's order to drop the anchor when the bow was about 100 ft. easterly of the east end of the centre pier, and that he had first observed a change in the south span after both anchors were down. A questionnaire had been submitted to this witness long prior to the trial, in which he had said that he had noticed

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Locke J.

the south span start to rise when the bow was passing the centre axis of the railway bridge and that it had been raised about 10 ft. when he saw it at that point. The learned trial judge said that he did not believe this witness.

Erickson, the seaman who was at the wheel, said, contradicting the evidence of LaBlanc, that the ship had been reduced to half speed at the Burlington buoy. He did not observe the south span lifting until the bow was one ship's length from the centre pier.

Lawrence Korth, a watchman, who was stationed on the forecastle deck, said that the red light on the north span continued to flash up to the time when the ship was only a few feet distant from the bridge.

Mrs. Amy Uan Cleaf, the wife of the lighthouse keeper who lived on the south side of the channel between the railway and highway bridges, gave evidence for the defence and said that the ship was only 90 ft. east of the east end of the centre pier when the south span commenced to rise. After reviewing the evidence of this witness and saying that it was impossible to escape the conclusion which he had formed at the trial, both from her demeanour and from her evidence, that she had a distinct bias against the bridge master and the bridge operators, the learned trial judge said in terms that he attached no weight whatever to her evidence.

P. T. Roworth, the senior bridge tender of the railway bridge called for the defence, said that when the ship was steering into the north channel about half a ship's length from the east end of the centre pier he saw a flashing red light on the north span and a solid red light on the south span. At that time he said that neither span had started to rise but, on cross-examination, contradicted this, saying that when the ship was at that point the south span was being opened, the north end of it being some 8 to 10 ft. in the air. Again, having said that at that time the light on the south span was solid red, when cross-examined he said that the light on that span had been solid red when he looked at it at a time when the ship was still in the lake and that he did not think that he had looked at it again thereafter. A further statement made by him on cross-examination was that the ship had blown a second blast from her whistle when she was near the outer end of the piers of the channel but later,

on re-examination, he said that the vessel was then approximately half way between the outer piers and the railway bridge. As to this witness the learned trial judge, after pointing out that he had admitted on cross-examination that he had not looked at the south span at any time after the ship entered the channel, said:

> In view of the very vague and to some extent contradictory estimates of this witness, I find it difficult to attach much weight thereto. I do not suggest that he was an untruthful witness, but I am satisfied that his recollection of the events had become blurred by lapse of time to such an extent that his very indefinite estimates are not to be relied on.

Some support for the evidence of LaBlanc as to the time when the south span opened might have been found in an entry in the ship's log made by him on the date of the accident which read:

> Struck north draw (1.29) of bridge wrecking same shoving it off its buttment into river. light on north draw flashing to signal using that side. when Entering R R bridge the South Draw opened but too late to change. So we backed full. and let go both anchors there was no signal to signify we woulden get North Draw.

As to this the learned trial judge found upon the evidence that the entry as to the point at which the south span commenced to rise was false and said that he was quite satisfied that there was in fact no attempt made to get into the south draw.

Upon this conflicting evidence the learned trial judge found as a fact that the south span commenced to rise when the *Fitzgerald* was not more than one ship's length in the channel and that immediately prior thereto the flashing red light on the north span had been changed to a steady red light, that the look-out on the ship was entirely inadequate and that this failure to keep a proper look-out in the circumstances was gross negligence which brought about the collision with the bridge. He found further that another factor which caused the disaster was the excessive speed of the vessel at the entrance to the channel, and later when the master, in view of that speed, failed to reduce it in time and to keep his vessel under such control that he could stop before reaching the bridge. The learned judge, as these findings show, accepted the evidence given by Hockridge, Love and Coleman, and that of Mathews as to the speed of the ship and the distances within which she could be

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Locke J.

stopped, in preference to that of the appellant LaBlanc, Mrs. Van Cleaf, Korth, Van Deusen and Roworth, where their evidence conflicted with that of the witnesses for the Crown which are mentioned.

In estimating the credibility of these witnesses whose evidence conflicted on these material points, the learned and greatly experienced trial judge had the advantage, which we have not, of observing these witnesses as they gave their evidence, and with this aid coming to a conclusion as to their veracity. In order to reverse his findings upon this aspect of the matter it would be necessary, in my opinion, for us to conclude that the learned judge was so clearly wrong as to indicate that he had not taken proper advantage of having seen and heard the witnesses. Far from coming to any such conclusion in the present case, I have, after examining all of the evidence in this lengthy record with great care, come to the same conclusion as the learned trial judge. I would not disturb these findings of fact.

As to the issue that there was contributory negligence on the part of the bridge tender, the respondent's case is based upon the fact that, admittedly, Hockridge did not signal to the approaching vessel that he was not able to immediately open the north span by having sounded five short blasts of the bridge whistle.

The wording of the regulation of June 27, 1949, dealing with this aspect of the matter is:

> 3. (2) If for any reason the bridge master is not able to immediately open the bridges he shall signal the approaching vessel by five short blasts of the bridge whistle.

Dealing with this contention the learned trial judge pointed out that the regulation requires the warning to be given only if the bridge master is not able to open both bridges, a situation which did not arise in the present case. In the present matter the change in the lights was made at a time when there was ample opportunity for the ship to be directed into the south channel and the learned judge found that the bridge master did the reasonable and prudent thing in the circumstances by immediately opening the south span when he found the north span could not be used. Being of this opinion, the learned trial judge found no negligence on the part of the bridge operator contributing

to the accident, a conclusion with which I am in complete agreement. Hockridge was entitled to assume that a proper look-out would be maintained on the ship and that she would approach at a speed that would be reasonable and in accordance with the regulation. The principle referred to by Lord Atkinson in *Toronto Railway Company v. King*[1], is not restricted in its application to traffic in the streets.

In the statement of defence of each of the appellants it was alleged that the bridge constituted an obstruction of the public right of navigation of a navigable channel and the provisions of s. 4 of the *Navigable Waters Protection Act*, R.S.C. 1952, c. 193, are pleaded. The statute applicable at the time of the accident was c. 140, R.S.C. 1927. The language of s. 4 is, however, identical.

What legal consequences would result if the appellant company had an enforceable right to use this channel, constructed by the Crown on its own property, if the exercise of that right was obstructed, due to a negligent act of the said appellants, is not explained either in the appellant's factum or in the argument addressed to us. It may be said also that the appellant company had no such right. Counsel for the appellant expressly disclaimed any contention that the bridge constituted a nuisance which might render applicable the decision of the Judicial Committee in *Steamship Eurana v. Burrard Inlet Tunnel and Bridge Company*[2].

It is to be remembered that the Burlington Channel was constructed by the predecessors of Her Majesty upon the property of the Crown and shipping is permitted to use it gratuitously to obtain entry to Hamilton Harbour and it is, of course, not suggested that any obligation rested upon the Crown, either to construct the work or to permit its gratuitous use.

Section 4 of the Act reads:

> No work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained in accordance with plans and regulations approved or made by the Governor in Council.

[1] [1908] A.C. 260 at 269, 7 C.R.C. 408.
[2] [1931] A.C. 300, 1 D.L.R. 785, 38 C.R.C. 263.

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Locke J.

Section 3 provides that, except as the provisions of the part which contain s. 4 relate to the rebuilding or repairing of any lawful work, nothing in the part applies to any work constructed under the authority of any Act of the Parliament of Canada. Dealing with this defence, Cameron J. held that, as it was shown that the channel and the south span were originally constructed about 1923 and that in or about 1931 the channel was widened and the north span constructed with funds voted by Parliament for these purposes, when, under an appropriation Act Parliament appropriates funds for the construction of specific works, such works are constructed under the authority of an Act of Canada. It might further be pointed out that the provision referred to in the *Navigable Waters Protection Act* is not by its terms made applicable to Her Majesty and, therefore, does not bind the Crown: s. 16, *The Interpretation Act,* R.S.C. 1927, c. 1.

The judgment appealed from determined the value of the north span which was wrecked by the collision and rendered valueless, except for some salvage, as being $215,073.52. The learned trial judge decided that the proper principle applicable in deciding its value was replacement cost less depreciation from the time it was constructed. The figure above mentioned was determined in this manner. The contract for the north span had been let by the Crown in 1930 and the construction carried out in 1931. Evidence was given by L. E. Rowebottom, Chief Prices Inspector of the Labour and Prices Division of the Dominion Bureau of Statistics, to the effect that the price index for material, wages and all other matters entering into the cost of construction of such a bridge in 1952 was 230.2 on the basis of 100 for the year 1930. In arriving at this figure, the witness made use of certain official publications of the Bureau of Statistics and, while these were not put in evidence by the Crown as they might have been under the provisions of s. 24 or s. 25 of the *Canada Evidence Act,* R.S.C. 1952, c. 307, counsel for the appellant LaBlanc cross-examined Rowebottom at length upon their contents, having previously asked for their production. The learned trial judge ruled that the documents should be admitted as exhibits and this was done. I respectfully agree that, in the circumstances

disclosed by the record, these documents were properly put in evidence and were admissible as proof of their contents and that the objection based upon their admission and their use by the witness fails.

When the north span was wrecked it was decided on behalf of the Crown that, since it would take at least a year to have a bascule span fabricated and built as a replacement, a temporary fixed bridge should be constructed to enable traffic upon the highway to cross the channel. In respect of the construction of this bridge and the approaches thereto the judgment allowed damages for its cost which amounted to $60,280.18. This figure as to the cost of constructing the bridge and the necessary approaches is not questioned but the appellants contend that, if liable, they should not be required to pay the replacement cost of the required span, as well as the cost of a bridge to replace it.

A further claim by the Crown, which was allowed, was for the loss of use of the bridge for three and one half months and the northerly channel of the canal for one year, and these items may conveniently be considered together.

It should be said that there is no evidence to suggest that, when the channel was constructed through the property of the Crown for the convenience of shipping, any legal obligation rested upon the Crown to provide a means of passage across this waterway, either for vehicles or pedestrians. There is no evidence as to the volume of such traffic at the time the channel was first constructed, but it is common ground that at the time of the accident there was a great volume of motor traffic upon the highway which connected with the bridge, which was the main road between Toronto and Niagara Falls and Buffalo, and a considerable volume of pedestrian traffic. The effect of the destruction of the north span was to disrupt this traffic for a period of three and one half months while the temporary span was being constructed. The Department of Public Works undertook this work promptly and also arranged a substituted means of passage for pedestrians across the Canadian National Railway bridge, for the cost of which a claim for damages was made.

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Locke J.

There was no revenue derived by the Crown, either from vessels using the channel or traffic crossing the bridge, and it is, accordingly, contended by the appellants that no monetary loss having been suffered the claim for loss of use fails.

The learned trial judge allowed the claim for the temporary bridge, adopting the principle that if a chattel is injured an amount paid for the hire of another while it is being repaired is recoverable as damages in tort. While the north span was destroyed, the bridge as an entirety suffered damage which resulted in the south span being rendered useless for the carriage of traffic during the time taken to construct the temporary bridge. The bridge had been constructed for the purpose of rendering services of great value to the general public and, as it was intended on behalf of the Crown to continue such services as rapidly as possible, I agree that the cost of the construction of the temporary bridge was recoverable.

The claim for loss of use of the north span and of the northerly channel of the ship canal presents further difficulties. As a consequence of the negligence of the master, the Crown was deprived of the use of the north span at least for the period of three and one half months taken to construct the temporary bridge and was deprived at least for one year of the use of the north channel of the canal, thus lessening the value of the channel as a whole and throwing an added burden of work upon the bridge across the south channel.

It is undoubted that no legal obligation rested upon the Crown to provide a means of access for shipping from Lake Ontario to and from the Harbour of Hamilton and that no profit resulted to the Crown from its operation. On the contrary, it was a source of continuous expense.

That the Crown had incurred a very large expense in constructing the channel and the bridges is undoubted and, to the extent indicated, it was deprived of its right to the use of these facilities for the periods mentioned. The learned trial judge considered that the loss was recoverable upon the principle adopted by the House of Lords in *The Greta Holme*[1], where a body of trustees who were charged with the duty of maintaining the harbour works and waterway of the River Mersey in the interests of the public recovered

[1] [1897] A.C. 596.

damages for loss occasioned to a dredge owned by the trustees and engaged in operations on the river. These operations were, of course, a source of expense and not of profit, but it was held by the House of Lords that damages were recoverable for the loss of use of the dredge while it was being repaired. The principle so stated has been followed in other decisions of the House of Lords which are referred to by the learned judge. Of these, perhaps the one which more closely touches the present matter is *Admiralty Commissioners v. S.S. Chekiang*[1]. In that case the claim was for damages caused in a collision to H.M.S. *Cairo,* a light cruiser, the operation of which was a matter of public expense rather than of profit. In the House of Lords Lord Phillimore said in part (p. 650):

> public bodies who are owners of ships employed in local public service may, when their vessels have been injured by collision, recover, among other sums, damages for their detention while under repair, although no gain which could be measured in money accrues to such bodies by the use of their ships or is lost by reason of their being put out of action.

As authority he referred to *The Greta Holme, The Mediana*[2] and *The Marpessa*[3].

The claim advanced on behalf of the Crown under this head was for $73,076.04, being for the deprivation of the use of the two bridges for a period of three and one half months amounting to $21,004.22 and for the loss of use of the north channel, estimated at 90 per cent. of its full use, since it could be used for vessels to tie up, and for the cost of providing the north span for eight and one half months. The basis upon which damages are to be assessed in such circumstances is not, in my opinion, entirely clear and the opinions expressed by the law Lords upon the subject have not always been in agreement. Clearly, one of the elements to be taken into account is that the Crown was deprived of its right to use these properties in which very large sums of public moneys had been invested for these extensive periods since no benefit accrued from the use of these moneys during these periods. In *The Greta Holme,* Lord Halsbury said that a public body had to pay money like other people for the conduct of its operations and if it is

[1] [1926] A.C. 637.
[2] [1900] A.C. 113.
[3] [1907] A.C. 241.

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Locke J.

deprived of the use of part of its machinery, which deprivation delays or impairs the progress of its work, it was entitled to obtain damages in the same way as other people. Referring to the difficulty of assessing the damages, Lord Herschell said that as the trustees were deprived of the use of the dredger they had sacrified the interest on the money spent on its purchase and that a sum equivalent to that should at least be allowed.

Cameron J. was asked by both parties to consider the matter as a jury might do and, taking into account the whole of the evidence, he reached the conclusion that an award of $30,000 would be fair and reasonable. In my opinion, this finding should not be disturbed.

By way of defence the appellants pleaded that the bridge machinery and its control and signal system were in an unsafe and improper condition and that there had been a failure to properly inspect and maintain in good order and condition such machinery and the said system. The evidence dealing with this aspect of the matter was considered at length in the reasons delivered at the trial and I agree with the finding made that the defence failed to prove that there was any inadequacy or negligence in the maintenance of the bridge and its equipment.

The appellants dispute their liability for the wages of the regular bridge staff from April 30, 1952, until August 15, 1952, and for the cost of the relocation of the ferry berth which was previously located in the south channel. Upon the evidence I agree with the conclusion of the learned trial judge that these claims should be allowed for the reasons stated by him.

The judgment at the trial held that the appellant company was entitled to restrict its liability in the manner provided by ss. 649 and 651 of the *Canada Shipping Act*, 1934, c. 44. The respondent has cross-appealed against this finding on the ground that, as that statute does not specifically provide that those sections shall apply to Her Majesty, the sections do not apply. The learned trial judge rejected this contention and the judgment as against the company was restricted to $38.92 for each ton of the ship's tonnage. This

reduced the damages found to have been sustained and awarded against the appellant LaBlanc of $367,823.49 to $184,383.50.

*The Canada Shipping Act* was enacted by Parliament in reliance upon the powers vested in it by head 10 of s. 91 of the *British North America Act*. It is not questioned that the sections referred to were within the powers of Parliament and restricted the liability of the owners of vessels for loss or damage occasioned by reason of the improper navigation of a ship owned by them where the event occasioning the loss occurs without their actual fault or privity. This was made applicable to the owners of all ships, except those belonging to His Majesty. This exception was provided by s. 712.

The purpose of s. 16 of the *Interpretation Act* to which I have referred above is, in my opinion, to prevent the infringement of prerogative rights of the Crown other than by express enactment in which the Sovereign is named. Section 712 of the *Canada Shipping Act* was held in the case of *Nesbit Shipping Co. Ltd. v. The Queen*[1], to effectively prevent the exercise of the Royal prerogative. The effect of the sections of the *Canada Shipping Act,* however, are to declare and limit the extent of the liability of ship owners in accidents occurring without their own fault and privity. It cannot be said, in my opinion, that the Royal prerogative ever extended to imposing liability upon a subject to a greater extent than that declared by law by legislation lawfully enacted. The fact that liability may not be imposed upon the Crown, except by legislation in which the Sovereign is named, or that any of the other prerogative rights are not to be taken as extinguished unless the intention to do so is made manifest by naming the Crown, does not mean that the extent of the liability of a subject may be extended in a case of a claim by the Crown beyond the limit of the liability effectively declared by law. I am accordingly of the opinion that the learned trial judge was right in permitting the amount of recovery to be restricted in the manner above indicated.

[1] [1955] 3 All E.R. 161, 4 D.L.R. 1, 73 C.R.T.C. 32.

1960

GARTLAND STEAMSHIP CO. v. THE QUEEN

Locke J.

The respondent further asked to vary the judgment at the trial by awarding interest upon the damages from the date of the accident. No such claim was made in the information and the matter was accordingly not considered in the judgment delivered at the trial. This is a substantive claim which, if intended to be asserted, should have been pleaded.

I would dismiss both the appeal and the cross-appeal with costs.

*Appeal allowed in part and cross-appeal dismissed with costs,* LOCKE *and* MARTLAND JJ. *dissenting.*

*Solicitors for the defendants, appellants: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.*

*Solicitor for the plaintiff, respondent: W. R. Jackett, Ottawa.*

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*Dec. 14, 15, 16

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Feb. 17

WILLIAM CRAWFORD AND HILLSIDE FARM DAIRY LTD. AND HAY BROS. FARMS LTD. ..APPELLANTS;

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA, CITY OF VANCOUVER AND FRASER VALLEY MILK PRODUCERS ASSOCIATION ..RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Constitutional law—Validity of the Milk Industry Act, 1956 (B.C.), c. 28 and Order No. 5 made thereunder—Statute to regulate production, distribution and marketing of milk and its products within province—Whether indirect taxation.*

In dealing with the sale of milk for consumption within the Province, a provincial Legislature may provide for the operation of a pool by a designated body to which all milk produced should be delivered and by which it would be sold and the net proceeds, after deduction of the operating expenses, divided among the producers of milk of equal quality in the proportion that the quantities delivered by each bears to the total quantity sold. Consequently, subject to the question of whether they infringe upon the powers of Parliament in relation to trade and commerce (a question with which this Court was asked not to deal), subs. (*a*), (*d*), (*e*), (*f*), (*h*), (*i*), (*j*), (*k*), (*l*), (*m*), (*o*), (*p*), (*q*), and (*t*)

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

of s. 41 of the *Milk Industry Act*, 1956 (B.C.), c. 28, authorizing the machinery for the carrying out in the Province of British Columbia of what is in essence such a pool, are *intra vires*. These subsections deal in matters of a merely local or private nature in the province and with property and civil rights therein. They do not authorize or impose any levy or tax.

Order No. 5 properly made under the Act, and which provides the machinery for the carrying out of the pool, is similarly valid, saving also any question of infringement upon the powers of Parliament under Head 2 of s. 91.

*Lower Mainland Dairy Products v. Crystal Dairy Ltd.*, [1933] A.C. 168 and *Lower Mainland Dairy Products Board v. Turner's Dairy Ltd.*, [1941] S.C.R. 573, distinguished.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], upholding on a reference the validity of the *Milk Industry Act*, 1956 (B.C.), c. 28 and of Order No. 5 made thereunder. Appeal dismissed with a qualification.

*J. J. Robinette, Q.C.*, and *R. P. Anderson*, for the appellants, William Crawford and Hillside Farm Dairy Ltd.

*J. G. Alley*, for the appellant, Hay Bros. Farms Ltd.

*M. M. McFarlane, Q.C.* and *G. S. Cumming*, for the respondent, Attorney-General of British Columbia.

*Hon. J. W. de B. Farris, Q.C.*, and *D. Braidwood*, for the respondent, Fraser Valley Milk Producers Association.

*R. K. Baker*, for the respondent, City of Vancouver.

*W. R. Jackett, Q.C.*, and *D. H. Aylen*, for the Attorney General of Canada.

The judgment of the Court was delivered by

LOCKE J.:—Under the provisions of the *Constitutional Questions Determination Act*, R.S.B.C. 1948, c. 66, His Honour the Lieutenant Governor in Council of British Columbia referred to the Court of Appeal, for hearing and consideration, the following questions:

1. Is the *Milk Industry Act*, c. 28 of the Statutes of British Columbia 1956, in its pith and substance a statute to regulate the production, distribution and marketing of milk and manufactured products within British Columbia and within the competence of the Legislative Assembly of British Columbia to enact or is it in its pith and substance a taxing statute to impose indirect taxation and *ultra vires* of the said Legislative Assembly

[1] (1959), 17 D.L.R. (2d) 637.

1960

CRAWFORD *et al.* v. ATTY.-GEN. FOR BRITISH COLUMBIA *et al.*

Locke J.

and if it is *ultra vires* in what particular or particulars and to what extent?

2. Is Order No. 5 of the Milk Board under the said Act, dated the 18th day of January, 1957, *intra vires* of the said Milk Board and if not in what particular or particulars and to what extent?

The opinion of the Court as certified to the Lieutenant Governor in Council, reads:

1. That the *Milk Industry Act,* being Chapter 28 of the Statutes of British Columbia, 1956, is in its pith and substance a statute to regulate the production, distribution and marketing of milk and manufactured milk products within British Columbia and is within the competence of the Legislative Assembly of British Columbia to enact.

2. That, subject to the question of whether it infringes upon the legislative jurisdiction of the Parliament of Canada in relation to trade and commerce, Order No. 5 of the Milk Board under the said Act, dated the 18th day of January, 1957, is *intra vires* of the said Milk Board.

Davey J.A. dissented as to Question 2, certifying his opinion as being that the said order is completely beyond the powers of the Milk Board because it is based upon indirect taxes to be collected from vendors in the form of adjustment levies.

The *Milk Industry Act* repealed, *inter alia,* the *Milk Act,* R.S.B.C. 1948, c. 208, and the *Creameries and Dairies Regulation Act,* R.S.B.C. 1948, c. 80. The statute contains 72 sections, almost all of which are designed to ensure that milk offered for sale in the Province shall be produced under sanitary conditions from cattle free from disease and that it be sold in the condition and in the manner best calculated to protect the public health. No one contends that these provisions are beyond the powers of the Province. The attack upon the statute is directed against part of one section alone, i.e. subss. (*h*) to (*q*) inclusive of s. 41, and the order made by the Milk Board purporting to act under the authority vested in it by these sub-sections.

By a commission issued under the provisions of the *Public Inquiries Act,* R.S.B.C. 1948, c. 162, the Honourable Mr. Justice Clyne was directed to inquire, *inter alia,* into any matters relating to the production, marketing and distribution of milk in the Province which, in his opinion, ought to be investigated in the public interest, and to make such recommendations as he might think proper. After a lengthy inquiry the commissioner made an exhaustive report in

which the difficulties of the producers of milk in the lower mainland of British Columbia were reviewed and recommendations for legislation were made.

The preamble to the *Milk Industry Act*, which is to be deemed as part of the Act intended to assist in explaining its purport and object (the *Interpretation Act*, R.S.B.C. 1948, c. 1, s. 23(5)) reads in part:

WHEREAS it has been made to appear to the Government of British Columbia that, as a result of instability in the production and marketing of milk in British Columbia and particularly on the Lower Mainland of the Province and on Vancouver Island, there has been uncertainty that producers of milk would receive a reasonable return therefor, and there have been lacking the incentives necessary to ensure to consumers continuity of supply of safe, clean milk in fluid form:

And whereas it has appeared that, due to the lack of proper and adequate pricing and an unjust and discriminatory marketing system, unwarranted surpluses have been encouraged and improper trade practices have existed which threatened the whole price structure and endangered the continuity of a supply to consumers of safe, clean fluid milk as aforesaid.

After referring to the inquiry conducted by Clyne J. and the fact that by his report certain findings and recommendations had been made to His Honour the Lieutenant Governor in Council, the preamble continues:

And whereas the Legislative Assembly of British Columbia has considered the contents of the said report and is of the opinion:

(*a*) That it is necessary to consolidate the present legislation dealing with milk and to enact further measures in relation thereto to safeguard the public health:

(*b*) That all milk for human consumption in fluid form must, in respect of qualities of safety and cleanliness, meet a common standard:

(*c*) That at the present time the total volume of such milk available for the fluid market greatly exceeds the demand therefor, but that in the foreseeable future, owing to increases in population and the limited area in which milk can be produced, the demand for such fluid milk may exceed the possible supply thereof:

(*d*) That the price of milk of such standard for consumption on the fluid market in British Columbia is affected only by local supply and demand, whereas the price for milk for manufacturing purposes is fixed by world market conditions in respect of the manufactured product:

(*e*) That, in order to ensure to the consuming public of British Columbia a continuity of supply of safe and clean fresh fluid milk meeting such standard, it is necessary that a premium be offered to producers thereof, but because of market conditions aforesaid the price which all producers shall receive for the total volume of such

1960

CRAWFORD *et al.* v. ATTY.-GEN. FOR BRITISH COLUMBIA *et al.*

Locke J.

milk must be conditioned by the price paid for the surplus supply which is sold at the world market price, resulting in a return to the producers of a blended price for all milk produced by them.

(*f*) That in this Province the history of production and distribution of milk for consumption in fluid form shows an inequality in bargaining strength as to price between producers and distributors, and that the fixing of prices to be paid to producers for such milk is therefore necessary:

(*g*) That, for the foregoing reasons and for other reasons referred to in the said report, it is essential that prices which the producer shall receive for all milk which he has produced under conditions qualifying it for the fluid market be fixed at a level which will ensure an adequate but not an excessive supply of milk qualified for the fluid market.

By s. 2 "qualifying milk" is defined to mean milk which is produced on an approved fluid-milk dairy-farm or an approved raw-milk dairy-farm, certified as such, which meets such standards for such milk as may be prescribed by regulation made under the statute.

Part III of the Act constitutes the Milk Board which is declared to be a body corporate and defines its functions.

Section 41, so far as it need be considered, reads:

For the purpose of controlling and regulating under this Act the marketing of milk produced in British Columbia, the Board shall, so far as the legislative authority of the Province extends, have power to make orders in relation to the said marketing, and, without limiting the generality of the foregoing, shall have power to make orders:

(*a*) Providing for the classifying of any or all persons engaged in the production, supplying, processing, distribution, or sale of milk within the Province, and providing for the licensing of persons in any or all of such classes and for the qualifications for such licences, and defining standards and grades in relation to the quality of any such milk:

* * *

(*c*) Prescribing the form of licences and the term of such licences, and the terms and conditions upon which the same shall be issued, renewed, suspended, or revoked:

(*d*) Prohibiting any person from engaging in the production, supplying, processing, distribution, or sale of milk, or of any class or classes, grade or grades thereof, within the Province unless he is the holder of a current licence from the Board which has not been suspended or revoked:

(*e*) Providing for classes of milk according to acceptability for utilization in each of such classes:

(*f*) Prescribing the terms and times of payment for milk supplied to vendors by producers thereof:

* * *

(*h*) Fixing the minimum value at which vendors shall account to producers for milk which is sold on the fluid market, which value shall be set by formula as hereinafter provided:

(*i*) Determining the minimum value at which vendors shall account to producers for milk used in manufactured milk products, which value shall be determined on the basis of current market yields:

(*j*) Fixing the price which shall be paid to all producers for all milk marketed by them and qualifying for the fluid market, which price shall be a blended price, taking into account the quantity of milk which has been sold on the fluid market and the quantity of such milk surplus to fluid-milk requirements and which must be sold on the market for manufactured milk products and the values applicable to the said quantities respectively in accordance with clauses (*h*) and (*i*) hereof:

(*k*) Apportioning the quantity of milk which has been sold as fluid milk among all producers qualifying for the fluid market and fixing the price for milk qualifying for the fluid market so that each producers of such qualifying milk receives:

(i) The fluid-milk value as determined in clause (*h*) for that proportion of all milk qualifying for the fluid market marketed by him which is equal to the proportion that total fluid-milk sales is of the total quantity of milk which qualifies for the fluid market received by licensed vendors in each area of production; and

(ii) The value as determined in clause (*i*) for the remainder of the milk marketed by him which qualifies for the fluid market;

and providing for the distribution of the total proceeds of milk which qualifies for the fluid market accordingly:

(*l*) Ordering that the proceeds of the total quantity of milk qualifying for the fluid market and produced by all producers in each area of production and sold on both the said markets shall be prorated among all such producers so that each producer shall receive his proportionate share of the total proceeds in accordance with the quantity of milk qualifying for the fluid market supplied by him:

(*m*) Establishing and adopting a formula for the purpose of the fixing of values hereunder in each area of production or for the Province as a whole, which formula shall take into account relevant economic factors, including changes in the general price level, changes in the price of any or all factors of production, and the quantity of milk which is sold on the fluid market in relation to the total quantity of milk which qualifies for the fluid market. The said formula shall be such as to provide a reasonable premium for the production of milk for the fluid market to ensure an adequate but not an excessive supply of milk which qualifies for such market:

* * *

(*o*) Directing that accounts be given by vendors to producers of the milk received by such vendors from such producers, which accounts shall contain particulars of the quantity of milk received, the total value thereof, and the amount due to each such producer at the

1960

CRAWFORD *et al.* v. ATTY.-GEN. FOR BRITISH COLUMBIA *et al.*

Locke J.

values and prices from time to time fixed and determined by the Board, and the basis (as to butter-fat content or on other basis) on which such values and prices have been fixed and determined:

(*p*) Directing the payment of the amounts due by vendors to producers in accordance with the said accounts:

(*q*) From time to time designating the vendor to whom or through whom a producer shall market his milk, and requiring every such vendor to accept milk from such producers as the Board may determine:

* * *

(*t*) Establishing or designating an agency to or through which all fluid milk shall or may be delivered or sold:

It was under the powers assumed to have been vested in the Milk Board that Order No. 5, the validity of which is questioned, was made.

The term "producer" is defined in s. 2 of the Act as meaning any dairy farmer who produces milk for human consumption and the term "vendor" as meaning, *inter alia,* any person dealing in milk, whether by purchase or sale or on the basis of delivery on consignment for sale, but not a producer as such. Section 3 of Order 5 provides for the issue of licences to vendors and producers, and by s. 4 no person shall act in either capacity unless he is in possession of a current licence. The fee for such licence is $1.

Section 15 requires that qualifying milk shall be classified at the premises of the vendor where it is received from the producer on the basis of utilization as follows:

(*a*) Class I milk shall be all qualifying milk to be utilized by a vendor for sale in fresh fluid form to:
  (i) Wholesale or retail customers in any part of the Province:
  (ii) Other vendors in any part of the Province:

(*b*) Class II milk shall be all qualifying milk sold in the Province to a vendor and surplus to his fluid requirements and utilized in the Province for the manufacture of canned evaporated milk or for the manufacture of concentrated fresh fluid milk:

(*c*) Class III milk shall be all qualifying milk sold in the Province to a vendor and surplus to his fluid requirements and utilized in the Province for any purpose other than those set forth in subsections (*a*) and (*b*) of this section.

Section 16 declares the manner in which the minimum value of the various classes of milk, as defined in the order, is to be determined. To the figures which result there may be additions or substractions, dependent on the butter fat

content as provided by s. 17. It is the resulting figures which are used for the purpose of the computations directed in the two succeeding sections of the Order.

Section 18 provides the manner in which the total value of qualifying milk received during any month at each plant by each vendor shall be computed, and s. 19 the manner in which the "producer price" per hundred weight for qualifying milk shall be determined. It is unnecessary for the purpose of this opinion to state in more exact detail the manner in which this value is determined.

Section 24, which contains the provision for what is referred to by the appellants as a levy or tax, reads as follows:

> For the purposes of milk regulation contemplated by the Act:
>
> (*a*) Each producer shall market his qualifying milk in each class in the same proportion that the total sales by all vendors of qualifying milk in each class bears to the total volume of qualifying milk received by them from all producers in each area of production. For the purpose of avoiding the unnecessary cost to vendors, producers, or consumers resulting from the movement of qualifying milk pursuant to the foregoing provisions of this section, and in lieu of requiring vendors to transfer to other vendors such quantity of qualifying milk in any class received by them from their producers as will ensure that each vendor shall market the same proportion of the volume of each class of qualifying milk, the producer price resulting from the computations mentioned in sections 19, 20, 22, 23 and 25 hereof is fixed as one price for qualifying milk so that each vendor will pay to each producer the same price for qualifying milk:
>
> (*b*) As in complying with the order for payment of the said price some vendors may be required to pay to producers more and other vendors may be required to pay to producers less than the total value of the volume of qualifying milk received by them as computed in section 18 hereof:
>
> (i) On or before the fifteenth day after the end of the month during which the milk was received, every vendor shall pay to the Board the amount by which the value of milk received by him as calculated under section 18 hereof is greater than the amount which he must pay to producers in complying with sections 19, 20, 22, 23, and 25 hereof:
>
> (ii) On or before the seventeenth day after the end of the month during which the milk was received, the Board shall pay to every vendor the amount by which the value of milk received by him as calculated under section 18 hereof is less than the amount which he must pay to producers in complying with sections 19, 20, 22, 23 and 25 hereof.

1960

CRAWFORD *et al.* v. ATTY.-GEN. FOR BRITISH COLUMBIA *et al.*

Locke J.

Section 25 (*a*), so far as it need be considered, reads:

> On or before the nineteenth day after the end of each month each vendor shall make payment to each producer for qualifying milk received at the plant of such vendor from such producer during the previous month:
>
> (i) Where the provisions of section 22 have not become applicable, at not less than the price for all qualifying milk adjusted for butter-fat differential as provided in section 20 hereof:

Section 22 relates to the payment where quotas have been established and we were informed that none such have been established by the Board.

Section 29 provides that the Board shall announce monthly the minimum accounting value determined for each month for each of the three classes of milk delivered by producers during the preceding month.

It will be seen from the foregoing that, so far as the producers (other than producer-vendors) are concerned, the milk is sold to the vendors at a price to be determined in the following month. The vendors are required to report monthly to the Milk Board showing the amount of qualifying milk purchased during the month and the extent to which it has been sold as Class I, Class II or Class III milk, as defined by s. 15.

With this information from all of the vendors, including presumably producer-vendors, the Board, in accordance with the formula stated in the Order, determines the value of the milk sold in each of the three classes. The value of the milk sold in the fluid market is placed at a higher figure than that sold for manufacturing purposes which is said to provide the incentive for continued production of qualifying milk. The vendor realizes his profit in handling such milk from the amount added by him to the amount for which he is liable to the Board. While the value placed upon milk sold for consumption in fluid form is an arbitrary figure when computed in accordance with the formula, the value of Class II and Class III milk can be more closely determined from the prices ruling in the manufacturing market during the month in question.

Having arrived at the total of the values of all qualifying milk in the manner directed by s. 18 of Order No. 5, the producer price is determined in the manner prescribed by s. 19. It is upon the footing that the respective rights and obligations of the parties are to be those defined in the Order

that the parties contract. As between the producer and the vendor, the obligation of the latter is twofold, he must account for the full determined value of all the milk he has received and he must pay to the producer the blended producer price. In order that this may be done in the case of all the producers, the vendor is obligated to pay to the Board any amount by which the value of the milk purchased by him, determined in the prescribed manner, exceeds the amount to be paid for it at the blended price, computed as aforesaid, on the assumption that all vendors discharge this obligation. The amount paid to the Board in these circumstances is in satisfaction of a contractual obligation. It is in no sense a levy.

Some illustrations of the manner in which these adjustments as between the Board and the vendors are made are to be found in the reasons for judgment of Davey J.A. As between the Board and the vendors the payments are made to and by the Board which accounts to the producers on behalf of what is in essence a pool operated on behalf of all the producers in the production area who have been supplied qualifying milk during the period.

The attack upon s. 41 and Order 5 is based upon the judgment of the Judicial Committee in *Lower Mainland Dairy Products v. Crystal Dairy Ltd.*[1]. Due to the fact that the production of milk in what is now defined by s. 40 of the Act as the Vancouver area of production has been for a very long time in excess of the demand for fluid milk, various attempts have been made by legislation to provide a means whereby the benefit of the available high price on the fluid market should be shared by all of the producers. In the *Crystal Dairy* case, the legislature had passed the *Dairy Products Sales Adjustment Act*, 1929, which authorized the appointment of a committee which would be empowered to require the producers to make returns to it of the milk sold by them, and those selling fluid milk were required to pay a levy assessed according to the quantity sold. The total of these levies was to be apportioned by the committee among the farmers who had sold milk to be used for manufacturing purposes at lower prices. The committee was further authorized to make a levy upon the producers to pay its expenses.

[1] [1933] A.C. 168, 1 D.L.R. 82.

1960

CRAWFORD *et al.* v. ATTY.-GEN. FOR BRITISH COLUMBIA *et al.*

Locke J.

It was held that both levies were taxes and it was held that, as they would tend to affect the price of commodities, they were indirect taxes and the Act was *ultra vires* the Province.

In a later case decided in this Court: *Lower Mainland Dairy Products Board v. Turner's Dairy Ltd.*[1], orders made by a marketing board established under the *Natural Products Marketing* (B.C.) Act, R.S.B.C. 1936, c. 165, which required the producers in the area to sell their milk to a company incorporated at the instance of the Board at prices fixed by it and directed that the proceeds of the resale of the milk should be divided *pro rata* among all of the producers, were held to be invalid as being merely a colourable attempt to impose indirect taxes upon those producers whose milk might otherwise be disposed of as fluid milk at prices in excess of what they would receive under the orders of the Board. It had been held at the trial that the real purpose of the impugned orders was to take from the producer supplying the fluid market a portion of his real returns and to contribute the same to other producers and that the sales and resales directed by the order were mere shams, and these findings were upheld in this Court.

In my view, neither of these cases affect the issue to be decided in the present matter. Apart from any objection that might be made to the legislation and the Order on the ground that, to the extent that they may trespass upon the powers of Parliament in relation to the regulation of trade and commerce under Head 2 of s. 91 of the *British North America Act,* they are *ultra vires* (and we are asked not to deal with this point), the parts of s. 41 which are questioned and the Order both deal, in my opinion, with matters of a merely local or private nature in the province within Head 16 of s. 92 and with property and civil rights in the province within Head 13.

In my opinion, in dealing with the sale of milk for consumption within the Province, the Legislature might provide for the operation of a pool by a designated body to which all milk produced should be delivered and by which it would be sold and the net proceeds, after deduction of the operating expenses, divided among the producers of milk of equal quality in the proportion that the quantities

[1] [1941] S.C.R. 573, 4 D.L.R. 209.

delivered by each bears to the total quantity sold. I consider that s. 41 of the Act authorizes, and Order No. 5 provides, the machinery for the carrying out of what is in essence such a pool but operated in a manner which effects, for the benefit of the producers and consumers, a large saving of expense by avoiding to a large extent the cost which would be incurred in delivering milk from the eastern and southern portion of the production area to the large market for fluid milk in the cities of Vancouver and New Westminster. The practical effect of the legislation is that each producer receives his proportionate share of the higher value of milk on the fluid market, which is paid to him in the blended price that he receives from the vendor. It is true that he does not receive the full amount realized on the fluid milk market, as he would if the milk was sold on behalf of the pool to which he delivers his milk, since by the method followed the price paid by the vendors must, of necessity, enable them to sell milk on the fluid market at a profit. The fact that the Legislature considers that this method is preferable in the interests of the milk industry as a whole cannot have any bearing upon the validity of the legislation.

I agree with the argument advanced by counsel for the Attorney-General of British Columbia that the legislation and the Order do not authorize or impose any levy or tax. In so far as the producer is concerned, the legislation authorizes the Board to fix the price which the vendor is to pay to him from month to month, this being the blended price referred to in the preamble, and the accounting value mentioned in the Order which is the value mentioned in paras. (*h*), (*i*) and (*j*) of s. 41.

In so far as the vendors are concerned, the contention that the amounts they may be required to pay to the Milk Board under the provisions of para. (*b*) of s. 24 of Order No. 5 is a levy or tax appears to me to be based upon a misapprehension of the real nature of the transaction between the producers and the vendors.

As appears from the reasons for judgment of the Chief Justice and of Sidney Smith and Coady JJ.A., it was contended in the Court of Appeal that subss. (*h*) to (*q*), inclusive, of s. 41, and Order No. 5, as they apply to producer-vendors, are *ultra vires*.

1960

CRAWFORD *et al.* v. ATTY.-GEN. FOR BRITISH COLUMBIA *et al.*

Locke J.

A producer-vendor is defined in s. 2 of the Act as being any person who distributes milk produced only by his own cattle.

Section 44, so far as it need be considered, reads:

> In the application of the provisions of this Act, a producer-vendor shall be entitled to all the rights and privileges and be subject to all the duties and obligations given to and imposed on a producer and on a vendor.

Order No. 5, s. 3, provides for the licensing of vendors and of producers, but not of producer-vendors as such. They are not mentioned elsewhere in the Order and, if there is some other order of the Milk Board regulating the manner in which such dealers shall operate, it is not before us.

As producers they are required by s. 24(*a*) of Order No. 5 to market their qualifying milk in each of the three classes defined by s. 15 in the proportions stated. In the factum filed on behalf of the appellant Hay Bros. Farms Ltd. in this Court, it is stated that the whole of the production of a producer-vendor is sold in the fluid market. As to do this would, upon the material before us, render the dealer liable to the heavy penalties prescribed by s. 63 of the Act and to a suspension of his licence under s. 13 of Order No. 5, it is apparent that in some manner such dealers are relieved of the obligation of complying with s. 24(*a*). We are not informed as to how this has been done.

The language of s. 44 of the Act must be construed as imposing upon a producer-vendor such of the obligations of a vendor as are by their nature applicable. The relation between a producer and a vendor, such as above referred to, is that of vendor and purchaser and the obligation imposed by s. 24 rests upon a vendor *qua* purchaser. Since one cannot contract with one self, this portion of the Order cannot refer to a producer-vendor.

Whether there is anything done by the Board in its dealings with producer-vendors which may be objectionable as beyond its powers cannot be determined upon the material before us.

A further contention made on behalf of the appellants is that Order No. 5 goes beyond the powers vested in the Milk Board by s. 41. In my opinion, ample powers are given to the Board by the subsections of s. 41 which are above quoted to make the said order.

While the form in which Question 1 is stated asks the opinion of the Court as to the constitutional validity of the *Milk Industry Act* as a whole, the answer made should be restricted, in my opinion, to that portion of the Act which it is contended is *ultra vires* and as to which we have heard argument. Whether or not any of the other 71 sections of the Act deal with matters beyond the powers of the Province is a matter which I consider, should not be determined without argument.

I would, accordingly, substitute for the answer made by the Court of Appeal to the first question the following:

> Subject to the question of whether they infringe upon the legislative jurisdiction of the Parliament of Canada in relation to trade and commerce, subsections (*a*), (*d*), (*e*), (*f*), (*h*), (*i*), (*j*), (*k*), (*l*), (*m*), (*o*), (*p*), (*q*) and (*t*) of s. 41 of the *Milk Industry Act* are *intra vires* the Legislature of British Columbia.

I agree with the answer made by the majority of the Court of Appeal to the second question.

Subject to the qualification to the answer to Question 1 as above mentioned, I would dismiss this appeal.

*Appeal dismissed, with qualification.*

*Solicitors for the appellants, William Crawford and Hillside Farm Dairy Ltd.: Boughton, Anderson, McConnell & Dunfee, Vancouver.*

*Solicitors for the appellant, Hay Bros. Farms Ltd.: Davis & Company, Vancouver.*

*Solicitors for the respondent, the Attorney-General for British Columbia: Cumming & Bird, Vancouver.*

*Solicitor for the respondent, the City of Vancouver: R. K. Baker, Vancouver.*

*Solicitors for the respondent, Fraser Valley Milk Producers Association: Sutton, Braidwood, Morris, Hall & Sutton, Vancouver.*

GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY ..... } APPELLANT;

AND

ELARION PETRISOR ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

The following oral judgment was delivered by the Chief Justice on December 9, 1959: "We are all of opinion that, even if there was not a sufficient compliance with statutory condition 15, the Court of Appeal was right in exercising its discretion under s. 112 of The Insurance Act. It was also justified in reversing the trial judge on the question of fact. The appeal is dismissed with costs.

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J. F. BOLAND ..... APPELLANT;

AND

MATACHEWAN CANADIAN GOLD, LTD. ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

The following oral judgment was delivered by the Chief Justice on December 2, 1959: "Accepting the appellant's contention that the onus was upon the respondent to show payment, we are all of opinion that there was evidence upon which the trial judge could decide as he did. We are also of opinion that, in the circumstances, he did not err in refusing to accept, particularly at the stage of the trial at which it was offered, the letter from Mr. Sutherland to the late Mr. Boland, nor in refusing to permit the appellant to call Mr. Sutherland as a witness. The appeal is dismissed with costs.

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McRITCHIE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

The following oral judgment was delivered by the Chief Justice on November 4, 1959: "Presuming we have jurisdiction, in view of the record, the trial judge must have believed one accomplice at least and therefore it was immaterial that he did not express any view as to the reasonableness of the alleged explanation. The appeal is dismissed.

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PETER KIEWIT SONS' COMPANY OF CANADA LIMITED AND RAYMOND INTERNATIONAL COMPANY LIMITED, carrying on business under the firm name and style of KIEWIT-RAYMOND (*Defendant*) ..... APPELLANT;

1959 *May 12, 13

1960 Feb. 22

AND

EAKINS CONSTRUCTION LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Contracts—Sub-contractor—Action for breach of contract—Whether item of work covered by contract—Whether change in plans—Whether contract substituted by new and different one—Work done under protest—Whether only price of contract recoverable—Quantum meruit—Whether quasi-contractual recovery—Whether frustration.*

The plaintiff, who took a sub-contract from the main contractor, the defendant, for a pile driving job, protested that he was being asked to do more than the sub-contract called for. The engineer, who had clearly defined duties under the main contract, insisted that the

*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

work was according to the sub-contract and no more. The main contractor told the plaintiff that it would have to follow the orders of the engineer and made no promise of additional remuneration. The plaintiff completed the work under protest, and sued for damages for breach of contract and, in the alternative, for compensation on a *quantum meruit* basis. The trial judge dismissed the action, but this judgment was reversed by the Court of Appeal. The main contractor appealed to this Court.

*Held* (Cartwright J. dissenting): The appeal should be allowed and the action dismissed.

*Per* Locke, Abbott, Martland and Judson JJ.: Having elected to do the work in these circumstances, the plaintiff could only recover under the contract. The contract could not have been abrogated and another substituted, since there was no consent, express or implied. When the positions of the parties became clear before any work was done, the proper remedy of the plaintiff was to refuse to go on except on its own interpretation of the contract and, if this was rejected, to elect to treat the contract as repudiated and to sue for damages. In the absence of a clause providing that the matter could be left in abeyance for later determination, the plaintiff could not go on with performance according to the main contractor's interpretation and then impose liability on a different contract.

The facts of this case did not justify an inference of frustration so as to remove the original contract and substitute an implied contract. A dispute over a question whether a certain item of work is an extra could not bring about frustration of a contract when the question of extras is covered by the contract. There is no room for the application of any theory of quasi-contractual recovery by way of implied contract or by the imposition of an obligation *ex aequo et bono*, when the parties, as in this case, have made an express contract covering the very facts in litigation and that contract remains open and unrescinded.

*Per* Cartwright J., *dissenting*: When the main contractor, knowing that the plaintiff was taking the position that it was being called on to do work outside the contract and would expect and demand to be paid for it, persisted, in circumstances of practical compulsion, in ordering that work to be done, the law imposed upon it the obligation to pay the fair value of the work performed, the benefits of which it had received. It was no answer to say that the plaintiff should have had the courage of its convictions and refused to perform any work beyond that which was required by the sub-contract. It must be remembered that that contract was difficult to construe. There is no difference in principle between compelling a man to pay money which he is not legally bound to pay and compelling him to do work which he is not legally bound to do.

*Practice—Costs—Success against one of two defendants—Whether power to make "Bullock order" under British Columbia Rules.*

*Per* Cartwright J.: In an action taken against two defendants and where success is obtained against one of them, the Court of Appeal for British Columbia has jurisdiction to order that the costs payable by the plaintiff to the successful defendant be recovered by the plaintiff

from the unsuccessful defendant. The operation of that rule is not limited to cases in which the issues raised are equitable. In the circumstances of this case, the order of this sort made by the Court of Appeal was a proper one.

APPEAL from a judgment of the Court of Appeal for British Columbia, reversing in part a judgment of Maclean J. Appeal allowed, Cartwright J. dissenting.

*J. S. Maguire* and *R. C. Bray,* for the defendant, appellant.

*W. Kirke Smith,* for the plaintiff, respondent.

The judgment of Locke, Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—The appellant, on January 9, 1956, entered into a contract with the British Columbia Toll Highways & Bridges Authority, a government corporation, to build the substructure, approach viaduct and northern approach road to the Second Narrows Bridge across Vancouver Harbour for the sum of $4,314,369.70. The respondent took a sub-contract from the appellant to supply and drive the timber piles for the substructure of pier 1 and piers 7 to 14 at stated unit prices, which amounted to a total of $132,350. The respondent sued the Bridge Authority and the main contractor, the appellant, for damages for breach of contract or, in the alternative, for compensation on a *quantum meruit*. The learned trial judge dismissed the action against both defendants. On appeal the dismissal against the Bridge Authority was sustained but the appeal was allowed against the main contractor and the case remitted to the trial court for an assessment of the work done on piers 10 to 14 to be paid for on a *quantum meruit* basis. The main contractor now appeals to this Court and asks for the restoration of the judgment given at the trial. The respondent does not cross-appeal against the judgment of the Court of Appeal affirming the dismissal of the action against the Bridge Authority. The dispute here, therefore, is entirely between the main contractor, as appellant, and the subcontractor, as respondent.

Before making its tender, the sub-contractor, Eakins Construction Limited, had before it the plans and specifications and the principal contract. The plans required the

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Judson J.

piles to be driven to a safe bearing capacity of 20 tons. The specifications required them to be driven to a minimum bearing capacity of 20 tons based on a certain formula. The pile driving contract was made on January 10, 1956, but some time in February, the engineer amended the plans by adding a requirement relating to piers 10 to 14 as follows: "Bottom of timber piles to be below bottom of sheet piling." T. K. Eakins, the managing director of the pile driving company, noticed the change at once. Beyond mentioning it to an official of the Kiewit Company, he did nothing. This was long before he began to work on the piers affected by the change and probably before any work was done on piers 7, 8, 9, which were not affected by the change. The work on these three piers was abandoned and settled for in March 1956 because the ground was too hard for the driving of wooden piles. Timber piling also proved to be impractical on pier 1. Steel piling was substituted at this pier. Kiewit did this work itself, Eakins having declined to tender for steel piling except on a cost plus basis. This leaves only the work on piers 10 to 14 at issue in this litigation.

Eakins began to work on pier 10, still without having made any protest about the change in the plans. At this pier wooden pile driving was also unsuccessful. After 22 piles had been driven, the engineer ordered them to be cut off and covered with gravel so that they would not become weight bearing. This work has not been paid for. Eakins submitted an account for this work which Kiewit refused to accept and offered a lesser amount. Eakins is entitled to payment for this work according to the terms of the contract. According to my judgment, this is all that Eakins is entitled to and if the parties cannot agree there will have to be a reference back to ascertain this amount. Clauses 7 and 9 of the contract cover this situation.

Eakins made its first protest that the amended plans provided for pile driving outside the terms of its contract just before it began to work on pier 11. The engineer insisted that the piles had to be driven as he required in accordance with the amended plans and Eakins proceeded with the work. There is no doubt that from this time on Eakins continued to protest that it was being required to do more work than its contract called for and it is equally

clear that the engineer insisted that his instructions be followed and that Eakins was entitled to no extra payment for what it chose to call "overdriving". The position taken by the disputants could not have been more clearly defined, the sub-contractor saying that it was working beyond its sub-contract and the engineer saying that it was not and threatening to put it off the job if it did not follow instructions.

Not until September 1956 did Eakins make any complaint in writing to Kiewit. When this brought no reply, Eakins wrote to the engineers, Messrs. Swan & Wooster, the employers of Stanwick, the resident engineer with whom Eakins had been having its controversy. This firm wrote to Kiewit saying that it realized that driving conditions had been difficult, but not entirely unexpected and that they did not "altogether agree that measures taken to obtain the desired results have been deviations from the contract." There is ample evidence of these difficulties but there is also evidence that not all of them arose from natural conditions. I am in agreement with the learned trial judge that some of them at least were the result of inefficient operation and inadequate judgment.

On January 29, 1957, a meeting was held at which Eakins, the engineers and Kiewit were represented. Everybody seems to have expressed sympathy for the Eakins company, which was close to being forced to abandon the contract owing to the pressing claims of creditors, but no one made any binding promise to pay anything extra. After this meeting, Eakins made a further complaint to the Bridge Authority on February 6 but did continue with the work which was completed on March 6, 1957.

The learned trial judge held that the sub-contractor was bound by all the terms of the main contract and that the addendum of which Eakins made so much was not a change in the plans at all but was added by way of clarification and for the information of the men in the field. After a careful analysis of the contract he came to the conclusion that this was within the engineer's defined powers. His conclusion, therefore, was that all the work was within the contract and that the claim for damages or compensation on a *quantum meruit* failed. On the other hand, the Court of Appeal took the directly opposite view that the obligation

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Judson J.

of the Eakins Company was defined by its sub-contract, that the addendum was not a term of the sub-contract and that in any event those clauses of the main contract which were appealed to as authorizing the addendum, did not in fact authorize it. Since Kiewit knew that Eakins expected to be paid for the work done in compliance with the engineer's orders and which it claimed to be outside the contract and since Kiewit's officer had told Eakins that it would have to comply with the engineer's orders, the Court of Appeal held that Eakins was entitled to compensation for the whole job, not merely for the extra work, on a *quantum meruit*. The basis for this is that Eakins had not been working to the sub-contract at all but that the parties by their conduct and dealings had substituted for the original sub-contract a new and different contract with more onerous obligations on Eakins.

Had it been necessary to choose between these two views of the legal relations between the parties, I would have preferred the view of the learned trial judge that the Eakins company was performing no more than its contractual duty. But quite apart from this, it is to me an impossible inference in this case that the parties agreed to substitute a new contract for the original one. From the very beginning, the Eakins company knew of this added term. It began to protest late in the day that the term imposed added obligations. The engineer, who had clearly defined duties under the main contract, denied any such interpretation. Nothing could be clearer. One party says that it is being told to do more than the contract calls for. The engineer insists that the work is according to contract and no more, and that what is asserted to be extra work is not extra work and will not be paid for. The main contractor tells the sub-contractor that it will have to follow the orders of the engineer and makes no promise of additional remuneration. In these circumstances the sub-contractor continues with the work. It must be working under the contract. How can this contract be abrogated and another substituted in its place? Such a procedure must depend upon consent, express or implied, and such consent is entirely lacking in this case. Whatever Eakins recovers in this case is under the terms of the original sub-contract and the provisions of the main contract relating to extras.

The engineer expressly refused to order as an extra what has been referred to throughout this case as "overdriving". The work was not done as an extra and there can be no recovery for it on that basis. When this position became clear, and it became clear before any work was done, the remedy of the Eakins company was to refuse further performance except on its own interpretation of the contract and, if this performance was rejected, to elect to treat the contract as repudiated and to sue for damages. In the absence of a clause in the contract enabling it to leave the matter in abeyance for later determination, it cannot go on with performance of the contract according to the other party's interpretation and then impose a liability on a different contract. Having elected to perform in these circumstances, its recovery for this performance must be in accordance with the terms of the contract.

With this view of the relations among the parties, my conclusion is that there was error in the judgment of the Court of Appeal in permitting recovery on a new contract which it found as a fact to exist between the sub-contractor and the main contractor but not between the sub-contractor and the Bridge Authority. The basis of such recovery is obviously purely contractual in character and the principle is simply stated in Winfield on the Law of Quasi-Contracts, p. 52:

> Another application of *quantum meruit* is as a mode of redress on a new contract which has replaced an earlier one. The position is that the parties (or one of them) have not observed the terms of the earlier contract, but it can be implied from their conduct that they have substituted another contract for the first. If they do so, and one of the parties does not fulfil his side of the second contract, the other can sue *quantum meruit* upon it for what he has done. The obligation sued upon is genuinely contractual, not quasi-contractual.

Up to this point, there is no suggestion in the reasons of the Court of Appeal that the legal fiction of an implied contract is being applied to enable the plaintiff to recover on a quasi-contractual basis. The suggestion of quasi-contractual recovery does, however, appear in the reasons of the learned Chief Justice, the doctrine of frustration being invoked to get rid of the original contract:

> The evidence is clear that what the appellant (i.e. Eakins Construction Limited) contracted to do and what it actually did while at all times taking the position that the work done was not within the scope of its contract, was so different from that contemplated that in my

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Judson J.

view the sub-contract ceased to be applicable and the work done by the appellant should be paid for as though no contract had been made, on a quantum meruit.

How can it be found that the contract ceased to be applicable? It did not cease to be applicable by consent of the parties and the case is not one where some supervening event or fundamental change in circumstances rendered further performance impossible or radically different from the contractual obligation. How can a dispute over a question whether a certain item of work is an extra bring about frustration of the whole contract when the question of extras is covered in elaborate detail by the contract itself? The principle to be applied is not in doubt. It was examined again as recently as 1956 in *Davis Contractors Ltd v. Fareham Urban District Council*[1], where *Bush v. Whitehaven Port and Town Trustees* (1888), Hudson on Building Contracts, 4th ed., vol. 2, p. 122, a case often appealed to in this type of dispute, was finally overruled. I take the statement of the principle from p. 729 of the *Fareham* case:

> Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.
>
> * * *
>
> It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

On any view of the facts of this case, there cannot be frustration. The performance of extra work will not justify it, even if such work was done. Extra work of the kind said to have been performed in this case is a contingency covered by the express contract and does not afford a ground for its dissolution. If there was to be extra piledriving, the character and extent of the obligation to pay were fully covered in the contract. Even on the plaintiff's own view of the case, its performance was not radically different from that called for by the contract. The facts of the case do not justify an inference of frustration.

[1] [1956] A.C. 696.

There is, therefore, no room for the application of any theory of quasi-contractual recovery whether by way of the legal fiction of an implied contract or the decision of the Court in the particular case to impose an obligation *ex aequo et bono*. The facts upon which such a theory of recovery can be based do not exist in this case, where the parties have made an express contract covering the very facts in litigation and that contract still remains open and unrescinded. Their relations on matters covered by the contract are governed by it and the Court has no power to substitute another form of obligation. This truism is stated in American Law Institute's volume on Restitution, Quasi-Contracts and Constructive Trusts, c. 4, s. 107, in the following terms:

> (1) A person of full capacity who, pursuant to a contract with another, has performed services or transferred property to the other or otherwise has conferred a benefit upon him, is not entitled to compensation therefor other than in accordance with the terms of such bargain, unless the transaction is rescinded for fraud, mistake, duress, undue influence or illegality, or unless the other has failed to perform his part of the bargain.

Since the work done, if not covered by the sub-contract, was an extra which the engineer might have allowed under the terms of the main contract imported into the sub-contract, it was for Eakins to show that the sub-contract had been terminated, either by its repudiation by the contractor and an election to treat the contract as at an end or that it had been abandoned or terminated by agreement between the parties. It is perfectly clear that throughout the performance Kiewit insisted that Eakins was obligated to do the work to the satisfaction of the engineer under the terms of the main contract which, it was contended, were imported into the sub-contract. It is equally clear that Eakins at no time treated the sub-contract as being at an end, simply insisting that it did not cover the additional work.

If Eakins had asked the engineer for a written order for the performance of the work which it claimed to be beyond the sub-contract and that had been refused and Kiewit had persisted in its attitude, Eakins might then have treated the contract as repudiated and sued for damages. Having

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Judson J.

failed to do this, and with the contract still open and unrescinded, it is my conclusion that any claim based upon any theory of quasi-contractual recovery is excluded.

I can find nothing in the terms of the contract under litigation nor in the events that occurred which could lead to the dissolution of this contract at any stage of its performance. I agree with the learned trial judge and I would allow the appeal with costs. The judgment at trial should be restored subject to a reference to ascertain, in accordance with the contract, the amount to be paid for the 22 piles cut off at pier 10.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for British Columbia, allowing in part an appeal from a judgment of Maclean J..

The facts and the terms of the relevant documents are fully stated in the judgments in the Courts below but it is necessary to set them out in some detail in order to make clear the questions raised for decision.

On January 9, 1956, the appellant entered into an agreement, hereinafter referred to as "the principal contract", with the British Columbia Toll Highways and Bridges Authority, hereinafter referred to as "the Authority", to build the sub-structure, approach viaduct and northern approach road for the Second Narrows Bridge across Vancouver Harbour for the sum of $4,314,369.70.

On January 10, 1956, an agreement in writing, hereinafter referred to as "the sub-contract" was entered into between the appellant and the respondent. It was prepared by the appellant and is in the form of an order addressed by the appellant to the respondent and accepted by the latter. Attached to it is a letter of the same date addressed by the respondent to the appellant quoting its prices for piling and the amount per pile it proposed to charge for driving and cutting off the piles.

The sub-contract provides, *inter alia*:

> You are to furnish, drive, cut off and treat all the timber piles at the Second Narrows Bridge for us at such unit prices shown on your attached proposal dated January 10th, 1956.
>
> For the purposes of this Agreement, the Contractor is Kiewit-Raymond, 1104 Hornby Street, Vancouver, B.C. and the Subcontractor is Eakins Construction Company Limited, 900 Pacific Street, Vancouver 1, B.C. This document will serve as our Subcontract to you for the above-mentioned services.

You are to furnish these services as requisitioned by our Project Manager, Mr. Judson Howell, or his representative.

It is understood that all of the specifications of the Authority under which we are bound, apply equally to you as a Material Supplier. This involves not only the plans and specifications, but the contract terms regarding responsibility and insurance.

* * *

Kindly acknowledge receipt of this order and Subcontract and your acceptance of its terms and conditions as promptly as possible.

The sub-contract was for the supply, driving and cutting off of the timber piles for piers numbers 1, 7, 8, 9, 10, 11, 12, 13 and 14.

We are now concerned only with the question of the compensation, if any, due to the respondent for work done on piers 10, 11, 12, 13 and 14. The order for the supply and driving of timber piles on pier 1 was cancelled before anything had been done by the respondent. The driving of timber piles on piers 7, 8 and 9 was abandoned after a certain amount of work had been done but in regard to what was done on those piers there has been an accord and satisfaction. There is no cross-appeal from the judgments below holding that the respondent is not entitled to any further payment in respect of piers 1, 7, 8 and 9.

Prior to the signing of the sub-contract, the managing director of the respondent had in his possession a copy of the principal contract and the plans referred to in the specifications. The provision in the specifications as to the driving of timber bearing piles is as follows:

Piles shall be driven truly vertical and to the lines and levels shown on the plans. Piles shall be driven with standard equipment, steam or drop hammers, approved by the engineer, to a minimum bearing capacity of 20 tons based on the following formulae:—

$$P=2\ \frac{WH}{S+1}$$ if drop hammer is used

$$P=2\ \frac{WH}{S+0.1}$$ if steam hammer is used.

Butt edges of piles shall be chamfered before driving so that the hammer will strike the heartwood in the centre of the pile and the tops of the piles shall be protected by use of a steel mat to prevent splitting of the pile during driving.

The plans referred to in the specifications contained the following note:

6. All timber bearing piles to be driven to a safe bearing capacity of 20 tons.

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

Shortly after the signing of the sub-contract the respondent returned the copy of the principal contract, specifications and plans. Just before commencing work, towards the end of February 1956, the respondent was furnished with another copy of the principal contract, specifications and plans and its managing director observed that a note had been added to the plans reading as follows:

10. Bottom of timber bearing piles to be below bottom of sheet piling.

This note was added by the engineer of the Authority at some date after the signing of the sub-contract. No addition to, or amendment of, the sub-contract was made to deal with the effect of this addition to the principal contract. The only piers in respect of which sheet piling was specified were numbers 10, 11, 12, 13 and 14.

The dispute between the parties arose out of the fact that the resident engineer of the Authority required the respondent to drive the timber bearing piles on piers 10 to 14 inclusive to a much greater depth than was necessary to achieve the safe bearing capacity of 20 tons provided in the specifications and in the note on the plans quoted above, which the respondent had before it when it entered into the sub-contract.

It is clear from the evidence; (i) that compliance with the demands of the resident engineer resulted in the respondent "over-driving" many of the piles at a cost greatly in excess of what would have been the cost of driving them to the specified safe bearing capacity of 20 tons; (ii) that the respondent repeatedly asserted both to Howell, the responsible officer of the appellant, and to Stanwick, the resident engineer in charge of the work for the Authority, that it was being called upon to do and was doing work which it was not obligated to do under its contract, was being put to heavy additional expense and would expect to be paid for that work; (iii) that the engineer maintained throughout that the respondent was bound to do any over-driving he directed and that the Authority was not obligated to make any payment therefor; (iv) that the appellant told the respondent that the respondent must comply with the orders of the engineer.

After the respondent had completed the work on piers 10 to 14 inclusive, to the satisfaction of the engineer including all the over-driving ordered by the latter, it made efforts to obtain payment from either the Authority or the appellant; but the Authority would pay nothing and the appellant was not willing to pay anything to the respondent over and above the unit prices specified in the sub-contract.

The respondent brought action against both the Authority and the appellant claiming in effect that it had been required to do work so far beyond the scope of its sub-contract that that contract should be regarded as having been cancelled by the defendants and they should be ordered to pay to the plaintiff the value of the materials furnished and the work performed by the respondent on an implied contract to pay, on a *quantum meruit,* the value of what it had done at their request.

The learned trial judge dismissed the action as against both defendants. On appeal to the Court of Appeal the judgment of the learned trial judge in so far as it dismissed the action against the Authority was affirmed; no appeal has been taken to this Court from that affirmation and consequently we are concerned only with the respondent's claim against the appellant.

The Court of Appeal allowed the respondent's appeal from the dismissal of its action against the appellant. The formal judgment of the Court of Appeal provides in part as follows:

AND THIS COURT DOTH FURTHER ORDER AND DECLARE that the Appellant is entitled to compensation on a quantum meruit basis from the Respondents Peter Kiewit Sons Company of Canada Limited and Raymond International Company Ltd. for work done and materials supplied on Piers 10, 11, 12, 13 and 14.

AND THIS COURT DOTH FURTHER ORDER AND DIRECT that the assessment of the amount of such compensation be referred back to the Court appealed from for determination in accordance with the findings of this Honourable Court, with liberty to the parties to adduce such additional evidence at the said hearing as they or any of them may be advised.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Respondent British Columbia Toll Highways and Bridges Authority do recover from the Appellant its costs here and below after taxation thereof;

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Appellant do recover from the Respondent Peter Kiewit Sons of Canada Ltd. its costs here and below after taxation thereof, together with all costs payable hereunder by the Appellant to the Respondent British Columbia Toll Highways and Bridges Authority.

The appellant relied on cls. 3, 4, 6 and 7 of the principal contract which it argued bound the respondent as well as the appellant; these read as follows:

3. The work shall be commenced forthwith on the execution of this agreement, and carried on and prosecuted to completion by the contractor in all the several parts in such manner and at such points and places as the engineer shall from time to time direct, and to the satisfaction of the engineer, but always according to the provisions of this contract. The contractor shall deliver the work complete in every particular to the Authority on or before the date or dates following, viz:

* * *

Time shall be deemed to be material and of the essence of this contract.

4. The works shall be constructed by the contractor under his personal supervision, of the best materials of their several kinds, and finished in a workmanlike manner, and in strict conformity with this contract, and to the complete satisfaction of the engineer.

6. The several parts of this contract shall be taken to explain each other and to make the whole consistent; and if it is found by the engineer that anything is necessary for the proper performance or completion of the work or any part thereof, the provisions for which are omitted or misstated in this contract, the contractor shall, at his own expense, at the direction of the engineer, perform and execute what is necessary to be done, as though provision therefor had been properly made and inserted and described in this contract. The correcting of any such error shall not be deemed to be an addition to or deviation from the terms of this contract.

7. The engineer may, IN WRITING, at any time before the final acceptance of the works, order any additional work, or materials or things, not covered by the contract, to be done or provided, or the whole or any portion of the works to be dispensed with, or any changes to be made which he may deem expedient, in or in respect of the works hereby contracted for, or the plans, dimensions, character, quantity, quality, description, location, or position of the works, or any portion or portions thereof, or in any materials or things connected therewith, or used or intended to be used therein, or in any other thing connected therewith, or used or intended to be used therein, or in any other thing connected with the works, whether or not the effect of such orders is to increase or diminish the work to be done, or the materials or things to be provided, or the cost of doing or providing the same; and the engineer may, in such order, or from time to time as he may see fit, specify the time or times within which such order shall, in whole or in part, be complied with. The contractor shall comply with every such order of the engineer. The decision of the engineer as to whether the compliance with such order increases or diminishes the work to be done, or the materials or things to be provided, or the cost of doing or providing the same, and as to the amount to be paid or deducted, as the case may be, in respect

thereof, shall be final. As a condition precedent to the right of the contractor to payment in respect of any such order of the engineer, the contractor shall obtain and produce the order, in writing, of the engineer, and a certificate, in writing, of the engineer, showing compliance with such order and fixing the amount to be paid or deducted in respect thereof.

The learned trial judge was of opinion that under the terms of the principal contract, particularly cls. 6 and 7 quoted above, the engineer was entitled to add note 10, "Bottom of timber bearing piles to be below bottom of sheet piling", that that addition was not actually a change in the plans at all, but that even if it could be said that the addition was a change it was one permitted by para. 1-8 of the specifications in the principal contract which reads as follows:

1-8 *Alterations to Drawings.* It shall be understood that the drawings represent the nature of the work to be executed and not necessarily the works exactly as they will be carried out. The Engineer shall, without invalidating the contract, be at liberty to make any reasonable alteration or to furnish any additional or amended drawings which do not radically change the type of construction.

The value of such alterations shall be ascertained by measurement and at the rates set forth in the Schedule of Approximate Quantities and Prices or at the rates to be settled as herein provided and may be added to or deducted from the contract sum as the case may be.

The learned trial judge goes on to hold that all the work done by the respondent including the "over-driving" was within the purview of the principal contract; and it is implicit in his reasons that the respondent was bound under the sub-contract to perform all the obligations in regard to the supplying and driving of timber bearing piles which rested upon the appellant under the principal contract. In reaching the last mentioned conclusion the learned trial judge appears to have proceeded not so much on the construction of the terms of the written sub-contract as on the evidence of the managing-director of the respondent, T. K. Eakins. This appears particularly from the following two passages in his reasons:

The managing director of the plaintiff, Mr. Eakins, admitted both in the discovery and in his evidence at the trial that he considered himself bound by the provisions of the principal contract as contained in this Exhibit 3. His conduct throughout was consistent with this statement.

* * *

Mr. Eakins admits that he was bound by the main contract, and that the resident engineer Stanwick had never promised to pay him for his so-called "over-driving".

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

Having found that the addition to the plans was permitted under the terms of the principal contract and that the respondent was bound thereby the learned trial judge concluded that all the work done by the respondent was done in fulfilment of its obligations under an express contract and that consequently no contract to pay anything beyond the amounts provided in that express contract could be implied. This conclusion cannot be questioned if the finding on which it is based is accepted.

It will be observed that the sub-contract is silent as to the depth to which piles are to be driven and the conclusion seems to me to be inescapable that in agreeing to its terms both the appellant and the respondent contemplated that the obligation assumed by the latter was to drive and cut off the piles in accordance with the provisions of the principal contract as they existed on that date, that is before the addition of note 10 to the plans. It is not necessary to quote at length from the evidence; the following extracts from that of T. K. Eakins sufficiently express his view:

> Q. And are you aware of the contract specifications?
>
> A. Certainly I am aware of that.
>
> Q. And you bid on them?
>
> A. Yes.
>
> Q. Are you seriously trying to tell this Court you didn't think you were bound by the provisions of that main contract?
>
> A. Of course I felt I was bound by the main provisions of the contract, because, as I say, in as regards they told me how to drive a pile, and what was expected, that's what they expected to do, and of course I went along with that.
>
> Q. And those were in your letters of November 23rd and other letters here, I believe, that you quote the sections of the contract in defence of your own position?
>
> A. That's right. Yes.
>
> * * *
>
> A. I felt that as long as I put down a stable pile to 20-tons I was completing my contract. That is what I contracted to do, that is what I went in to do, but that is not what I was allowed to do.

It is not necessary to determine whether the appellant either expressly or by its conduct agreed with the Authority that the piles should be driven in accordance with the terms of the principal contract with the addition of note 10, without the payment of additional compensation. It is clear that the respondent not only did not so agree but repeatedly and

vigorously protested that its obligation was limited to driving and cutting off the piles so that they were stable, truly vertical, conformed to the lines and levels shown on the plans and were driven to a safe bearing capacity of 20 tons based on the formula set out in the specifications and quoted above. It should be noted that the evidence of all the witnesses who testified on the point was in agreement that the words in the specifications—"piles shall be driven . . . to the levels shown on the plans"—refer to the levels of the tops of the piles after they have been driven and cut off, and having nothing to do with the prescribed depth of penetration.

Counsel for the appellant contends that, throughout the proceedings, the significance of the addition of note 10 to the plans has been greatly exaggerated, as, in his submission, the evidence shews that in the numerous discussions between the engineer and the representatives of the respondent the former reiterated that the piles were to be driven to the depth that satisfied him rather than to a depth greater than that to which the sheet piling had been driven. The addition has, however, this importance that without it there was nothing in the principal contract (other than the general powers of the engineer defined in cls. 6 and 7) or in the specifications or in the plans requiring the appellant or the respondent (in so far as the latter had assumed the obligations of the former) to drive the piles to a greater depth than was necessary to achieve the safe bearing capacity of 20 tons in accordance with the specified formula.

It is significant that there was no denial of the testimony of T. K. Eakins and H. G. Eakins that the respondent was compelled to do driving to the extent of three to four times the amount necessary to achieve the specified safe bearing capacity. The only attack made on the accuracy of their evidence on this point is found in the evidence of Stanwick who stated that defects and failures in the driving equipment used by the respondent made it difficult to determine whether any particular pile had been "over-driven".

In my view, on the true construction of the sub-contract interpreted, as it must be, in the light of the circumstances surrounding its execution, the respondent agreed to perform the obligations of the appellant as to the supplying, driving

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

and cutting off of the piles on the piers with which we are concerned as those obligations were defined in the principal contract (including the specifications and plans) as it existed when the sub-contract was made. The evidence shews that the respondent was called upon to do, and did do, work greatly in excess of those obligations.

Proceeding on the assumption that cls. 3, 4, 6 and 7 of the principal contract were incorporated into the sub-contract, Sheppard J.A., after a careful analysis of those clauses and of the relevant portions of the specifications, concluded that they did not authorize the adding of note 10 to the plans or the requirement by the engineer that the respondent should drive the piles to a penetration greatly in excess of that specified. I agree with this conclusion and with the reasons leading to it stated by the learned Justice of Appeal.

In my opinion the evidence supports the view expressed by the learned Chief Justice of British Columbia in the following paragraph:

> The evidence is clear that what the appellant (i.e. Eakins Construction Limited) contracted to do and what it actually did while at all times taking the position that the work done was not within the scope of its contract, was so different from that contemplated that in my view the sub-contract ceased to be applicable and the work done by the appellant should be paid for as though no contract had been made, on a quantum meruit.

It can scarcely be denied that the work done by the respondent, under continuing protest, was done under circumstances of practical compulsion. It is clear that Howell repeatedly told the officers of the respondent that they must obey the instructions of the engineer as to the depth to which the piles were to be driven regardless of their views as to the meaning of the contract and the specifications. The sort of pressure exerted on the respondent by Howell is testified to by T. K. Eakins and H. G. Eakins and is exemplified in the following passage in the evidence of the latter:

> Mr. Howell reported that their project was some months behind in its schedule, that it was of paramount importance to carry this foundation work on to its completion so that they, in turn, could keep up their working schedule, that if we did not continue to the completion of the work he had no alternative but to call in the bonding company to take over, in which case, he pointed out, not only would the company (i.e the respondent) sacrifice that which remained but would be subject to extraordinary charges which are generally observed when a bonding company takes over.

Howell was not called as a witness and there is no denial of this evidence.

Howell, with the fullest knowledge that the respondent was taking the position that it was being called to do work entirely outside its contract and would expect and demand to be paid for it (a position which, in my opinion, both in fact and in law it was justified in taking) persisted in ordering that work to be done. In these circumstances the law implies an obligation on the part of the appellant to pay for that work of the performance of which it has had the benefit. I find some difficulty in basing the appellant's liability on an implied contract when the evidence shows that the respondent was repeatedly pressing the appellant to agree that it would pay for the work which it was doing and which did not fall within the terms of the sub-contract, and the appellant instead of so agreeing was making only "nebulous statements" to the effect that the respondent ought to be paid or that "there was something coming to" the respondent. I prefer to use the terminology which has the authority of Lord Mansfield and Lord Wright and was adopted by this Court in *Deglman v. Guaranty Trust Company of Canada and Constantineau*[1], particularly at pages 734 and 735, and to say that the appellant having received the benefits of the performance by the respondent of the work which the latter did at the insistence of the former the law imposes upon the appellant the obligation to pay the fair value of the work performed.

It is said that the respondent (who held what turns out to be the right view as to the meaning of the sub-contract) should have had the courage of its convictions and refused to perform any work beyond that which was required by the sub-contract, and when this resulted in its being put off the job should have sued the appellant for damages. It must, however, be remembered that the sub-contract was so difficult to construe that there has been a difference of judicial opinion as to its true meaning. The appellant (who held what turns out to be a mistaken view as to the meaning of the sub-contract) threatened the respondent with what might well amount to financial ruin unless it did the additional work which the sub-contract did not obligate it to do.

[1] [1954] S.C.R. 725, 3 D.L.R. 785.

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

To say that because in such circumstances the respondent was not prepared to stop work and so risk the ruinous loss which would have fallen on it if its view of the meaning of the contract turned out to be erroneous the appellant may retain the benefit of all the additional work done by the respondent without paying for it would be to countenance an unjust enrichment of a shocking character, which, in my opinion, can and should be prevented by imposing upon the appellant the obligation to pay to which I have referred above.

The case appears to me to be analogous to those in which a person who has paid money, under protest and under circumstances of practical compulsion, to another who was not in law entitled to the payment can recover it back by action. A number of the leading cases which illustrate the application of that principle are collected and discussed in the judgments delivered in this Court in *Knutson v. The Bourkes Syndicate*[1]. The judgment of Kerwin J., as he then was, concurred in by Rinfret, Crocket and Taschereau JJ., makes two things clear: (i) that it makes no difference whether the duress be of goods and chattels or of real property or of the person; and (ii) that in such cases the plaintiff's right to recover is not affected by the circumstance that the defendant honestly believed he was entitled to the payment which he demanded.

The concluding paragraph of the judgment of Kerwin J. at page 425 reads as follows:

> Here the evidence is plain that the payments were made under protest and that they were not voluntary in the sense referred to in the cases mentioned. The circumstance that O. L. Knuston thought that he had a right to insist upon the payments cannot alter the fact that under the agreement of September 16th, 1936, it is clear that he had no such right. In order to protect its position under the option agreement and to secure title to the lands which it was under obligation to transfer to the incorporated company, the Syndicate was under a practical compulsion to make the payments in question and is entitled to their repayment.

I can discern no difference in principle between compelling a man to pay money which he is not legally bound to pay and compelling him to do work which he is not legally bound to do; in the one case money is improperly obtained, in the other money's worth. The remedy in the former case

[1] [1941] S.C.R. 419, 3 D.L.R. 593.

is to order repayment of the money; the remedy in the latter case should be, in my opinion, to order the person who has compelled the doing and has reaped the benefit of the work to pay its fair value. It would, I think, be a reproach to the administration of justice if we were compelled to hold that the courts are powerless to grant any relief to a plaintiff in such circumstances.

It is argued for the appellant that if the appeal does not succeed *in toto* the order of the Court of Appeal should be varied to provide that the respondent is entitled to be paid on a *quantum meruit* basis for that work only which was done over and beyond the work called for by the subcontract. On this point I am in agreement wtih the Court of Appeal and am content to adopt the reasons of Sheppard J.A. for rejecting this submission.

For the above reasons I have reached the conclusion that the appeal on the substantive claim should be dismissed.

It was contended, however, that the Court of Appeal did not have jurisdiction to order that the respondent should recover from the appellant the costs of the trial and in the Court of Appeal payable by the respondent to the Authority. This submission is based on the following decisions which are set out in the appellant's factum and which counsel for the respondent submits were wrongly decided: *Hampton v. Park*[1], *Union Bus Sales Ltd. v. Dueck on Broadway Ltd. et al.*[2] and *Loonam et al. v. Mannix Ltd. et al.*[3]. These are all decisions of single judges and until the present case the question does not appear to have been considered by the Court of Appeal for British Columbia.

The English practice in regard to the making of a "Bullock order" is well settled. The cases are collected in 26 Halsbury, 2nd ed., p. 98, s. 186, and in the Supplement. Their effect is summarized in s. 186 as follows:

> Where there are two defendants reasonably sued as being liable jointly or in the alternative, the unsuccessful defendant may be ordered to pay to the plaintiff the costs payable by him to the successful defendant or to pay the costs of the successful defendant direct to him.

Assuming that there was jurisdiction to make it, the order of the Court of Appeal was proper under the circumstances of the case at bar in which the appellant took

[1] (1937), 3 W.W.R. 662, 52 B.C.R. 294, 4 D.L.R. 726.
[2] (1958), 26 W.W.R. 527.
[3] (1959), 27 W.W.R. 424.

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

the position, *inter alia,* that if the respondent was entitled to be paid more than the price stipulated in the sub-contract its right of recovery was against the Authority rather than the appellant.

There is no doubt that the three cases relied upon by the appellant decide that in British Columbia there is no jurisdiction to make a "Bullock order" in cases in which equitable issues do not arise.

The first of the cases mentioned above is a decision of Murphy J. It is based on the decision of Clement J. in *Green v. British Columbia Electric Railway et al.*[1]. That learned Judge discusses the question of costs at pages 79 et seq of the report and takes the view that the cases establishing the English practice are based on s. 5 of the *Supreme Court of Judicature Act* (1890), 53 and 54 Vict. C. 44, which reads:

> 5. Subject to the Supreme Court of Judicature Acts, and the rules of court made thereunder, and to the express provisions of any Statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid.

The learned judge points out that there is no such clause in the British Columbia statutes and rejects the submission that the jurisdiction can be inferred from the wording of Order LXV, rule 32, of the British Columbia Rules of Court:

> Where the costs of one defendant ought to be paid by another defendant, the Court may order payment to be made by one defendant to the other directly; and it is not to be necessary to order payment through the plaintiff.

In his view, scope for the operation of this rule is to be found in cases in which the issues raised are equitable.

The decision in *Green v. British Columbia Railway Co., supra,* was criticized by Morrison C.J. in *Rhys v. Wright and Lambert*[2], but it was not necessary for the learned Chief Justice to express a final opinion in regard to its correctness.

[1] (1915), 9 W.W.R. 75, 25 D.L.R. 543, 19 C.R.C. 240.
[2] (1931), 2 W.W.R. 584, 43 B.C.R. 558, 3 D.L.R. 428.

In *Hampton v. Park, supra,* Murphy J. felt himself bound by the decision of Clement J. but he does not appear to have agreed with it. He says at page 664.

> The correctness of the *Green* decision on the alternative proposition, (i.e. that the Court was without jurisdiction to make a "Bullock order"), is, I think, questionable but inasmuch as it is strictly in point, has stood unimpeached on this aspect for many years and has been followed in at least two instances I do not think it is open to me to disregard it as a precedent.

*Union Bus Sales Ltd. v. Dueck, supra,* was decided by Ruttan J. and *Loonam et al. v. Mannix Ltd., supra,* by Manson J. Both of these learned Judges were of opinion that they should follow *Hampton v. Park.*

If the matter were *res integra* it would be my opinion that the Supreme Court of British Columbia has jurisdiction to make an order of the sort in question in any proper case whether the issues raised are legal or equitable.

Section 9 of the *Supreme Court Act,* R.S.B.C. 1948, c. 73, provides:

> The Court is and shall continue to be a Court of original jurisdiction, and shall have complete cognizance of all pleas whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the Province.

*The Laws Declaratory Act,* R.S.B.C. 1948, c. 179, provides by s. 2, subs. 34:

> Generally in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail:

In *Green v. British Columbia Railway, supra,* Clement J. was of opinion that the Supreme Court of British Columbia would have jurisdiction to make a "Bullock order" in a case where the issues were equitable, and this view is supported by the English authorities.

In the case of *Sanderson v. Blyth Theatre Co.*[1], a common law action, in which such an order was made, Romer L.J. says at p. 539:

> This jurisdiction has been frequently exercised in Chancery in proper cases, and can, of course, be exercised in the King's Bench Division. The costs so recovered over by the plaintiff are in no true sense damages, but are ordered to be paid by the unsuccessful defendant, on the ground

[1] [1903] 2 K.B. 533.

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

that in such an action as I am considering those costs have been reasonably and properly incurred by the plaintiff as between him and the last-named defendant.

and at p. 544 Vaughan Williams L.J. says:

I concur in the judgments of my learned brethern because I think there is jurisdiction under the old Chancery practice for ordering the recoupment of costs directed to be paid by another litigant.

Order LXV, Rule 1, marginal rule 976, of the British Columbia Rules of Court provides:

1. Subject to the provisions of these rules the costs of and incident to all proceedings in the Court, including the administration of estates and trusts, shall follow the event, unless the Court or Judge shall, for good cause, otherwise order . . .

It will be observed that, in the case at bar, on the view of Romer L.J., quoted above, the costs, under the order of the Court of Appeal are following the event. The successful Authority is awarded its costs as against the plaintiff, the successful plaintiff is allowed to recover them over from the unsuccessful defendant as "costs reasonably and properly incurred by the plaintiff as between him and the last-named defendant."

The view that jurisdiction exists is supported by the wording of order LXV, rule 32 of the British Columbia Rules of Court quoted above.

The operation of that rule is not, I think, limited to cases in which the issues raised are equitable. Such a distinction would be anomalous in a court having the widest jurisdiction over all cases and in which the rules of equity, in case of conflict, prevail over those of the common law. The wording of the rule presupposes the existence of the power to make a "Bullock order" and gives an alternative power to order payment directly from one defendant to another.

Unfortunately, we have not the benefit of any detailed expression of the reasons which brought the Court of Appeal to the conclusion that the cases relied upon by the appellant on this point ought not to be followed, but, in my respectful opinion, the Court of Appeal had jurisdiction to make the order as to costs which it did make and that order was a proper one under all the circumstances.

I would dismiss the appeal with costs.

1960

PETER KIEWIT SONS' CO. v. EAKINS CONSTRUCTION LTD.

Cartwright J.

*Appeal allowed with costs,* CARTWRIGHT J. *dissenting.*

*Solicitors for the defendant, appellant: Clark, Wilson, White, Clark & Maguire, Vancouver.*

*Solicitors for the plaintiff, respondent: Gilmour & Company, Vancouver.*

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1959

*Nov. 13

1960

Mar. 18

BERNARD VELENSKY, HARRY VELENSKY AND JAKE BUDOVITCH } APPELLANTS;

AND

THE CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED (trustee in bankruptcy) ..... } RESPONDENT.

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

*Bankruptcy—Fraudulent payment—Voidability—Guarantee returned to guarantors—Trustee's claim against guarantors—Power to order payment direct to trustee—The Bankruptcy Act. R.S.C. 1952. c. 14. s. 64(1).*

The appellants had guaranteed a bank loan to a company. Two months before the company was declared bankrupt, it deposited in its account at the bank a sum sufficient to cover the loan. The bank charged the note against the company's account and returned the guarantee to the guarantors. The trustee in bankruptcy attacked the payment to the bank, but the action was dismissed by the trial judge. The trustee's appeal as against the bank was dismissed, but allowed as against the guarantors who were ordered to pay to the trustee the amount of the guarantee, on the view that the company had intended to give the guarantors a preference, that the latter had intended to receive a preference but that the bank had no such intention. The guarantors were granted special leave to appeal to this Court on the question as to whether there was power under the Act to order payment by the guarantors directly to the trustee.

*Held*: The appeal should be allowed and the action dismissed.

Accepting, for the purpose of this appeal, the findings of fact made by the Court of Appeal, the question to be determined was whether or not the effect of s. 64(1) of the *Bankruptcy Act* was to render the payment fraudulent and void as against the trustee. There was only one payment and it was either good or void. It could not be good as between the bank and the trustee and at the same time void as between the guarantors and the trustee. Therefore, since no appeal

*PRESENT: Cartwright, Abbott, Martland, Judson and Ritchie JJ.

1960

VELENSKY *et al.* v. CDN. CREDIT MEN'S TRUST ASSOC. LTD.

was taken from the judgment declaring good the payment as between the bank and the trustee, that question was now *res judicata*. The trustee's only right was to have the payment declared void and consequently to recover the amount of the payment. It was too late for such an order.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division, reversing in part a judgment of Anglin J. Appeal allowed.

*R. V. Limerick, Q.C.*, for the Appellants.

No one appearing for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal by Bernard Velensky, Harry Velensky and Jake Budovitch, brought by special leave granted by my brother Taschereau, from a judgment of the Appeal Division of the Supreme Court of New Brunswick. The appeal to the Appeal Division was brought by the Trustee in Bankruptcy of Bernard Motors Limited, hereinafter referred to as "the trustee", from a judgment of Anglin J. The appeal was allowed as against Bernard Budovitch, Bernard Velensky, Jake Budovitch and Harry Velensky, hereinafter referred to collectively as "the guarantors" and was dismissed as against the Provincial Bank of Canada, hereinafter referred to as "the Bank". By the judgment of the Appeal Division it was ordered that the four guarantors pay to the trustee as a joint and several liability the sum of $10,000.

The notice of motion brought by the trustee before Anglin J. asked for numerous items of relief, all of which were refused by that learned judge. The trustee appealed to the Appeal Division as to only two of these items and asked in its notice of appeal for an order:

> (1) declaring fraudulent and void as against the trustee of the bankrupt the payment of the sum of $10,000.00 by the bankrupt to the Provincial Bank of Canada on the second of October, 1953, or, alternatively, the charging by the Provincial Bank of Canada on the second day of October, 1953, of the sum of $10 000.00 against the account of the bankrupt with the said bank, in full payment and satisfaction of a promissory note made by the bankrupt under date of the twelfth day of February, 1953, payable on demand, with interest at the rate of 6% (six per cent) per annum to the order of Bernard Budovitch endorsed by Bernard Budovitch and Bernard Valensky, and payment of which had been guaranteed by the said Bernard Budovitch and Bernard Valensky and by Harry Valensky and Jake Budovitch;

(2) directing the said Provincial Bank of Canada, Bernard Budovitch, Bernard Valensky, Harry Valensky and Jake Budovitch, jointly and severally to pay forthwith to the trustee of the bankrupt the said sum of $10,000.

Anglin J. reached the conclusion that the presumption in favour of the trustee raised by s. 64 of the *Bankruptcy Act* had been rebutted and that the intention of Bernard Motors Limited, hereinafter referred to as "the company", was not to give a preference to either the Bank or the guarantors.

The Appeal Division took a different view as to the inferences which should be drawn from the evidence. Its members were unanimously of opinion that there was an intention on the part of the company to give a preference to the guarantors and an intention on the part of the guarantors to obtain such a preference. Bridges J., with whom Jones J. concurred, was of opinion that the company also intended that the Bank should receive a preference. All three members of the Court were of opinion that the Bank had not intended to receive a preference.

As in my opinion even on the view of the evidence most favourable to the trustee the appeal succeeds, I propose to accept for the purposes of this appeal the findings of fact made by the Appeal Division. These are fully set out in the reasons of Bridges J. and Richard J. and I shall attempt to give only a brief summary.

Bernard Budovitch was the president and a director of the company; Bernard Velensky was its secretary-treasurer and a director; the management of the company's business was in their hands. Jake Budovitch is the father of Bernard Budovitch and Harry Velensky is the father of Bernard Velensky.

On February 12, 1953, the company borrowed $10,000 from the Bank on a promissory note for that amount signed by the company payable to Bernard Budovitch and endorsed by him and Bernard Velensky. On February 16, 1953, the four guarantors executed a guarantee in favour of the Bank whereby they jointly and severally guaranteed payment of all present and future debts and liabilities owing by the company to the Bank. Under the terms of the

1960

VELENSKY *et al.* v. CDN. CREDIT MEN'S TRUST ASSOC. LTD.

Cartwright J.

guarantee the liability of the guarantors and of each of them was limited to $10,000. The guarantee contained the following clause:

> Provided always that the undersigned, or any one or more of them (if more than one) or the respective executors, administrators or legal representatives of any of the undersigned, may at any time determine their or his further liability under this guarantee by notice in writing to be given to said Bank, but said determination by any one or more of the undersigned or by the respective executors, administrators or legal representatives of any of the undersigned shall not prevent the continuance of the liability hereunder of any others or other of the undersigned or of their or his respective executors, administrators or legal representatives.

On October 2, 1953, the company was, and had been for some weeks, an insolvent person as defined in the *Bankruptcy Act*. On that day Bernard Budovitch made a deposit of $9,531.99 in the account of the company at the Bank and following this deposit the amount standing to the company's credit was $11,527.

In the afternoon of October 2, 1953, after the deposit had been made, Jake Budovitch and Harry Velensky went to the Bank and, the manager being absent, saw W. H. Anthony, the assistant manager. They asked him to charge the $10,000 note to the company's account and to return the guarantee to them. Anthony did not consider they had the authority to direct him to do this; he telephoned to the company's office, asked for "Bernie", spoke to either Bernard Budovitch or Bernard Velensky, told the person to whom he was speaking of the request of Jake Budovitch and Harry Velensky and received the answer "Well, I guess you might as well". Anthony thereupon charged the note against the company's account and, a few days later when it was received from the head office of the bank, returned the guarantee to Jake Budovitch and Harry Velensky.

On December 1, 1953, a receiving order was made against the company and later the Canadian Credit Men's Trust Association was duly elected trustee.

On this state of facts, the question as to what are the rights of the trustee turns on the effect of s. 64(1) of the *Bankruptcy Act*, which reads as follows:

> 64. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person

making, incurring, taking, paying or suffering the same becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

This subsection must be read in the light of subs. (3), which provides:

(3) For the purpose of this section, the expression "creditor" shall include a surety or guarantor for the debt due to such creditor.

The applicable words of subs. (1) as interpreted by subs. (3) are:— . . . every payment made . . . by any insolvent person in favour of any creditor . . . with a view of giving such creditor (which expression includes a surety . . . for the debt due to such creditor) a preference over the other creditors shall, if the person making . . . the same becomes bankrupt within three months after the date of making . . . the same, be deemed fraudulent and void as against the trustee in bankruptcy.

Applying these words to the facts as found by the Appeal Division, it appears that the payment of $10,000 was made by an insolvent person, the company, in favour of a creditor, the bank, with a view of giving the four guarantors (sureties for the debt due to the bank) a preference over the other creditors—which four guarantors, if that is important, also had the intention of being preferred—and the person making the payment, the company, became bankrupt within three months.

In these circumstances the task of the Court was to determine whether or not the effect of s. 64(1) was to render the payment of the $10,000 fraudulent and void as against the trustee.

I can find nothing in the section or in the jurisprudence to warrant declaring the payment good as between the bank and the trustee and at the same time void as between the guarantors and the trustee.

There was only one payment and it must be either good or void. If, as the Appeal Division appear to have held, it would not be void as against the bank unless the bank had the intention of being preferred and so it is good as between the bank and the trustee, then the debt to the bank has been paid and there can be no liability on the part

1960

VELENSKY *et al.* v. CDN. CREDIT MEN'S TRUST ASSOC. LTD.

Cartwright J.

of the guarantors. They guaranteed only the payment of whatever (up to $10,000) was owing to the bank and on this view nothing was owing.

With respect, I incline to the view that it having been found as a fact that the intention of the insolvent was to prefer both the bank and the guarantors and that the intention of the latter, although not of the former, was to be preferred, it should have been held that the payment was void, the bank should have been ordered to repay the $10,000 to the trustee and left to exercise its rights against the guarantors. I do not, however, have to reach a final conclusion as to this because it is too late to make any such order. It is now *res judicata* that as between the bank and the trustee the payment is good and no appeal has been taken from the judgment so declaring. The debt to the bank for the payment of which the guarantors were sureties has been paid in full and as a result they are discharged.

I am unable to construe s. 64 as giving any rights to the trustee in regard to a preferential payment other than the right to have such payment declared void and the consequential right to recover the amount of the payment. The question from whom the amount of the payment can be recovered does not arise unless and until the payment has been declared void.

I agree with the statement in Halsbury, 3rd ed., vol. 2, p. 560:

> If a payment or other disposition of property, otherwise valid, be made in circumstances that amount to a fraudulent preference, the payment, at the time it is made, is a good payment, and so remains unless and until it is set aside as a fraudulent preference.

In my view, as the payment to the bank (which is the only payment in question) has not been (and cannot now be) set aside, the question whether had it been so set aside an order for payment could have been made directly against the guarantors does not arise and I think it better to express no opinion upon the conflicting views expressed in *In re G. Stanley & Co.*[1] on the one hand, and in *Re Lyons*[2] and *Re Conley,*[3] on the other.

[1] [1925] Ch. 148.
[2] (1934), 152 L.T. 201, [1934] All E.R. 124.
[3] [1937] 4 All E.R. 438, reversed [1938] 2 All E.R 127.

I would allow the appeal, set aside the order of the Appeal Division as against the three appellants and restore the order of Anglin J. as to them. The appellants should have their costs in the Appeal Division and in this Court against the trustee.

*Appeal allowed with costs.*

*Solicitors for the appellants: McNair & McNair, Fredericton, and Limerick and Limerick, Fredericton.*

*Solicitors for the respondent: McKelvey, MacCauley, Machum & Fairweather, St. John.*

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GLADYS (GERALDINE) EVANS .....APPELLANT;

AND

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

1960
*Jan. 26, 27
Mar. 8

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Income tax—Right to life income under will contested—Legal fees incurred to have right determined—Whether fees deductible expenses or capital outlay—The Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(a) and (b).*

Exercising a power of appointment conferred upon him by the will of his father, the appellant's first husband bequeathed her the income for life of a one-third share of the father's estate. The trustee of the father's estate applied to the Court for advice and direction as to whether she was entitled to the income. In 1955, the matter was finally decided by this Court in favour of the appellant who had been represented by counsel in all the proceedings. In computing her income tax return for 1955, she deducted the legal fees she had paid her solicitors. The deduction was disallowed by the Minister. The Income Tax Appeal Board allowed the deduction, but the Minister's assessment was affirmed by the Exchequer Court of Canada.

*Held*: (Fauteux and Judson JJ. dissenting): The appellant was entitled to the deduction.

*Per* Taschereau, Cartwright and Ritchie JJ.: The outlay in question was not a payment on account of capital within s. 12(1)(*b*), but an expense, within s. 12(1)(*a*), properly incurred for the purpose of gaining an income to which she was at all relevant times entitled but of which she was unable to obtain payment without incurring the outlay. Although she became entitled to be paid the income

*PRESENT: Taschereau, Cartwright, Fauteux, Judson and Ritchie JJ.

1960

EVANS
v.
MINISTER OF
NATIONAL
REVENUE

Cartwright J.

from the one-third share, the legal ownership of the share was to remain in the trustee and in no circumstances could she ever become entitled to any part of that capital. Her right was solely to require the trustee to pay the income. The payment of the legal fees did not bring this right or any asset or advantage into existence. Her right to receive the income was derived not from the judgment of the Court but from the combined effect of the wills. The fact that a bare right to be paid income can be sold or valued on an acturial basis at a lump sum does not require or permit that right, while retained by the beneficiary, to be regarded as a capital asset.

*Per* Fauteux and Judson JJ., *dissenting*: The judgment of the Exchequer Court rightly decided that the outlay was on account of capital and non-deductible by virtue of s. 12(1)(*b*) of the Act.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada[1], reversing a judgment of the Income Tax Appeal Board and affirming the Minister's assessment.

Appeal allowed, Fauteux and Judson JJ. dissenting.

*T. Sheard, Q.C.*, and *F. S. Burbidge*, for the appellant.

*D. Guthrie, Q.C.*, and *J. D. C. Boland*, for the respondent.

The judgment of Taschereau, Cartwright and Ritchie JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment[1] of Cameron J. allowing an appeal from a decision of the Income Tax Appeal Board delivered by W. S. Fisher, Esquire, Q.C. and affirming an assessment made upon the appellant.

The facts are not in dispute.

Thomas Alexander Russell died on December 29, 1940, leaving a large estate; his son, John Alexander Russell who was the first husband of the appellant, died on August 8, 1950; the appellant re-married on July 27, 1953; the widow of Thomas Alexander Russell died on September 20, 1953.

By the combined effect of the wills of Thomas Alexander Russell and John Alexander Russell the appellant became entitled on September 20, 1953, for the remainder of her lifetime to the income from a one-third share of the residue of the estate of Thomas Alexander Russell. We were informed by counsel that the income from this one-third share is approximately $25,000 a year. The surviving trustee of the will of Thomas Alexander Russell applied on

[1] [1959] Ex. C.R. 54, [1958] C.T.C. 362, 59 D.T.C. 1001.

originating notice to the Supreme Court of Ontario for the opinion, advice and direction of the Court as to the following questions arising in the administration of his estate:

(1) What is the extent of the power of appointment given by the donor, the late Thomas Alexander Russell by the said Will to the late John Alexander Russell in respect of the disposition of income on the share of the said John Alexander Russell? and

(2) Has the said John Alexander Russell as donee of the power properly appointed and executed the same under the terms of his Will?

The motion came on for hearing before Lebel J., as he then was, and counsel for Mrs. Andersen, the only surviving child of Thomas Alexander Russell, submitted that the appellant was not entitled to the income from the one-third share. The learned judge gave judgment on June 2, 1954, holding that the appellant was entitled to the income. Mrs. Andersen appealed from this judgment to the Court of Appeal for Ontario; her appeal was dismissed by a unanimous judgment delivered on September 10, 1954; she appealed further to this Court[1] and, on April 26, 1955, her appeal was dismissed by a unanimous judgment.

In all these proceedings the present appellant was represented by solicitors and counsel; she received her party and party costs out of the estate of Thomas Alexander Russell but had to pay personally the sum of $11,974.93, the difference between her party and party costs and her solicitor and client costs; this was paid for her by the trustee of the Thomas Alexander Russell estate out of the income which she would otherwise have been entitled to receive during the year 1955. The question in this appeal is whether in computing the income of the appellant for the year 1955 she was entitled to deduct this sum of $11,974.93.

The provisions of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended, which are relevant to the issues in this appeal are:

2. (1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year.

[1] [1955] 2 D.L.R. 721.

1960

EVANS
v.
MINISTER OF
NATIONAL
REVENUE

Cartwright J.

(3) The taxable income of a taxpayer for a taxation year is his income for the year minus the deductions permitted by Division C.

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

12 (1) In computing income, no deduction shall be made in respect of

(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part.

139 (1) In this Act

(*ag*) "property" means property of any kind whatsoever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes a right of any kind whatsoever, a share or a chose in action.

Section 12(1)(*a*) and (*b*) was derived from s. 6(1)(*a*) and (*b*) of the *Income War Tax Act*, which provided as follows:

6 (1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

(*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

Cameron J. was of opinion that the payment of $11,974.93 was an outlay on account of capital and so barred from deduction by the provisions of s. 12(1)(*b*); consequently he found it unnecessary to consider whether or not the payment

fell within s. 12(1)(*a*). The gist of the reasoning which brought the learned judge to this conclusion is contained in the following paragraphs:

> The answer to the question which I have posed depends upon the nature and quality of the right which the respondent had and in the defence of which the outlay was made. If it was a capital asset I am bound, I think, by the decision of the Supreme Court of Canada in *Dominion Natural Gas Co. Ltd. v. M.N.R.* (1941) S.C.R. 19, to find that such outlay was one on account of capital and therefore nondeductible. Further reference to that case will be made later.
>
> Upon first consideration and since Mrs. Evans received only income from her right, the expenditures might seem to have been made not on account of capital but on account of income. That would, I think, have been the case had she in any year found it necessary to lay out money for legal expenses to enforce payment of the quarterly or annual income when the right to receive it was not in question but the trustees had failed to pay it over. Such a case would have been similar to one in which a landlord was required to pay legal expenses in collecting his rent. That, however, was not the case here. What was in dispute was not the *amount* of income to which she was entitled but whether or not she was entitled to anything. It was her right to income which was disputed on the ground that her father-in-law's Will did not confer on her husband the power to appoint the income to her in the circumstances; and even if it had done so the power was not validly exercised. In my opinion, what the respondent had was a life estate or a life interest in the income from a portion of the residue of her father-in-law's state. That right must be distinguished from the income which flowed therefrom to her as a result of her ownership of the right. While it was an intangible right, I think it would normally be considered a proprietary right—something which the respondent possessed to the exclusion of all others and quite apart from the fact that by the provisions of s. 139(1)(*ag*) the word "property" includes "a right of any kind whatsoever". That right was something capable of evaluation as, for example, by the succession duty officers or by actuaries. It could be sold or pledged. Had that right been purchased, for example, by an investment corporation, the right in its hands would, I think, have been considered as a capital asset. In my view, it was a capital asset and the source of her income.

With the greatest respect, I disagree with the conclusion set out in the last sentence of this paragraph that the appellant's right was a capital asset.

As I read the whole of his reasons, the learned judge was of opinion that if the decisions of the courts in England were applicable he would have decided the question in favour of the tax-payer but felt himself bound by the

1960

EVANS
v.
MINISTER OF NATIONAL REVENUE

Cartwright J.

decision of this Court in *Dominion Natural Gas Ltd. v. M.N.R.*[1] to reach a contrary conclusion. That case was decided under s. 6(1) of the *Income War Tax Act*, quoted above. In giving the judgment of the majority of this Court in *B.C. Electric Ry. Co. v. M.N.R.*[2], my brother Abbott said:

> The less stringent provisions of the new section should, I think, be borne in mind in considering judicial opinions based upon the former sections.

Whether, in view of the later decisions of this Court in *M.N.R. v. The Kellogg Company of Canada Ltd.*[3] and *M.N.R. v. Goldsmith Bros. Smelting and Refining Co. Ltd.*[4], the *Dominion Natural Gas* case would be decided in the same manner if it arose to-day under the present section is a question which I do not have to consider. It is distinguishable from the case at bar.

In *B.C. Electric v. M.N.R., supra,* all members of the Court adopted as a useful guide in determining whether an expenditure is one made on account of capital the test formulated by Lord Cave in *Atherton v. British Insulated and Helsby Cables Limited*[5], as follows:

> . . . when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

The reasons for judgment in *Dominion Natural Gas* had the effect of adding as an alternative to the words "with a view to *bringing into existence* an asset or an advantage for the enduring benefit of a trade" in the passage quoted, the words "or with a view to *preserving* an asset or advantage for the enduring benefit of a trade".

[1] [1941] S.C.R. 19, [1940] 4 D.L.R. 657.
[2] [1958] S.C.R. 133 at 136, 12 D.L.R. (2d) 369, 77 C.R.T.C. 29.
[3] [1943] S.C.R. 58, 2 D.L.R. 62.
[4] [1954] S.C.R. 55, 2 D.L.R. 1.
[5] [1926] A.C. 205 at 214.

The "asset" or "advantage" under consideration in *Dominion Natural Gas* was a valuable, exclusive perpetual franchise; this franchise did not of itself yield any income to the Company which held it; it was a permanent right used and useful in the earning of the company's income by the sale of its product to the persons residing in the territory covered by the franchise; it was rightly regarded as an item of fixed capital.

In *M.N.R. v. Goldsmith Bros., supra,* at p. 57 Rand J. succinctly explained the judgment in *Dominion Natural Gas* as having been based on the view that the legal fees there in question were "expenses to preserve a capital asset in a capital aspect". The judgment in *Dominion Natural Gas* is not of assistance in deciding whether the right to income possessed by the appellant in the case at bar should be regarded as a capital asset.

In the case at bar, as has already been pointed out, the appellant, on September 20, 1953, became entitled for the remainder of her life-time to be paid the income from the one-third share. The legal ownership of that share remains at all times in the trustee and the capital of which it consists will be paid on the appellant's death, to those entitled under the will of Thomas Alexander Russell. In no circumstances can the appellant ever become entitled to any part of that capital; her right is solely to require the trustee to pay the income arising from the share to her; this is a right enforceable in equity and everything received by the appellant by virtue of the right will be taxable income in her hands. The payment of the legal fees in question did not bring this right or any asset or advantage into existence. Her right to receive the income is derived not from the judgment of the Court but from the combined effect of the wills of Thomas Alexander Russell and John Alexander Russell. Wrongly, as it turned out, the trustee entertained doubts, presumably engendered by the claims of Mrs. Andersen, as to whether it should pay to the appellant the income to which she was entitled and it would not pay anything until the matter had been passed upon by the Court.

1960

EVANS
v.
MINISTER OF NATIONAL REVENUE

Cartwright J.

The precise form in which the matter was submitted to the Court appears to me to be of no importance; the legal expenses paid by the appellant were expended by her for the purpose of obtaining payment of income; they were expenses of collecting income to which she was entitled but the payment of which she could not otherwise obtain. So viewed, it could scarcely be doubted that the expenses were properly deductible in computing the appellant's taxable income. This, in my opinion, is the right view of the matter and is not altered by the circumstance that it was mistakenly claimed by Mrs. Andersen that the appellant was not entitled to any income at all.

With the greatest respect for the contrary view entertained by the learned Judge, I cannot agree that the fact that a bare right to be paid income can be sold or valued on an actuarial basis at a lump sum requires or permits that right, while retained by the appellant, to be regarded as a capital asset. I do not think that in ordinary language a right to receive income such as that enjoyed by the appellant would be described as a capital asset. If it were all that she possessed, I think that the natural and accurate answer to the question "Has she any capital?" which would be made by either the man on the Clapham omnibus or a professional accountant would be "No, but she has a substantial income".

If the circumstances of the case at bar are viewed in the light most favourable to the respondent it can be said that the legal expenses were incurred not only to collect the income to which the appellant was entitled and which was being wrongly withheld from her but also to prevent the right to receive that income being destroyed; the right in question remains throughout a right to income. In the *Dominion Natural Gas* case, on the other hand, the expenses were incurred in litigation the subject matter of which was an item of fixed capital.

In my opinion, in the circumstances of this case there are two relevant questions both of which must, on the admitted facts, be answered in the affirmative; (i) was the appellant's

claim in regard to which the expenses were incurred a claim to income to which she was entitled? (ii) were the legal expenses properly incurred in order to obtain payment of that income? It does not appear to me to be either necessary or relevant to inquire further as to what were the grounds (held by the Court to be without substance) upon which the payment of the income was withheld. It would be a strange result if the question, whether legal expenses incurred in enforcing or preserving a right should be regarded as an outlay on account of capital or on account of income, fell to be determined on a consideration not of the true nature of that right but of the nature of the ill-founded grounds on which it was disputed.

For the above reasons it is my opinion that the outlay of the legal expenses in question was not a payment on account of capital falling within s. 12(1)(*b*) but was an expense, falling within s. 12(1)(*a*), incurred by the appellant for the purpose of gaining income from property, to which income she was at all relevant times entitled but of which she was unable to obtain payment without incurring these expenses.

I would allow the appeal, set aside the judgment of the Exchequer Court and restore that of the Income Tax Appeal Board with costs throughout.

The judgment of Fauteux and Judson JJ. was delivered by

FAUTEUX J. (*dissenting*):—I respectfully agree with the reasons and the conclusion of Mr. Justice Cameron of the Exchequer Court[1] and would therefore dismiss the appeal with costs.

*Appeal allowed with costs,* FAUTEUX *and* JUDSON JJ. *dissenting.*

*Solicitors for the appellant: Johnston, Sheard & Johnston, Toronto.*

*Solicitor for the respondent: A. A. McGrory, Ottawa.*

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[1] [1959] Ex. C.R. 54, [1958] C.T.C. 362, 59 D.T.C. 1001.

1960
Mar. 15, 16
Apr. 11

THOMAS KRIBS, GERALD GRIFFITH, BERNARD GRIFFITH AND ROBERT QUIRIE ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law—Rape—Evidence of complaint—Whether admissible—Person to whom complaint made not called as witness—Whether only bare fact of complaint admissible and not particulars of it.*

The accused were convicted by a jury on a charge of rape. The only evidence at the trial of any complaint having been made was given by the victim. The person to whom she allegedly complained could not be traced and consequently was not called as a witness in corroboration. The verdict was affirmed by a majority in the Court of Appeal. The accused appealed to this Court on two grounds of law: (1) that the victim's evidence of the details of the complaint allegedly made by her should not have been admitted at trial, and (2) that the jury should not have been charged that they might conclude from her evidence that her conduct had been consistent throughout. It was conceded by counsel for the accused that the validity of the second ground depended upon the validity of the first.

*Held:* The appeal should be dismissed.

The submission that in the absence of any evidence from the person to whom the complaint was allegedly made, the evidence of the victim as to the fact of the complaint was inadmissible, was ill-founded. The principle upon which such a complaint, not made on oath, nor in the presence of the accused, nor, as in this case, forming part of the *res gestae,* is admissible in a case of this nature, is one of necessity. It is presumed that the victim will complain at the first reasonable opportunity and, consequently, that her silence might naturally be taken as a virtual self-contradiction of her story. The victim should therefore be entitled to rebut, by her own evidence of complaint, the presumption which would attach to her silence, and that right should not be denied for the sole reason that the person to whom the alleged complaint was made was untraceable. There was no rule, either statutory or of other kind, that such evidence must itself be confirmed or corroborated.

The submission that the evidence of complaint should be limited to the fact that a complaint was made without giving any of the particulars of it, could not be entertained. Furthermore, the victim did not give particulars in this case.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming, by a majority decision, a jury's verdict on a charge of rape. Appeal dismissed.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Judson JJ.

[1] (1960), 32 C.R. 226.

*C. Dubin, Q.C.,* for the appellants.

*E. Pepper,* for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—The appellants were convicted by a jury, in the Supreme Court of Ontario, on a charge of rape. The verdict was appealed to the Court of Appeal[1] for the province, and affirmed by a majority decision, Morden J.A. dissenting on two questions of law which now and pursuant to s. 597(1)(*a*) of the *Criminal Code* form the basis of this appeal. As stated in appellants' factum, these two grounds are:

1. The learned trial Judge erred in admitting the prosecutrix' evidence of the details of the complaint allegedly made by her.

2. The learned trial Judge erred in charging the jury that they might conclude from her evidence that her conduct had been consistent throughout.

For the appreciation and the consideration of the first ground, it is only necessary, but sufficient, to advert to that phase of the evidence of the prosecutrix, which is related to the complaint itself and to the circumstances immediately contemporaneous with it. Having testified how she had been forcibly conveyed in an automobile to a secluded place and there become the victim of the appellants, she said that she then crossed certain fields to reach the highway where she hailed an approaching truck. She boarded the truck, started to cry and upon the driver's inquiry as to the cause of her grief, she then made a complaint. Her evidence, the admissibility of which is challenged, proceeds as follows:

Q. Now, we will go back to the truck again. You were in the truck, you said, going towards Toronto?

A. Yes.

Q. Yes. And, having got into the truck, the truck driver asked you a question?

A. Yes.

Q. What was the question?

A. I was crying, and he asked me what was wrong.

Q. Yes, and did you tell him?

A. Yes.

Q. What did you say, please?

[1] (1960), 32 C.R. 226.

1960

KRIBS *et al.* v. THE QUEEN

Fauteux J.

A. I told him I was attacked by four boys and that my girl friend had got away, and that I didn't know where she was.

Q. Yes. Anything else?

A. He asked me where they were, and I pointed over to the car. You could see it from the truck.

Q. Yes. You could still see the car?

A. Yes.

Q. Now, was there any more conversation?

A. Yes.

Q. Go ahead.

A. He said that he would drive me back to London, but first of all I had to give him a kiss before he would.

Q. And did you?

A. No, I never. I got out of the truck.

Q. You got out of the truck?

A. Yes.

While she did give a certain description of the truck and of its driver, she did not take the license number of the vehicle nor did she know the driver thereof. In the result, the latter being untraceable, could not be called as a witness and there was consequently no evidence to confirm the fact of her complaint to him.

As presented, in the course of the hearing in this Court, the submission made on behalf of the appellants in support of the first ground of appeal is twofold. First, it is said that in the absence of any evidence from the truck driver, the evidence of the prosecutrix as to the fact of the complaint is inadmissible. It is then submitted that even if such evidence is admissible, the particulars of the fact complained of cannot be given in evidence by the prosecutrix as, it is contended, it was in this case.

These two points are really the only ones to be considered in this appeal; for, as conceded by counsel for the appellants, the validity of the second ground of appeal, which is related to the address of the trial Judge to the jury on the effect of the evidence of complaint, is conditioned upon the validity of the first for either one of the two points submitted in support of the latter ground.

No case in point could be found by counsel for the appellants to support the proposition that evidence of fresh complaint by the prosecutrix is inadmissible in the absence of any evidence from the recipient of such com-

plaint. From the following authorities, we were asked to draw, as did the learned dissenting Judge, inferences in affirmance of the validity of this submission.

The first is the *Lillyman* case[1] where both the prosecutrix and the recipient of her complaint testified as to the fact of the complaint. Our attention was called particularly to the following excerpt, at page 170 of the judgment of the Court, delivered by Hawkins J.:

> It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the res gestae, can be admitted. It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains.

It was suggested that when speaking of the evidence of complaint, Hawkins J. was referring, not to the prosecutrix' evidence, but to the evidence of the person to whom she complained. With deference to the dissenting Judge, I am unable to agree with this interpretation. In the consideration of this and the other cases referred to, one is reminded of the two observations made by the Earl of Halsbury L.C. in *Quinn v. Leathem*[2]:

> . . . one is . . .that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

We were then referred to a group of decisions: *Rex v. Walker*[3]; *R. v. Megson*[4]; *R. v. Guttridge et al.*[5]; *R. v. Nicholas*[6] and *R. v. Wallwork*[7]. In all of these cases, the prosecutrix did not give evidence, and because of this fact, evidence of the recipient of the complaint as to the fact

[1] (1869), 2 Q.B. 167.
[2] [1901] A.C. 495 at 506.
[3] (1839), 2 Mood. & R. 212.
[4] (1840), 9 C. & P. 420.
[5] (1840), 9 C. & P. 471.
[6] (1846), 2 Car. & Kir. 246.
[7] (1958), 42 C.A.R. 153.

1960

KRIBS *et al.* v. THE QUEEN

Fauteux J.

or the particulars of the outrage complained of was rejected. Reference was also made to *Rex v. Osborne*[1]; *Rex. v. Lovell*[2]; *Thomas v. The Queen*[3]; *Rex v. Washington*[4] and *Rex v. Lebrun*[5], where comments are made with respect to the confirmatory or corroborative nature of the evidence of the recipient of the complaint. While the testimony of the recipient of a complaint may be confirmatory or corroborative of the testimony of the prosecutrix as to the fact and the particulars of the complaint made by her, it does not follow that the admissibility of the evidence of the prosecutrix, as to these matters, is conditioned upon the corroboration or confirmation by the recipient. The comments made in these cases are of no assistance and, in my view, beyond the point here to be decided.

Finally, we were referred to Phipson On Evidence, 9th ed., at page 133, where it is said that:

> The complaint should be proved by calling both the prosecutrix herself and the person to whom it was made.

The authorities relied on by Phipson for this statement do not, as it was ultimately conceded at the hearing, on behalf of the appellants, support the same.

Counsel for the appellants properly called our attention to two cases where the validity of his first submission is negatived. One is *R. v. Eyre*[6]. The other is *R. v. Ball*[7], where Coady J. A. delivering the judgment of the Court of Appeal for British Columbia, said:

> The evidence of the complainant as to the complaint made by her would be admissible in evidence, it seems to me, even if the party to whom the complaint was made was not called as a witness. The failure to call the party as a witness, or if called, to confirm what was said by the complainant, goes to the weight to be attached to the complainant's evidence.

With this statement of the law and for the reasons hereafter given, I am in complete agreement.

The argument underlying appellants' proposition is that by adding to her recital of the outrage, the fact that she complained about it, the prosecutrix confirms her own

[1] [1905] 1 K.B. 551.
[2] (1923), 17 C.A.R. 163.
[3] [1952] 2 S.C.R. 344, 15 C.R.I., 103 C.C.C. 193, 4 D.L.R. 306.
[4] [1951] O.W.N. 129.
[5] [1951] O.R. 387, 12 C.R. 31, 100 C.C.C. 16.
[6] (1860), 2 F. & F. 579.
[7] (1957), 117 C.C.C. 366 at 369, 25 C.R. 250, 21 W.W.R. 113.

story and enhances her credibility. This, it is said, can only properly be done, not by her own, but by independent evidence. The true question, in my view, is not what is the effect of evidence of fresh complaint, but what is the principle upon which such complaint, not made on oath, nor in the presence of the accused, nor, as in this case, forming part of the *res gestae,* is admissible in a case of the nature of the one here considered.

The principle is one of necessity. It is founded on factual presumptions which, in the normal course of events, naturally attach to the subsequent conduct of the prosecutrix shortly after the occurrence of the alleged acts of violence. One of these presumptions is that she is expected to complain upon the first reasonable opportunity, and the other, consequential thereto, is that if she fails to do so, her silence may naturally be taken as a virtual self-contradiction of her story. In Hawkins' Pleas of the Crown, quoted by Hawkins J. in the *Lillyman* case, *supra,* at page 170, it is said:

> It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact.

In Wigmore On Evidence, vol. 4, 3rd ed., p. 218, reference is made to the history of the evidence of complaint in the case of rape and, at page 220, it is said:

> (*b*) So, where nothing appears on the trial as to the making of such a complaint, the jury might naturally assume that none was made, and counsel for the accused might be entitled to argue upon that assumption. As a peculiarity, therefore, of this kind of evidence, it is only just that the prosecution should be allowed to forestall this natural assumption by showing that the woman was *not silent,* i.e. that a *complaint was in fact made.*
>
> This apparently irregular process of negativing evidence not yet formally introduced by the opponent is regular enough in reality, because the impression upon the tribunal would otherwise be there as if the opponent had really offered evidence of the woman's silence. Thus the essence of the process consists in the showing that the woman did *not* in fact behave with a silence inconsistent with her present story. The Courts have fully sanctioned this analysis of the situation.

Thus it appears that by giving evidence of her conduct shortly after the alleged occurrence, the prosecutrix does not, in a sense, enhance or confirm her story any more than she does in reciting all that she did in resistance to the assault, but she rebuts a presumption and, in doing so,

1960

KRIBS *et al.* v. THE QUEEN

Fauteux J.

adds, for all practical purposes, a virtually essential complement to her story. In the *Lovell* case, *supra,* Lord Chief Justice Hewart, in reference to that type of evidence, said this, at page 169:

> There is a clear distinction between matters which affect the intrinsic credibility of the witness's own story when that story is considered by itself, and, on the other hand, corroborative evidence in the sense of independent testimony proceeding from a source other than the prosecutrix and implicating the accused; and it may be that sometimes the distinction between those two things has not been kept clearly in view. Historically, as Sir Richard Muir has pointed out in the cases he has cited and in the passages he has read from Hale's Pleas of the Crown, in sexual cases the fact of complaint by the prosecutrix was admitted, not so much as new matter tending to support a story sufficient in itself, but rather as an indispensable ingredient in the story of the prosecutrix, without which the story of the prosecutrix would be open to grave suspicion. Historically, that appears to be the origin of the admissibility of evidence of this kind, and in the opinion of the Court the right direction is that which is given in the case of *Lillyman* in the passage already referred to.

Where an accused is charged with rape, the Judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied, beyond a reasonable doubt, that her evidence is true. (*Criminal Code,* s. 134). Furthermore and if evidence of fresh complaint has been adduced, it is also the duty of the Judge to impress upon the jury that they are not entitled to make use of the complaint as any evidence whatever of the facts complained of but that evidence can only be legitimately used by them for the purpose of enabling them to judge for themselves whether the conduct of the woman was consistent with her testimony on oath, given in the witness box, negativing her consent and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman, under the circumstances detailed by her. (*The Queen v. Lillyman, supra,* pp. 177 and 178).

But there is no rule, either statutory or of other kind, suggesting that the prosecutrix' evidence as to fresh complaint must itself be confirmed or corroborated. And there seems to be no valid reason why, in cases such as the present, where the recipient of an alleged complaint is untraceable, the prosecutrix should be denied the right to rebut, by her own evidence of complaint, the factual presumption which would otherwise attach to her silence as to the matter. If appellants' contention were accepted, a prosecutrix, complaining at the first opportunity to an untraceable witness, might possibly be denied the right to testify that, immediately after this first complaint, she complained to another person available as a witness, on the basis that the former but not the latter complaint was really the one made at the first opportunity.

For all these reasons, I agree with the majority of the Court of Appeal that appellants' first submission is ill-founded.

The second objection to the evidence, which is that evidence of complaint should be limited to the fact that a complaint was made without giving any of the particulars of it, was also considered in *The Queen v. Lillyman, supra,* at page 171 *et seq.*, and at page 177, Hawkins J. said:

> After very careful consideration we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so.

It is true that in the *Lillyman* case, *supra,* both the prosecutrix and the person to whom she complained were heard as witnesses. However, the reasons given against limiting the evidence of the complaint to the bare fact of that complaint are equally present in cases where the evidence of complaint by the prosecutrix is the only evidence as to fresh complaint.

I am also in respectful agreement with the Chief Justice for Ontario that, in the present instance, the prosecutrix did not give particulars.

1960

KRIBS *et al.* v. THE QUEEN

Fauteux J.

I would, therefore, dismiss the appeal. There should be an order that the time spent in custody under the sentences, pending the disposition of this appeal, be allowed as time served under the said sentences.

*Appeal dismissed.*

*Solicitors for the appellants: Young & Hutchinson, Woodstock.*

*Solicitor for the respondent: W. C. Bowman, Toronto.*

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1960

*Mar. 8, 9
Apr. 11

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF CROWLAND (*Defendant*) ..... APPELLANT;

AND

FERDINAND SLEVAR (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Taxation—School taxes—Issue of public school debentures—Taxpayer a public school supporter at the time—Subsequent establishment of separate school—Taxpayer then became separate school supporter—Whether taxpayer liable to pay assessment to retire debentures—The Public Schools Act, R.S.O. 1950, c. 316, s. 3—The Separate Schools Act, R.S.O. 1950, c. 356, s. 56(1), (5), (6).*

Prior to September 1954, the plaintiff was a public school supporter in the defendant municipality. Subsequently a separate school was established and he became a supporter of that school and was so assessed. In the period from January 1946 to September 1954, seven by-laws authorizing the issue of debentures for public school purposes were passed by the municipality. In the year 1953, the municipal tax bill in respect of the plaintiff's property claimed, in addition to the separate school rate, an amount to raise the instalments of principal and interest falling due in that year upon the debentures issued pursuant to the seven by-laws. The plaintiff's action, seeking a declaration that his property was exempt from the payment of all rates imposed for public school purposes, was dismissed by the trial judge. This judgment was reversed by the Court of Appeal. The municipality appealed to this Court.

*Held:* The appeal should be dismissed and the action maintained.

The plaintiff, on becoming a separate school supporter, ceased to be liable either personally or to have his property charged for rates subsequently imposed to discharge the debentures.

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*PRESENT: Kerwin, C.J., and Locke, Cartwright, Martland and Judson JJ.

The exemption from the payment of all rates imposed for the support of public schools given by s. 56(1) of *The Separate Schools Act* is qualified by s. 56(6) and by s. 3 of *The Public Schools Act*, but only in respect of rates annually imposed before the establishment of a separate school and in respect of any liability already incurred. The rates are not imposed by the debenture by-laws, but are imposed annually when the rating by-law is passed. Nothing in s. 3 creates any liability; the section does no more than provide for the continuation of a liability which can only be found in the limited one arising under s. 56(6) for the rate imposed under the annual rating by-law before the taxpayer becomes a separate school supporter or before the establishment of a separate school.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Aylen J. Appeal dismissed.

*S. S. MacInnes, Q.C.*, for the defendant, appellant.

*A. Kelly, Q.C.*, and *J. K. Smith*, for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The respondent sued the appellant township for a declaration that he, as a separate school supporter, was exempt from the payment of all rates imposed for public school purposes, including levies imposed for the purpose of paying the annual instalments of principal and interest on certain debentures issued by the appellant before September 28, 1954. The learned trial judge dismissed his action. The Court of Appeal[1] reversed this judgment and granted the declaration asked for. The Township now appeals.

In the period from January 24, 1946 to September 28, 1954, the Township authorized seven issues of debentures, totalling $1,014,000 for the purpose of constructing and equipping public schools in Public School Area no. 1. During this period the respondent was a public school supporter within this school area. Between 1954 and 1957 a Roman Catholic separate school was established. The respondent then became a separate school supporter. In the assessment roll prepared for the year 1957 and upon which rates and taxes were levied in the year 1958, the respondent was properly entered and rated as a separate school supporter.

In the year 1958 the municipal tax bill issued by the Township in respect of the respondent's property claimed for school purposes the appropriate separate school rate

[1] [1960] O.R. 9, 20 D.L.R. (2d) 518.

1960
TOWNSHIP OF CROWLAND v. SLEVAR
Judson J.

and, in addition, an amount which was the aggregate of the rates allegedly imposed on the respondent to raise the instalments of principal and interest falling due in the year 1958 upon the debentures issued pursuant to the seven by-laws passed before the establishment of the separate school. The respondent then brought his action.

The only part of the declaration sought which needs to be considered in these reasons is in these sharply defined terms:

> A declaration that the plaintiff and the taxable property of the plaintiff are exempt for the year 1958 and for every subsequent year while the plaintiff continues a supporter of a separate school from the payment of all rates imposed by the defendant for the support of public schools and public school libraries, or for the purchase of land or the erection of buildings for public school purposes or for the interest and principal of debentures issued to secure money borrowed for public school purposes.

The learned trial judge held that s. 3 of *The Public Schools Act,* R.S.O. 1950, c. 316, and s. 56, subs. (6) of *The Separate Schools Act,* R.S.O. 1950, c. 356, exempted the respondent from any further personal liability for public school taxes after he became a separate school supporter, but that the lands of the respondent remained charged with the amount required to pay off the debentures in question.

The Court of Appeal held that the exemption from the payment of rates imposed for public school purposes provided for in subs. (1) of s. 56 of *The Separate Schools Act* was unrestricted save as to any rate imposed before the exemption became effective; that the relevant statutes do not create a liability at large upon separate school supporters to pay taxes to meet debenture payments upon debentures for public school purposes issued prior to the establishment of a separate school, but create only a liability to pay taxes according to rates actually imposed before the exemption becomes effective; and that the passing of a debenture by-law in itself does not impose such a rate, a rate being imposed only by some proceedings taken to fix and collect such rate after the actual rate has annually been determined.

I would affirm the judgment of the Court of Appeal for the reasons given. The error in the judgment at trial was in the finding that the lands of the respondent were charged with the amounts required to pay off those debentures from the date of their issue.

The problem arises because of a supposed conflict between s. 56 of *The Separate Schools Act*, R.S.O. 1950, c. 356, and s. 3 of *The Public Schools Act*, R.S.O. 1950, c. 316. The two relevant subsections of s. 56 of *The Separate Schools Act* read:

56. (1) Every person paying rates, whether as owner or tenant, who by himself or his agent, on or before the 15th day of July in any year, gives to the clerk of the municipality notice in writing that he is a Roman Catholic and a supporter of a separate school situate in the municipality or in a municipality contiguous thereto shall be exempt from the payment of all rates imposed for the support of public schools and of public school libraries, or for the purchase of land or the erection of buildings for public school purposes within the city, town, village or section in which he resides, for the following year, and every subsequent year thereafter while he continues a supporter of a separate school.

(6) Nothing in this section shall exempt any person from paying any rate for the support of public schools, or public school libraries, or for the erection of a schoolhouse or schoolhouses, imposed before the establishment of the separate school.

Section 3 of *The Public Schools Act* reads:

Nothing in this Act authorizing the levying or collecting of rates on taxable property for public school purposes shall apply to the supporters of Roman Catholic separate schools, except that all taxable property shall continue to be liable to taxation for the purpose of paying any liability incurred for public school purposes while the property was subject to taxation for such purposes.

The exception did not come into s. 3 of *The Public Schools Act* until the year 1909 by 9 Ed. VII, c. 89. But for this exception there would be nothing to qualify the sweeping exemption contained in s. 56(1) of *The Separate Schools Act* except the qualification of minor scope contained in subs. (6) of s. 56 of the same Act. This minor qualification only relates to rates annually imposed before the exemption becomes effective. These rates are imposed annually by the municipality when the rating by-law is passed. They are not imposed by the debenture by-laws even though each by-law contains a section to the following effect:

COMMENCING in the year 1955 and thereafter in each year in which an instalment of principal of the said debt and interest become due, the Corporation shall levy and raise the specific sum shown for the respective year in the fourth column of the said Schedule. Such sum shall be levied and raised by a special rate sufficient therefore, over and above all other rates, upon all the rateable property of ratepayers who are supporters of Public Schools in School Area No. 1 of the Township of Crowland.

1960
TOWNSHIP OF CROWLAND v. SLEVAR
Judson J.

The debenture by-law is authorized by s. 56(2) of *The Public Schools Act*, R.S.O. 1950, c. 316, made applicable to rural schools by s. 58 of the same Act, and there is nothing in this legislation to authorize the imposition of a rate by debenture by-law. The section above quoted from the debenture by-law does no more than provide that certain sums are to be levied annually. There can, however, be no rate ascertained in any one year until the number of ratepayers and the assessed value of their properties are determined for that year by the annual Assessment Roll. The sums required become rates only when the amount for which each ratepayer is liable is determined, and the rate is not imposed upon a ratepayer before the passing of the annual by-law fixing and imposing the rate. This is the principle stated *In Re Separate Schools Act*[1].

The historical review of s. 56(6) of *The Separate Schools Act* contained in the reasons of the Court of Appeal reinforces this interpretation. As originally enacted by 16 Victoria, c. 185, s. 4 (Statutes of Canada 1852-53), it read:

> . . . nor shall such exemption extend to school rates or taxes imposed or to be imposed to pay for School Houses, the erection of which was undertaken or entered into before the establishment of such separate School.

A significant change was made in this exemption in 1855 by 18 Victoria, c. 131, s. 12. As amended, it became the recognizable predecessor of s. 56(6) in the following form:

> Provided always, that nothing herein contained shall exempt any such person from paying any rate for the support of Common Schools or common School Libraries, or for the erection of a School-house or School-houses, which shall have been imposed before such Separate School was established.

What the legislation did in 1855 is to me quite clear. "Rates or taxes to be imposed" were taken out of the exception to the exemption thus limiting such exception to rates imposed before the establishment of a separate school. There has been no substantial change in subs. (6) of s. 56 of *The Separate Schools Act* since the year 1855.

I turn now to the interrelation between s. 3 of *The Public Schools Act* and s. 56 of *The Separate Schools Act*. Section 3 of *The Public Schools Act* came into the legislation in two

[1] (1901), 1 O.L.R. 584 at 589.

stages—the first in 1874 and the second in 1909. In 1874, by 37 Victoria, c. 28, s. 193, it was enacted in the following unambiguous terms and it remained unchanged until the year 1909:

> Nothing in this Act authorizing the levying or collecting of rates on taxable property for public school purposes shall apply to the supporters of Roman Catholic separate schools.

Standing in this form, the section could not be in conflict with the exemption contained in *The Separate Schools Act*. However, in 1909, by 9 Ed. VII, c. 89, the following exception was added.

> . . . except that all taxable property shall continue to be liable to taxation for the purpose of paying any liability incurred for public school purposes while such property was subject to taxation for such purposes.

The appellant's main submission on the appeal is that the combined effect of the 1909 exception to s. 3 of *The Public Schools Act,* together with the above quoted section of the debenture by-law directing the levy for the purpose of paying the debentures, is to make the respondent, as a municipal taxpayer, liable to contribute to the payment of these debentures until they are fully paid even after he has become a separate school supporter.

It would be a strange result if this exemption were to be cut into by legislation of the kind enacted in 1909, which takes the form of an exception to an exemption already defined in the broadest terms. The fallacy in the appellant's submission is that nothing in s. 3 creates any liability. The section does no more than provide for the continuation of a liability which must be found elsewhere and the only liability that is to be found elsewhere is the limited one arising under s. 56(6) of *The Separate Schools Act* for the rate imposed under the annual rating by-law before the taxpayer becomes a separate school supporter or before the establishment of a separate school.

There is nothing in the debenture by-law nor in the legislation authorizing its issue which amounts to the imposition of rates within the meaning of s. 56(6) of *The Separate Schools Act*. Neither the debentures nor their supporting legislation create a charge against land. The main import of the supporting legislation (which is s. 56 of *The Public Schools Act*) is to provide that the money required

1960
TOWNSHIP OF CROWLAND v. SLEVAR
Judson J.

for capital purposes by public schools is to be raised by debentures of the municipality, and subs. (2) is added solely for internal purposes to indicate that the money which will be raised annually to pay the debentures must come, not from all ratepayers of the municipality but only from those who are supporters of the public schools and thus to ensure that no part of the money for the debentures shall be raised from separate school supporters.

*The Municipal Act*, R.S.O. 1950, c. 243, s. 308, provides that a yearly rate be levied sufficient to pay all the debts payable within the year. When the council has taken the appropriate action to determine what the annual rate shall be, to cause it to be levied, and to turn the collection over to the collector, then only is there a rate which becomes chargeable against the property of the ratepayer.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the defendant, appellant: Raymond, Spencer, Law & MacInnes, Welland.*

*Solicitors for the plaintiff, respondent: Day, Wilson, Kelly, Martin & Campbell, Toronto.*

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1960
*Feb. 5,
Apr. 11

DREAM HOME CONTESTS (EDMONTON) LIMITED ..... APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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RONALD A. HODGES .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Criminal law—Lotteries—Scheme whereby ticket purchaser most closely estimating value of house would receive same as prize—Retention of trust company to assist in conduct of scheme-operators deposited*

*PRESENT: Taschereau, Locke, Fauteux, Martland and Ritchie JJ.

*sufficient sum to guarantee prize awarded even if only one ticket sold—whether illegal lottery under s. 179(1)(e) of the Criminal Code, 1953-54 (Can.), c. 51.*

The appellants conducted a scheme whereby any person buying a ticket for $1 would be entitled to submit an estimation of the value of a house and its contents, and the closest estimator would receive the house with its contents and the land on which the house would be transported. A trust company, engaged to assist in the conduct of the scheme, required, as a condition for providing its services, that the operators deposit a sum sufficient to assure payment for the house and to guarantee that the house would be awarded to the winner of the contest. The accused were convicted of conducting a scheme under s. 179(1)(*e*) of the *Criminal Code*. The conviction was affirmed by a majority in the Court of Appeal.

*Held:* The appeals should be dismissed.

*Per* Taschereau and Fauteux JJ.: Under s. 179(1)(*e*) of the Code, the element of chance is not essential. Consequently, following the decision of *Roe. v. The King* [1949] S.C.R. 652, the offence was committed even if skill had been the only factor that allowed the winner to determine the value of the house, since it was clear that the purchasers of tickets became entitled under the scheme to receive from the operators a larger sum than the amount paid because others had also paid money under the same scheme. The fact that the winner was to receive a house and not a "larger sum of money" or "amount of valuable security" did not prevent the application of the section, since the words "valuable security" are defined in s. 2(42) of the Code as including "a document of title to lands or goods wheresoever situate".

The argument that the house was to be conveyed, not by the promoters, but by the trust company, could not be accepted. Everything done by the trust company was done on behalf of the promoters.

*Per* Locke, Fauteux, Martland and Ritchie JJ.: The submission that by depositing a sufficient sum of money with the trust company, the prize would be awarded irrespective of whether or not any other tickets had been sold, could not be entertained. What constitutes the offence under s. 179(1)(*e*) is the conducting of a scheme by which a participant will receive, as in this case, a larger amount of valuable security than he paid because other persons have contributed to the scheme. The deposit with the trust company was only made by reasons of the fact that it was part of a scheme by which contestants would pay money to enter the contest. This brought the case squarely under the prohibition of the section.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming the appellants' convictions under s. 179(1)(*e*) of the *Criminal Code*. Appeals dismissed.

*J. W. McClung,* for the appellants.

*H. J. Wilson, Q.C.,* and *J. W. Anderson,* for the respondent.

[1] (1959-60), 30 W.W.R. 130, 126 C.C.C. 30.

1960

DREAM HOME CONTESTS LTD. AND HODGES v. THE QUEEN

The judgment of Taschereau and Fauteux JJ. was delivered by

TASCHEREAU J.:—Both appellants were charged under ss. 179(1)(*a*) and 179(1)(*e*) of the *Criminal Code* of Canada.

Under s. 179(1)(*a*) the charges read as follows:

THE INFORMANT SAYS THAT he has reasonable and probable grounds to believe and does believe that

DREAM HOME CONTESTS (EDMONTON) LIMITED

being a body corporate, between the 1st day of May A.D. 1959, and the 27th day of June A.D. 1959, at the City of Edmonton, Province of Alberta, did unlawfully advertise a scheme, to wit: the Dream Home Contest, for the purpose of disposing of property, to wit: the Fekete Dream Home, to be disposed of by a mode of chance, contrary to the provisions of Section 179(1)(*a*) of the Criminal Code.

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THE INFORMANT SAYS THAT he has reasonable and probable grounds to believe and does believe that

RONALD A. HODGES

between the 1st day of May A.D. 1959, and the 27th day of June A.D. 1959, at the City of Edmonton, Province of Alberta, did unlawfully advertise a scheme, to wit: the Dream Home Contest, for the purpose of disposing of property, to wit: The Fekete Dream Home, to be disposed of by a mode of chance. Contrary to the provisions of Section 179(1)(*a*) of the Criminal Code.

The charges under 179(1)(*e*) read as follows:

THE INFORMANTS SAYS THAT he has reasonable and probable grounds to believe and does believe that

DREAM HOME CONTESTS (EDMONTON) LIMITED

being a body corporate, between the 1st day of April A.D. 1959, and the 27th day of June A.D. 1959, at the City of Edmonton, Province of Alberta, did unlawfully conduct a scheme by which a person upon payment of a sum of money shall become entitled under the scheme to receive from the said Company a larger amount of valuable security than the amount paid by reason of the fact that other persons have paid a sum of money under the scheme. Contrary to the provisions of Section 179(1)(*e*) of the Criminal Code.

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THE INFORMANT SAYS THAT he has reasonable and probable grounds to believe and does believe that

RONALD A. HODGES

between the 1st day of April A.D. 1959, and the 27th day of June A.D. 1959, at the City of Edmonton, Province of Alberta, did unlawfully conduct a scheme by which any person upon payment of a sum of money shall become entitled under the scheme to receive from the person conducting the scheme, or any other person, a larger amount of valuable security than the amount paid by reason of the fact that other persons have paid a sum of money under the scheme. Contrary to the provisions of Section 179(1)(*e*) of the Criminal Code.

The learned magistrate dismissed both charges under 179(1)(*a*) but convicted both defendants under 179(1)(*e*).

His reasons for dismissing the charges under 179(1)(*a*) were that under that section, *a mixed element of chance and skill* entered into the estimates made by those who purchased tickets, while the statutes in order to apply required *exclusively a chance element*. The magistrate based his opinion on the unanimous judgment rendered by this Court in *Roe v. The King*[1] where that precise point was definitively settled.

The Crown did not appeal this part of the judgment to the Appellate Division of the Supreme Court of Alberta, and it is therefore unnecessary to deal with it. But. the magistrate convicted both accused on the charge of violating section 179(1)(*e*), and the Appellate Division[2] confirmed his finding, Mr. Justice Johnson dissenting.

We have now to deal only with the appeals of Dream Home Contests (Edmonton) Limited and Ronald A. Hodges, both convicted under s. 179(1)(*e*).

Section 179(1)(*e*) reads:

> 179. (1) Every one is guilty of an indictable offence and is liable to imprisonment for two years who
>
> (*e*) conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, upon payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation, to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation.

The scheme as engineered was as follows:—The appellants built a house called a "Dream Home" that was on display to the public on a lot situate at 117th Street and Jasper Avenue in Edmonton, Alberta. The accused issued a brochure showing who built the Home and giving the names of the 17 suppliers of materials and subcontractors. The contestants eligible to participate in the contest had to purchase a one dollar ticket, and were required to esti-

[1] [1949] S.C.R. 652, 94 C.C.C. 273, 2 D.L.R. 785.
[2] (1959-60), 30 W.W.R. 130, 126 C.C.C. 30.

1960

DREAM HOME CONTESTS LTD. AND HODGES v. THE QUEEN

Taschereau J.

mate the total retail value of this Dream Home with attached garage, including its furnishings, appliances, fixtures and appointments therein contained.

It was a condition of the contest that the contestant who most closely estimated the total retail value of the Dream Home, would be awarded the Home, and that it would be conveyed by the company to a permanent lot, in the subdivision of Lynnwood in the Townsite of Jasper Place. The retail value of the Dream Home was to be determined by the persons, firms or corporations supplying products and services in connection with the construction, furnishing, equipping and completing the Home as displayed.

The sealed estimates of retail value by those who had purchased tickets, were held "In Trust" by the Northwest Trust Company Limited until the close of the contest, which was December 30, 1959, at which time a committee appointed by the Trust company was to open the sealed estimates, and the contestant who most closely estimated the retail value of the Home would be the contest winner. Some 400,000 tickets were printed of which a substantial number were sold, and Home Contests (Edmonton) Limited and the other defendant Hodges, who is the main shareholder and manager of the said company, deposited with the Trust company $31,000 to be drawn against, as the building of the Home progressed.

I am quite satisfied that in order to determine the retail value of this Dream Home, much more than a mere element of *chance* was necessary. It was essential for the winner to have at least a fair knowledge of construction, of cost of materials, etc. etc., and *skill* was obviously a much more important factor than *chance* in determining the retail value of the Home.

But the law as it exists today is the same as that considered in *Roe v. The King, supra.* In that case, Roe had been prosecuted under the first part of s. 236(*c*) as it then existed, and secondly, under the second part of the same section added to the *Criminal Code* in 1935 (25-26 Geo. V, ch. 56, s. 3). Under the new Code of 1955, the corresponding sections are 179(1)(*d*) and 179(1)(*e*).

In the *Roe* case it was held that the charge under the first part of the old s. 236(*c*) ought to be dismissed. It was found that there was a mixed element of skill and chance and that, therefore, there could be no offence.

But the Court held that under the second part of the former s. 236(*c*), now 179(1)(*e*), there is no reference to chance or to a mixed element of chance and skill, and that the receiving of money was not subordinated to either of these elements. Roe was found guilty because a larger sum of money was paid to the winner, by reason of the fact that other persons had paid money under the scheme.

In the present case, it seems clear to me that the purchasers of tickets who pay money, may become entitled under the scheme as they do, to receive from the person managing the operation, a larger sum than the amount paid, because others have also paid money under the same scheme. A ticket purchaser who happens to be the winner, as a result of his skilful guessing, even if the element of chance is entirely absent, receives a larger sum of money than the amount he has paid, because some others who have purchased tickets have also paid money under the same scheme. This is the gist of the offence. It may not be immoral but it is illegal.

In s. 179(1)(*a*) the element of chance is essential, but it is not in 179(1)(*e*). In *Roe v. The King* this Court has said:

> This part of s. 236(*c*) now 179(1)(*e*) which stands alone, does not refer to chance, or to mixed chance and skill. The receiving of money is not subordinated to any of these elements. The larger sum of money is paid to the winner by reason of the fact that other persons have paid money under this scheme.

I think that this Court is bound by its own decision in the *Roe* case cited *supra,* and that the offence is committed, even if skill has been the only factor that allowed the winner to determine the retail value of the Dream Home.

It has been suggested that s. 179(1)(*e*) does not apply, because the winner here does not receive as contemplated by the Act a "larger sum of money" or "amount of valuable security" than the sum or amount paid or given. In the present case, the winner was to receive a house.

1960

DREAM HOME CONTESTS LTD. AND HODGES v. THE QUEEN

Taschereau J.

This argument cannot stand in view of the fact that the words "valuable security" are defined in s. 2, subs. 42 of the *Criminal Code*, and include "a document of title to lands or goods wheresoever situate."

It has also been argued that the house was to be conveyed to the winner, not by the promotors of the scheme, but by the Trust company. I am satisfied that everything done by the Trust company was done on behalf of the promoters and that this argument cannot be accepted. As to the appellants' submission that by paying $31,000 to the Trust company, they assured the award of the prize to the successful estimator, irrespective of whether or not any tickets had been sold, I agree with what has been said by my brother Martland.

Both appeals should be dismissed.

The judgment of Locke, Fauteux, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—The appellant company is incorporated under the laws of the Province of Alberta. The appellant, Hodges, was a signatory of its Memorandum of Association and is its majority shareholder. In mid 1959, the appellant company caused to be erected a house, which was fully furnished, and which was on display at 117th Street and Jasper Avenue, in the City of Edmonton.

The appellant company advertised extensively a contest, which was to continue until the end of the year 1959, under the terms of which the house and its contents would be awarded to the contestant who submitted the closest estimate of the actual retail value of the house, including furnishings and fixtures. Entry into the contest could be effected by the purchase of tickets sold at $1 each. These tickets contained an estimate form and an entry blank. The appellant company had 400,000 tickets printed. At the time of the trial, some 1,400 had been sold. The winner of the contest would be entitled to receive, in addition to the house and its contents, a lot in the subdivision of Lynwood, in the townsite of Jasper Place, to which the house and its contents would be moved by the appellant company after completion of the contest.

Arrangements were made by the appellant company to have the tickets widely distributed for sale in Edmonton and in Northern Alberta, by having sales effected through various community leagues and branches of the Canadian Legion.

The appellants approached Northwest Trust Company which agreed to receive sealed tenders from the contractors and suppliers in connection with the house which, taken together, would establish its total retail value. The trust company also agreed to receive, record, and dispose of the tickets to the ticket vendors upon the instructions of the appellant company. It also received the moneys derived from the sale of tickets, part of which was to be held by it in trust for the vendors of the tickets, and the balance in trust for the appellant company.

As a condition of providing these services, the trust company required the deposit by the appellant company of $31,000 to assure payment of certain expenditures, including the payment for the house. This was to ensure that the house would be awarded to the winner of the contest. Title to the house, to its contents, and to the lot, was taken in trust by the trust company.

The arrangements for the printing and distribution of the tickets, the arrangements with the trust company, and, generally, most of the arrangements in respect of the contest, were effected for the appellant company by the appellant Hodges.

Both the appellants were charged under paras. (*a*) and (*e*) of subs. (1) of s. 179 of the *Criminal Code*. The charges under para. (*a*) were dismissed, but both appellants were convicted by the learned magistrate under para. (*e*). From these convictions, both appellants appealed, unsuccessfully, to the Appellate Division of the Supreme Court of Alberta,[1] Mr. Justice Johnson dissenting. The present appeal relates solely to the convictions under para. (*e*), which provides as follows:

> 179. (1) Every one is guilty of an indictable offence and is liable to imprisonment for two years who
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> * * *
>
> (*e*) conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, upon payment of any sum of money, or the giving of any valuable security, or by

[1] (1959-60), 30 W.W.R. 130, 126 C.C.C. 30.

1960

DREAM HOME CONTESTS LTD. AND HODGES v. THE QUEEN

Martland J.

obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation, to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation;

The sole contention of each of the appellants is that no offence was shown because the winning estimator would not become entitled to a larger amount of valuable security because other persons had paid or obliged themselves to pay any sum of money. It was argued that the awarding of the prize was wholly exclusive of the participation in the contest of other unsuccessful estimators. The appellant's submission was that, by paying the $31,000 to the trust company, the appellant company had assured the award of the prize to the successful estimator, who would receive such prize irrespective of whether or not any other tickets had been sold.

The appellants seek to distinguish the decision of this Court in *Roe v. TheKing*,[1] because of the fact that, in that case, which involved a contest to estimate the time for a barrel to float down the Red River from the international boundary to Winnipeg, the appellant had signed an admission that the winning estimators would receive a larger sum of money that that paid for their tickets because other non-winning estimators had contributed to the scheme. In the present case it is contended that the situation is different because the winning of the prize did not depend upon the sale of tickets to non-winning estimators.

A similar argument was made on behalf of the appellant in *Rex v. Blain*,[2] a judgment of the Court of Appeal of Saskatchewan. In that case the contest involved the estimating of the actual time when the ice in the Saskatchewan River at Prince Albert would break up. Tickets were sold at fifty cents per ticket but the prize of $1,000 was donated by the Kinsmen Club of Prince Albert, who also paid the cost of operating the scheme, thus leaving the proceeds from the sale of the tickets available for charitable purposes.

[1] [1949] S.C.R. 652, 94 C.C.C. 273, 2 D.L.R. 785.
[2] [1951] 1 W.W.R. 145, 99 C.C.C. 152.

The accused, Blain, was the individual who had managed the scheme.

The conviction of the appellant was sustained by the Court of Appeal. In his judgment, at p. 151, Chief Justice Martin referred to the admission made by the appellant in the *Roe* case, and to the statement by Taschereau J. at p. 657 in that case, that the admission "brings the case within the prohibition of the statute".

Chief Justice Martin then goes on to say, and, I think, correctly:

> This statement was not intended to mean that the only scheme which falls within the second part of sec. 236(1)(*c*) (the equivalent of sec. 179(1)(*e*) of the present Criminal Code) is one in which the larger sum comes from the proceeds of the sale of tickets to non-winning estimators. Moreover, the language of the section indicates that the prize need not come from moneys contributed by a limited class of persons. The larger sum of money may come from the person managing the scheme "or any other person" by reason of the fact that "other persons have paid or given . . . any sum of money . . . under such scheme".

It seems to me that what constitutes the offence defined in s. 179(1)(*e*) is the conducting of a scheme and the question to be determined, in this case, is whether, under the scheme, a participant will receive a larger amount of valuable security than he paid because other persons have contributed to the scheme. The deposit of the $31,000 with the trust company was a part of an overall scheme conducted by the appellants. That scheme, when examined as a whole, in my view, clearly contemplated, at its inception and throughout, that the award by the appellant company of the prize to the winning estimator would be made at the conclusion of the contest by reason of the payments for tickets of all the other non-winning contestants. The deposit of the funds with the trust company was only made by the appellant company by reason of the fact that it was a part of a scheme by which contestants would pay money to enter the contest. As Macdonald J. A. said, in his judgment in the Appellate Division:

> The property to be won would be paid for initially by money which came from the appellants, according to the arrangement made with the trust company. But it seems to me there can be no doubt that under the scheme in question, the appellants sought not only to recoup themselves for their initial outlay but also to make a substantial margin of profit, depending upon the number of tickets sold. The number of tickets seized by the police demonstrates that many tickets had been sold to the public, so at the time of such seizure the scheme was well under way. It seems

1960

DREAM HOME CONTESTS LTD. AND HODGES v. THE QUEEN

to me that it has been proved beyond any reasonable doubt that the winner would be entitled to receive from the appellant company "a larger . . . amount of valuable security than the sum paid" by him "by reason of the fact that other persons have paid . . . any sum of money under the scheme", namely, by the purchase of tickets. The facts proved in evidence beyond any reasonable doubt, in my view, bring the case squarely under the prohibition of the statute.

Martland J.

In my opinion, therefore, the appeals of both the appellants should be dismissed.

*Appeals dismissed.*

*Solicitors for the appellants: Maclean & McClung, Edmonton.*

*Solicitor for the respondent: The Attorney-General for Alberta.*

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1960

*Jan. 27, 28
Apr. 11

SHELL OIL COMPANY (*Plaintiff*) ..... APPELLANT;

AND

EINAR MAYNARD GUNDERSON (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Real property—Mines and minerals—Whether lease for petroleum and gas expired at end of five-year period—Pooling provision.*

In July 1950, the plaintiff was granted a petroleum and gas lease in respect of the south-east quarter of a section for five years "and so long thereafter as the leased substances or any of them are produced from the said lands". It was provided that if after the five-year period the leased substances were not being produced and the lessee was then engaged in drilling or working operations thereon, the lease would remain in force so long as such operations continued or if any materials were produced so long as the materials were produced. The lessee had the right to pool or combine the lands or any portion thereof with adjoining lands to form a unit, and drilling operations on or production from any lands included in such unit would have the affect of continuing the lease. Clause 3 required the lessee to pay a yearly royalty for all wells on the said lands where gas only or primarily was found and not used or sold, and while the royalty was paid, such wells were to be deemed producing wells. The lease defined the term "said lands" as meaning "all the lands hereinbefore described or referred to". The plaintiff did

*PRESENT: Kerwin C.J. and Locke, Abbott, Martland and Ritchie JJ.

not drill any wells on the quarter section or produce any of the substances, but in 1952 drilled a gas well on the north-east quarter of the same section. This well was capped and not connected to any gathering system. Shortly before the expiry of the five year period, the plaintiff gave a notice pooling the south-east quarter with other land, including the quarter on which the gas well had been drilled and capped, and tendered the yearly royalty. The plaintiff's action for a declaration that the lease was in full force and effect was dismissed by the trial judge. This judgment was affirmed by the Court of Appeal.

*Held:* The lease no longer subsisted.

The five-year term had expired and there was no well on the quarter-section and no production from the well on the north-east quarter. The pooling provision, in itself, did not result in any extension of the primary five-year term. To be effective to continue the lease in force, drilling operations had to be of the kind defined in the lease, and none of that kind had been made. The capped well was not a producing well under clause 3 so as to continue the term of the lease beyond the five-year period. *Prima facie,* clause 3 could only apply in relation to a gas well on the quarter section and there was no such well. The pooling provision did not provide that the existence of a non-producing gas well on some part of the unit, other than the quarter section, would have the same effect in extending the term as though it were upon the quarter section itself.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming a judgment of Primrose J. Appeal dismissed.

*R. A. MacKimmie, Q.C.,* and *J. H. Laycraft,* for the plaintiff, appellant.

*J. M. Robertson, Q.C.,* for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The issue in this case is as to whether a petroleum and natural gas lease, dated July 19, 1950, granted by Herbert Frank Morris to the appellant in respect of the south-east quarter of section 13, township 21, range 29, west of the 4th meridian, in the Province of Alberta (hereinafter referred to as "the quarter section"), is still in force and effect, as contended by the appellant, or whether it expired at the end of its primary term of five years, as contended by the respondent. The respondent is the executor of the last will and testament of Herbert Frank Morris, the lessor, who is now deceased. The learned

[1][1959], 28 W.W.R. 506.

1960

SHELL OIL COMPANY v. GUNDERSON

Martland J.

trial judge and the Appellate Division of the Supreme Court of Alberta[1], by unanimous judgment, have decided in favour of the respondent.

The lease stated that the lessor, being registered as owner of the quarter section, in consideration of the payment to him of $2,500 by the appellant and in consideration of the royalties in the lease reserved:

> DOTH HEREBY GRANT AND LEASE unto the Lessee all the petroleum and natural gas and related hydrocarbons except coal and valuable stone, (hereinafter referred to as the "leased substances"), within, upon or under the lands hereinbefore described . . .
>
> TO HAVE AND ENJOY the same for the term of Five (5) years from the date hereof and so long thereafter as the leased substances or any of them are produced from the said lands, subject to the sooner termination of the said term as hereinafter provided.

This was followed by a proviso, not applicable in the circumstances of this case, and then by a further proviso which reads, in part, as follows:

> AND FURTHER ALWAYS PROVIDED that if at any time after the expiration of the said Five (5) year term the leased substances are not being produced on the said lands and the Lessee is then engaged in drilling or working operations thereon, this Lease shall remain in force so long as such operations are prosecuted and, if they result in the production of the leased substances or any of them, so long thereafter as the leased substances or any of them are produced from the said lands; . . .

The other clauses of the lease material to this appeal are the following:

> 1. In this Lease, unless there is something in the subject or context inconsistent therewith, the expressions following shall have the following meaning, namely:
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> * * *
>
> (*b*) "Drilling unit" shall mean a section, legal sub-division or other unit of land representing the minimum area in which any well may be drilled on or in the vicinity of the said lands as defined or prescribed by or under any law of the Province of Alberta now or hereafter in effect governing the spacing of petroleum and/or natural gas wells.
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> (*c*) "Said lands" shall mean all the lands hereinbefore described or referred to, or such portion or portions thereof as shall not have been surrendered.
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> * * *
>
> 3. Provided no royalties are otherwise paid hereunder, the Lessee shall pay to the Lessor each year as royalty the sum of Fifty Dollars ($50.00) for all wells on the said lands where gas only or primarily is found and the same is not used or sold, and while the said royalty is so paid each such well shall be deemed to be a producing well hereunder.
>
> * * *

[1] [1959], 28 W.W.R. 506.

9. The Lessee is hereby given the right and power at any time and from time to time to pool or combine the said lands, or any portion thereof, with other lands adjoining the said lands, but so that any one such pool or unit (herein referred to as a "unit") shall not exceed one drilling unit as hereinbefore defined, when such pooling or combining is necessary in order to conform with any regulations or orders of the Government of the Province of Alberta or any other authoritative body, which are now or may hereafter be in force in relation thereto. In the event of such pooling or combining, the Lessor shall, in lieu of the royalties elsewhere herein specified, receive on production of leased substances from the said unit, only such portion of the royalties stipulated as the area of the said lands placed in the unit bears to the total area of lands in such unit. Drilling operations on, or production of leased substances from, any land included in such unit shall have the same effect in continuing this Lease in force and effect during the term hereby granted, or any extension thereof, as to all the said lands, as if such operation or production were upon or from the said lands, or some portion thereof.

The material facts are not in dispute. No well has ever been drilled by the appellant on the quarter section and since the date of the lease, none of the leased substances has been actually produced from the quarter section. In 1952, the appellant drilled a gas well on the north-east quarter of the same section as that in which the quarter section is situated. This well was capped and is not connected to any gathering system. It is capable of producing natural gas but it has not been on production because of the lack of an outlet for the gas. Under the Drilling and Production Regulations established pursuant to *The Oil and Gas Resources Conservation Act, 1950,* c. 46, Statutes of Alberta, 1950, the spacing unit for a gas well was a section of land.

In June 1955, shortly before the five-year primary term of the lease had expired, the appellant served upon the respondent a notice in the following form:

TO: Honorable Einar Maynard Gunderson, Esq.,
Executor of the Estate of Herbert Morris, Deceased,
4240 Elbow Drive, Calgary, Alberta.

Re: A-554-P & N.G. Lease—Herbert Morris,
SE ¼ Sec. 13, Twp. 21, Rge. 29,
West 4th Meridian
Okotoks Area, Alberta.

Take notice that Shell Oil Company as lessee named in a Petroleum and Natural Gas Lease, dated the 19th day of July, A.D. 1950, granted by Herbert Morris and covering all the petroleum and natural gas and related hydrocarbons except coal and valuable stone. Within, upon or

1960

SHELL OIL COMPANY v. GUNDERSON

Martland J.

under the SE ¼ Sec. 13, Twp. 21, Rge. 29, West 4th Meridian, in the Province of Alberta, hereby pools and combines the said SE ¼ of Sec. 13, Twp. 21, Rge. 29, West 4th Meridian with the NE ¼, the NW ¼ and the SW ¼ of the said Section 13, so as to form a drilling unit as defined in the said lease and as prescribed by regulations of the Government of the Province of Alberta.

DATED at the City of Calgary, in the Province of Alberta, this 22nd day of June, A.D. 1955.

SHELL OIL COMPANY

Original signed by ROBERT N. GADBOIS

Per: _____

Robert N. Gadbois

Manager, Land Department.

"F.J.C."

c.c. Honorable Einar Maynard Gunderson, Esq.,
1016—475 Howe Street, Vancouver 1, B.C.
Area Production
Calgary Division Land
Calgary Division Production.

With this notice was tendered a cheque for $50. Prior to July 19, in each year subsequent to 1955, the appellant tendered to the respondent the sum of $50. None of such tendered payments was accepted by the respondent.

The question in issue is as to whether, as a result of the drilling of the well on the north-east quarter, the service of the notice dated June 22, 1955, to pool into a unit the quarter section and the remaining three quarter sections in the same section, and the tender of the annual payments of $50, the term of the lease was extended beyond the five-year period.

The term is defined as:

> five (5) years from the date hereof and so long thereafter as the leased substances or any of them are produced from the said lands . . .

The five-year term has expired. Admittedly, there is no well on the quarter section, and there has not been production from the well on the north-east quarter.

The appellant, however, relies upon the pooling provision, clause 9, and particularly upon the last sentence of that paragraph, which states:

> Drilling operations on, or production of leased substances from, any land included in such unit shall have the same effect in continuing this Lease in force and effect during the term hereby granted, or any extension thereof, as to all the said lands, as if such operation or production were upon or from the said lands, or some portion thereof.

This provision, in itself, would not appear to result in any extension of the primary five-year term. It provides for drilling operations on or production of leased substances from any land included in the unit having the same effect, in extending the term of the lease, as if they were upon or from the quarter section.

Drilling operations, in order to be effective to continue the lease in force beyond the five-year term, would have to be of the kind defined in the proviso to the habendum clause, which has been previously quoted. That proviso refers to drilling operations "after the expiration of the five-year term". The proviso takes effect only if the lease has been extended as a result of production and if, when production ceases, the lessee is then engaged in drilling operations. The only drilling operations on the unit in this case occurred and were completed in 1952 long before the five-year term expired. They were not drilling operations of the kind contemplated by the proviso.

In so far as the provision of clause 9 relating to production of leased substances is concerned, it does not, in itself, serve to extend the five-year term under the provisions of the habendum clause, previously quoted, because there was no production from any part of the unit at the time when the five-year term expired.

However, the appellant then refers to the provisions of clause 3 of the lease. Its contention is that the capped well, though not located on the quarter section, was on the unit which resulted from the pooling notice, that such capped well by virtue of clause 3 was deemed to be a producing well under the lease and, therefore, leased substances were deemed to be produced from the quarter section after the five-year period expired so as to continue the term of the lease.

The appellant's case must, therefore, depend upon the validity of this interpretation of clause 3 of the lease. That clause relates solely to wells where gas only or primarily is found and the same is not used or sold. The well on the north-east quarter section falls within that category, but the clause restricts this description by referring only to wells "on the said lands". The definition clause, (1)(*c*), provides that unless there is something in the subject or context inconsistent therewith "said lands" "shall mean all the lands hereinbefore described or referred to, or such

1960

SHELL OIL COMPANY v. GUNDERSON

Martland J.

portion or portions thereof as shall not have been surrendered." The only lands "hereinbefore described" were the lands in the quarter section which were described, at the commencement of the lease, by their legal description. *Prima facie,* therefore, clause 3 could only apply in relation to a gas well on the quarter section and there was no such well.

The appellant contends, however, that "said lands" where used in clause 3 refers to the whole section because of the provisions as to pooling contained in clause 9. However, I cannot see anything in the subject or context of clause 3 which is inconsistent with giving to the expression "said lands" its defined meaning in that clause.

Clearly, the appellant did not consider "said lands" in clause 3 to be the whole of the section in the years 1953 and 1954, after the well on the north-east quarter had been drilled, for there appears to have been no tender of any $50 or other payment in those years. The appellant must, therefore, contend that whereas "said lands" in clause 3 meant only the quarter section prior to June 22, 1955, the date of the pooling notice, the meaning changed thereafter, because of the pooling notice, so as to include the whole of the section. I do not agree with this. The subject and context of clause 3 in which the words "said lands" appear remain the same. There is not, in my view, anything contained in clause 9 sufficient to provide that the existence of a non-producing gas well on some part of the unit, other than the quarter section, shall have the same effect in extending the term of the lease as though it were upon the quarter section itself.

I am, therefore, of the opinion that the appellant's contention fails and that the judgments in the courts below correctly decided that the lease in question no longer subsists. I think that this appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Chambers, Might, Saucier, Peacock, Jones, Black & Gain, Calgary.*

*Solicitors for the defendant, respondent: Fenerty, Fenerty, McGillivray, Robertson, Prowse & Brennan, Calgary.*

JACK GOLDHAR .....APPELLANT;

1960

*Mar. 8
Apr. 11

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

*Criminal law—Habeas corpus—Conspiracy to traffic in drugs—Accused held in penitentiary under certificate of sentence issued by convicting Court—Whether sufficient authority for detention of accused—New Criminal Code coming into force during alleged period of offence—Whether sentence should be under new Code—The Supreme Court Act, R.S.C. 1952, c. 259, s. 57—The Penitentiaries Act, R.S.C. 1952, c. 206, ss. 49(1), 51—The General Sessions Act, R.S.O. 1950, c. 158, s. 2—The Criminal Code, 1953-54 (Can.) c. 51, ss. 2(10), 408(1)(d), 413.*

The accused was convicted in the Court of General Session of the Peace for the County of York of conspiracy to traffic in drugs and was sentenced to 12 years imprisonment, pursuant to s. 408(1)(d) of the new *Criminal Code*, which came into force during the period of time within which the offence was alleged to have been committed. He has been detained in a penitentiary by the authority of a Calendar of Sentences under the seal of the Court of General Sessions of the Peace. His appeal from the conviction was dismissed and leave to appeal to this Court was refused. He then moved for a writ of *habeas corpus* which was refused by a judge of this Court. His appeal from the sentence having been dismissed by the Court of Appeal and leave refused by this Court, he now appeals from the refusal of the writ.

*Held:* The appeal should be dismissed; the application for a writ of *habeas corpus* was rightly dismissed.

*Per* Kerwin C.J.: The Calendar was a certificate regular on its face that the accused had been convicted by a Court of competent criminal jurisdiction and, therefore, it was impossible to go behind it on an application for *habeas corpus*. There was no substance in the objection that the description of the offence was insufficient; nor did it make any difference that the Court of General Sessions of the Peace was not a superior court of criminal jurisdiction.

As to the argument that the sentencing provisions of the former Code should have been applied, there was nothing to indicate that the evidence before the jury did not disclose that the conspiracy commenced after April 1, 1955. The Court of Appeal having heard and dismissed an appeal as to sentence, any judge in Ontario would be bound by that decision and, therefore, any judge of this Court, having by virtue of s. 57 of the *Supreme Court Act* concurrent jurisdiction with the Court or judges of Ontario, would be similarly bound. There was now no justification for the idea that, if a person is refused a writ of *habeas corpus* by one judge, he may go to each judge in succession to renew his application.

*Per* Taschereau, Fauteux, Abbott and Judson JJ.: The question sought to be determined by the accused—the maximum penalty for the offence of which he was convicted—would require consideration of the evidence at trial, and would be tantamount to converting the

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott and Judson JJ.

1960

GOLDHAR (2) v. THE QUEEN

writ into a writ of error or an appeal. The functions of such a writ do not extend beyond an inquiry into the jurisdiction of the Court by which process the subject is held in custody and into the validity of the process upon its face.

The accused was convicted and sentenced by a Court of competent jurisdiction, the Calendar was a certificate regular on its face, and the application for the writ was rightly dismissed.

*Per* Locke and Cartwright JJ.: What was sought by the accused was an adjudication on the question as to what was the maximum penalty for the offence of which he was convicted. That was a point which the trial judge had jurisdiction to decide, and which could be further pursued on appeal. The writ of *habeas corpus* is not a writ of course and may be refused where an alternative remedy by which the validity of the detention can be determined is available. So long as the sentence of a competent Court stands unreversed, it is a legal justification for the imprisonment. On the facts of this case, the writ was rightly refused, and *a fortiori* it should be refused now as the very question which the accused seeks to have decided was *res judicata* between the parties.

APPEAL from a judgment of Martland J. of the Supreme Court of Canada[1], refusing a writ of *habeas corpus*. Appeal dismissed.

*G. B. Langille,* for the appellant.

*D. H. W. Henry, Q.C.,* and *L. E. Levy,* for the respondent.

THE CHIEF JUSTICE:—Jack Goldhar applied to Martland J. under s. 57 of the *Supreme Court Act,* R.S.C. 1952, c. 259, for a writ of *habeas corpus ad subjiciendum.* That section reads as follows:

57.(1) Every judge of the Court, except in matters arising out of any claim for extradition under any treaty, has concurrent jurisdiction with the courts or judges of the several provinces, to issue the writ of *habeas corpus ad subjiciendum,* for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

(2) If the judge refuses the writ or remands the prisoner, an appeal lies to the Court.

The writ was refused[1] and under the authority conferred by subs. (2) Goldhar appealed to the Court.

On April 27, 1956, Goldhar had been found guilty in the Court of General Sessions of the Peace for the County of York in the Province of Ontario under the first count of an indictment charging that he and others at the City of

[1] [1958] S.C.R. 692, 122 C.C.C. 113, 16 D.L.R. (2d) 509.

Toronto, in the County of York and elsewhere in the Province of Ontario, between the fifteenth day of March and the sixth day of August in the year 1955, unlawfully did conspire together, the one with the other or others of them and persons unknown, to commit the indictable offence of having in their possession a drug, to wit., diacetyl-morphine, for the purpose of trafficking, an indictable offence under the *Opium and Narcotic Drug Act*, contrary to the *Criminal Code*. On May 4, 1956, he was sentenced by the judge presiding in the General Sessions of the Peace, His Honour Judge Macdonell, to twelve years imprisonment in the Kingston Penitentiary. Presumably shortly thereafter he was taken to the institution where he is now incarcerated.

A search was made by a solicitor on behalf of the appellant in the Records Office of the Kingston Penitentiary and there was produced to him a Calendar of Sentences,—Sessions—as being the authority under which the appellant was detained. That calendar was a certificate, dated May 4, 1956, signed by the Deputy Clerk of the Peace, York, and under the seal of the Court of General Sessions of the Peace in and for the County of York, certifying that the name of the prisoner was "Goldhar, Jack", that the offence was "conspiracy (to have in possession a drug for the purpose of trafficking)", that the date of sentence was "4th May, 1956" and that the sentence was "Twelve years in the Kingston Penitentiary". Attached to the solicitor's affidavit was a copy of the Calendar of Sentences and a copy of the indictment with the endorsement of the conviction and sentence on the back. The affidavit stated that the deponent had been advised by a stenographer in the Records Office of the penitentiary that the Calendar is the only document received at such office "when a person is convicted by a Judge at a Court of General Sessions of the Peace or by a Judge at a County Court"; and that, "it is only in the situation where a conviction is registered by a magistrate or the Supreme Court that Form 18 of the forms set out in the *Criminal Code* is used as the Warrant of Committal to Kingston Penitentiary". Furthermore, he was advised that the Calendar of Sentences,—Sessions was the only authority by which Goldhar was detained in custody.

1960

GOLDHAR (2) v. THE QUEEN

Kerwin C.J.

An appeal by Goldhar to the Court of Appeal for Ontario from his conviction was dismissed and an application for leave to appeal from that dismissal to this Court was refused. He thereupon launched the motion for a writ of *habeas corpus,* which was heard in October and November 1958, and his appeal from the order of Martland J. came on for hearing in June 1959. It then appearing that he had not applied to the Court of Appeal for Ontario for leave to appeal from his sentence, the appeal before us was adjourned in order to permit him to seek such leave, with permission to renew his appeal to this Court after the disposition of his application to the Court of Appeal. That Court granted him leave to appeal from his conviction restricted to the ground:

> Whether Section 408(1)(d) of Criminal Code, 1953-54, Ch. 51 is applicable to the conspiracy committed since, if it is not, the maximum sentence for a conspiracy not specifically named in Criminal Code. R.S.C. 1927, Ch. 36 is found under Section 573 of said statute, namely seven years.

When, pursuant to such leave, his appeal from sentence was heard by the Court of Appeal, it was dismissed. An application by him to appeal to this Court[1] from that dismissal was refused. Thereupon, pursuant to the leave reserved to him, he renewed his appeal before us from the order of Martland J. and that appeal was heard on March 7 and 8 of this year.

Sections 49(1) and 51 of the *Penitentiaries Act,* R.S.C. 1952, c. 206 enact:

> 49. (1) The sheriff or deputy sheriff of any county or district, or any bailiff, constable, or other officer, or other person, by his direction or by the direction of a court, or any officer appointed by the Governor in Council and attached to the staff of a penitentiary for that purpose, may convey to the penitentiary named in the sentence, any convict sentenced or liable to be imprisoned therein, and shall deliver him to the warden thereof, without any further warrant than a copy of the sentence taken from the minutes of the court before which the convict was tried, and certified by a judge or by the clerk or acting clerk of such court.
>
> 51. The warden shall receive into the penitentiary every convict legally certified to him as sentenced to imprisonment therein, unless certified by the surgeon of the penitentiary to be suffering from a dangerously infectious or contagious disease, and shall there detain him, subject to the rules, regulations and discipline thereof, until the term for which he has been sentenced is completed, or until he is otherwise legally discharged, but a convict, if certified by the surgeon to be suffering in

[1] [1960] S.C.R. 60, 125 C.C.C. 209.

manner aforesaid, may remain and be kept in his former custody until his condition in the opinion of the surgeon justifies withdrawal of the certificate.

By s. 2 of *The General Sessions Act,* R.S.O. 1950, c. 158, it is provided:

2. The courts of general sessions of the peace shall have jurisdiction to try all criminal offences except homicide, and the offences mentioned in section 583 of the Criminal Code (Canada).

Section 583 referred to was in the old *Criminal Code.* By s. 2(10) of the new *Criminal Code,* 1953-54, c. 51, which came into force April 1, 1955,

"court of criminal jurisdiction" means

(*a*) a court of general or quarter sessions of the peace, when presided over by a superior court judge or a county or district court judge, .....

and by s. 413 of the new Code

413. (1) Every superior court of criminal jurisdiction has jurisdiction to try any indictable offence.

(2) Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than .....
(Certain offences which do not include that of which the accused was convicted.)

The Calendar is a certificate regular on its face that the appellant was convicted by a court of competent criminal jurisdiction and therefore it is impossible to go behind it on an application for *habeas corpus; Re Trepanier*[1]*; Re Sproule*[2]*; In re Henderson*[3].

There is no substance in the appellant's objection that the description of the offence in the Calendar as "conspiracy (to have in possession a drug for the purpose of trafficking)" is insufficient; nor does it make any difference that the Court of General Sessions of the Peace is not a superior court of criminal jurisdiction; *Rex v. Martin*[4].

While what has been said is sufficient to dispose of the appeal, reference might be made to the argument on behalf of the appellant that as he was found guilty of a charge of having conspired between March 15 and August 6, 1955, and the new *Criminal Code* came into force on April 1, 1955,

[1] (1885), 12 S.C.R. 111.
[2] (1886), 12 S.C.R. 140.
[3] [1930] S.C.R. 45, 1 D.L.R. 420, 52 C.C.C. 95.
[4] (1927), 60 O.L.R. 577, 3 D.L.R. 1134, 48 C.C.C. 23.

1960

GOLDHAR (2) v. THE QUEEN

Kerwin C.J.

the provisions of the old Code applied and he could not be sentenced to more than seven years imprisonment, which was the maximum provided for under the old Code for conspiracy to commit an indictable offence. Under s. 573 of the old *Criminal Code* the maximum penalty for conspiracy to commit an indictable offence was seven years. Under s. 408(1)(*d*) of the new *Criminal Code* the maximum penalty for conspiracy to commit an indictable offence (other than conspiracy to murder, conspiracy to bring a false accusation or conspiracy to defile) is the same as the penalty imposed in respect of the particular indictable offence regarding the commission of which there has been a conspiracy. In the case of having in possession a drug for the purpose of trafficking, the maximum penalty, under s. 4(3)(*b*) of the *Opium and Narcotic Drug Act*, is fourteen years. There is nothing to indicate that the evidence before the jury did not disclose that the conspiracy commenced after April 1, 1955, and that therefore the new Code would apply. The Court of Appeal having heard and dismissed an appeal as to sentence any judge in Ontario would be bound by that decision and I agree with what was held by Gwynne J. in *In re Boucher*[1], by Sedgewick J. in *In re Patrick White*[2] and by Girouard J. in *In re Charles Seeley*[3] that, therefore, any judge of this Court, having concurrent jurisdiction with the court or judges of the Province of Ontario under what is now s. 57 of the *Supreme Court Act*, would be similarly bound.

In the *Seeley* case the order of Girouard J. was confirmed on appeal on other grounds and Chief Justice Fitzpatrick, speaking for the Court, referred to the remarks of Lord Herschell in *Cox v. Hakes*[4], where Lord Herschell stated that it was always open to an applicant for a writ of *habeas corpus*, if defeated in one court, at once to renew his application to another, and that a person detained in custody might thus proceed from court to court until he obtained his liberty. In *Smith v. The King*[5], Chief Justice Anglin stated that had it been competent for the Court to deal with that

[1] (1879), Cassels Digest 327.
[2] (1901), 31 S.C.R. 383.
[3] (1908), 41 S.C.R. 5.
[4] (1890), 15 A.C. 506 at 527.
[5] [1931] S.C.R. 578, 4 D.L.R. 465, 56 C.C.C. 51.

aspect of the case before him, he would have been disposed to think Mr. Justice Newcombe right as the latter had decided in the same sense as in the three earlier cases mentioned above. The dissenting opinion of Lamont J. in *Smith v. The King* refers to Lord Halsbury's statement, at p. 514 of *Cox v. Hakes*:—"If release was refused a person detained might—see *Ex parte Partington*—make a fresh application to every judge or every court in turn". Lamont J. also referred to what Lord Herschell had stated at p. 527 in *Cox v. Hakes*. Lamont J. also referred to the decision of the Privy Council in *Eshugbayi Eleko v. Government of Nigeria*[1]. However, the judgments in connection with various applications by Edward Thomas Hastings show that whatever may have been the position at one time, there is now no justification for the idea that, if a person is refused a writ of *habeas corpus* by one judge, he may go to each judge in succession to renew his application.

From the report in *In re Hastings*[2], it appears that Hastings had been convicted on each count of an indictment containing five counts. The warrant of commitment sent to the Governor of Walton Prison, Liverpool, where the applicant was detained, stated:

> Whereas ..... Edward Thomas Hastings is and stands covicted of larceny, false pretences and fraudulent conversion. It is therefore ordered and adjudged by this court that (he) be sent for corrective training of four years.

The applicant applied for leave to appeal against the convictions and leave was given in respect of the first and two of the other counts. The Court of Criminal Appeal quashed the conviction on the first count and the appeal in relation to the two other counts was dismissed. Pearson J. in giving the judgment of the Court stated that the applicant had been "sentenced on each count concurrently", that although leave to appeal against sentence had not been asked for, the sentence was, in the view of the Court, reasonable and "the conviction on the first ground is quashed ..... and there will be no alteration of sentence". The report in (1958) 1 W.L.R. is the report of an application for a writ of *habeas corpus* to the Queen's Bench Division on the

[1] [1928] A.C. 459, 3 W.W.R. 43.
[2] [1958] 1 W.L.R. 372.

1960

GOLDHAR (2) v. THE QUEEN

Kerwin C.J.

ground that his detention was illegal, the main argument being that no sentence of the Court was ever passed upon him. That application was denied. Hastings thereupon appealed to the Court of Appeal who refused to entertain the application on the ground that being a criminal cause or matter that Court had no jurisdiction; (The Times, July 29, 1958.).

The next step was an application for a writ of *habeas corpus* to the Queen's Bench Division differently constituted in *In re Hastings* (No. 2)[1]. Lord Parker, speaking for himself and Hilbery and Diplock JJ., referred to the statement of Lord Esher when *Cox v. Hakes* was before the Court of Appeal under the title *Ex parte Cox*[2], that "it is not correct to say that under the old system there could be an application to all the judges in succession". He then remarked that none of Their Lordships in the House of Lords dissented from Lord Esher's statement, unless it be Lord Halsbury in the passage quoted. It was pointed out that the decision in the *Eleko* case had remained unquestioned except in an Irish case, but it was held that the applicant, having already once been heard by a Divisional Court of the Queen's Bench Division, is not entitled to be heard again by another Divisional Court of the same Division.

The next step appears in *In re Hastings* (No. 3)[3], where a Divisional Court of the Chancery Division held that an applicant for a writ of *habeas corpus* in a criminal cause or matter, who had once been heard by a Divisional Court of the Queen's Bench Division, cannot be heard again by a Divisional Court of the Chancery Division. Finally, to complete the picture, an appeal from this decision to the Court of Appeal in *In re Hastings* (No. 3)[4] was dismissed on the ground that no appeal lay to the Court of Appeal.

In fact, all reason is consonant with the opposite rule and it is unthinkable that after the Court of Appeal for Ontario has decided a point against the accused on the latter's appeal as to sentence, any judge in that province would decide differently on an application for a writ of *habeas corpus*. Under s. 57 of the *Supreme Court Act* every

[1] [1959] 1 Q.B. 358.
[2] (1887), 20 Q.B.D. 1.
[3] [1959] 1 Ch. 368.
[4] [1959] 1 W.L.R. 807.

judge of this Court has merely concurrent jurisdiction with the courts or judges of Ontario to issue a writ of *habeas corpus* and upon an appeal to the Court the latter may make only that order which the single judge would have had power to make.

The appeal should be dismissed.

The judgment of Taschereau, Fauteux, Abbott and Judson JJ. was delivered by

FAUTEUX J.:—The appellant appeals from an order of Martland J. refusing his application for a writ of *habeas corpus ad subjudiciendum.*

The question, which counsel for the appellant admittedly sought to be determined by way of *habeas corpus* proceedings, is stated in the reasons for judgment of other members of the Court. In my view, it is one which would require the consideration of the evidence at trial and which, in this particular case, extends beyond the scope of matters to be inquired under a similar process. To hold otherwise would be tantamount to convert the writ of *habeas corpus* into a writ of error or an appeal and to confer, upon every one having authority to issue the writ of *habeas corpus,* an appellate jurisdiction over the orders and judgments of even the highest Courts. It is well settled that the functions of such a writ do not extend beyond an inquiry into the jurisdiction of the Court by which process the subject is held in custody and into the validity of the process upon its face.

I agree with the view that the appellant has been convicted and sentenced by a Court of competent jurisdiction, that the Calendar is a certificate regular on its face that the appellant has been so convicted and sentenced and that, with the material before him, Martland J. rightly dismissed the application for a writ of *habeas corpus.*

I would, therefore, dismiss the appeal.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from an order of Martland J. made on November 20, 1958, refusing the appellant's application for a writ of *habeas corpus ad subjiciendum*[1].

[1] [1958] S.C.R. 692, 122 C.C.C. 113, 16 D.L.R. (2d) 509.

1960

GOLDHAR (2) v. THE QUEEN

Cartwright J.

The relevant facts and the history of the proceedings are set out in the reasons of the Chief Justice.

I do not find it necessary to deal with all the points which were so fully and ably argued before us. Assuming, contrary to the argument of counsel for the respondent, that Martland J. had jurisdiction to entertain the application I am of opinion that he was right to refuse the writ.

Before Martland J. and on the argument of this appeal counsel agreed that, if any objection could have been made successfully to the adequacy of the document held by the warden of the Penitentiary as authority for detaining the appellant, it would have been in order for the warden to obtain a proper minute or warrant of committal setting out the offence of which the appellant was convicted in the terms of the indictment. Counsel for the appellant made it plain that what he sought before Martland J. and before us was an adjudication on the question whether the maximum penalty for the offence of which the appellant was convicted was seven years or fourteen years in view of the circumstance that the indictment alleged a conspiracy between March 15 and August 6 in the year 1955, and if the offence were committed before April 1, 1955, the maximum penalty was seven years while if it were committed after that date the maximum was fourteen years. In my opinion this is a difficult question of law; and my brother Fauteux, in giving the judgment of the majority of the Court in *Goldhar v. The Queen*[1], delivered on November 30, 1959, described it as "undoubtedly one of substance".

It was, however, a point which the learned Judge who presided at the trial of the appellant in the Court of General Sessions of the Peace had jurisdiction to decide, and if in the view of the appellant he erred in law in reaching his decision the proper course for the appellant to pursue was to appeal to the Court of Appeal.

The writ of *habeas corpus ad subjiciendum* is a writ of right and is issued *ex debito justitiae,* upon it being shown that there is ground for believing that the applicant is unlawfully held in custody, so that the Court may inquire into the cause of his imprisonment and in a proper case order his immediate release; but it is not a writ of course

[1] [1960] S.C.R. 60, 125 C.C.C. 209.

and may be refused where an alternative remedy by which the validity of the detention can be determined is available to the applicant. In *Ex part Corke*[1], Lord Goddard, delivering the judgment of the Queen's Bench Division in which Slade J. concurred, said that *habeas corpus* is not a means of appeal where an accused has been convicted and sentenced by a court of competent jurisdiction. The remedy in such a case is by way of appeal; for so long as it stands unreversed the sentence of a competent court is a legal justification for imprisoning the applicant.

I wish to reserve my opinion as to whether the writ is available if the warrant of committal shows on its face that the sentence was one not permitted by law.

When the matter came before Martland J. it appeared from the material that the appellant had been convicted and sentenced by a court of criminal jurisdiction having jurisdiction to try the appellant on the charge of which he was convicted, that an appeal against the conviction had been taken and dismissed and that no appeal had been taken against the sentence imposed. On this state of the record, in my view, Martland J. was right in refusing the writ, for the judgment of His Honour Judge Macdonell unless set aside by the Court of Appeal furnished a sufficient ground for holding the applicant in custody.

*A fortiori,* we should refuse the writ now that the sentence imposed by His Honour has been affirmed by a judgment of the Court of Appeal and an application for leave to appeal to this Court from that judgment has been refused by this Court. The very question which the applicant seeks to have decided on this application is *res judicata* between the parties. In giving the judgment of the Privy Council in *Sambasivam v. Public Prosecutor Federation of Malaya*[2], Lord MacDermott said:

> The maxim "*Res judicata pro veritate accipitur*" is no less applicable to criminal than to civil proceedings.

The question of the legality of the sentence imposed on the applicant has been conclusively determined by a court of competent jurisdiction and cannot be re-opened; this

[1] [1954] 2 All E.R. 440.
[2] [1950] A.C. 458 at 479.

1960
GOLDHAR (2) v. THE QUEEN
Cartwright J.

results not from the application of the principle of *stare decisis* but from the operation of the rule stated in the maxim quoted above, *"Res judicata pro veritate accipitur"*.

Since the question of the legality of the sentence imposed on the appellant has become *res judicata* nothing would be gained by endeavouring to form an opinion as to how it should have been answered had it remained open; I have already said that it appears to me to be one of difficulty and I venture to express my regret that we have not the benefit of knowing the reasons which brought the Court of Appeal to the conclusion at which it arrived.

I would dispose of the appeal as proposed by the Chief Justice.

*Appeal dismissed.*

*Solicitor for the appellant: M. Robb, Toronto.*

*Solicitor for the respondent: The Attorney-General of Ontario.*

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1960
*Mar. 2
Apr. 11

GERALD MARQUIS (*Plaintiff*) .....APPELLANT;

AND

ANTONIO LUSSIER (*Defendant*) .....RESPONDENT;

AND

DAME GABRIELLE ROBERT (*Defendant*) ..... } RESPONDENT.

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

*Actions—Prescription—Bodily injuries—Incidental demand—Additional damages claimed more than one year after the institution of the principal action—Whether prescription interrupted—Civil Code, arts. 2224, 2226, 2262, 2264, 2265.*

When an action for damages for bodily injuries had been instituted within the time prescribed by art. 2262 of the *Civil Code*, the prescription is interrupted and will not start to run until final judgment is

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Judson JJ.

obtained. Consequently, at any time before final judgment is obtained, a plaintiff may, by incidental demand or amendment, claim additional damages resulting from the same cause of action.

The plaintiff instituted an action within the one year prescribed by art. 2262 of the *Civil Code* for damages for bodily injuries resulting from a motor vehicle accident. Some 25 months later he claimed an additional amount of damages by way of incidental demand. The trial judge maintained the action and awarded damages on both the principal and the incidental demands. The Court of Appeal maintained the action but rejected the incidental demand as being prescribed.

*Held:* The judgment at trial should be restored since the incidental demand was not prescribed.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], modifying the judgment of Cliche J. Appeal allowed.

*J. Goyette, Q.C.,* and *A. Nadeau,* for the plaintiff, appellant.

*R. Cordeau, Q.C.,* for the Defendant Lussier, respondent.

*M. Lagacé,* for the defendant Robert, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Dans son action, instituée le 25 mars 1954, le demandeur-appelant allègue que le 9 octobre 1953, il était passager dans le taxi du défendeur-intimé Antonio Lussier. Ce dernier conduisait son automobile sur la route de Granby en direction de Montréal, lorsqu'à un certain moment il aperçut sur la route le camion du défendeur Patenaude, fit une brusque manœuvre à gauche pour l'éviter, mais perdit le contrôle de son véhicule, et se précipita dans le fossé du côté gauche.

Comme conséquence de cet accident, le demandeur fut gravement blessé, et a poursuivi conjointement et solidairement le propriétaire, conducteur du taxi dans lequel il se trouvait, et Patenaude, propriétaire du camion situé sur la route, attribuant à chacun la faute commune de cet accident à cause de leur imprudence, de leur inhabileté et de leur inattention. Le montant de la réclamation a été de $8,091.50.

Le 23 novembre 1955, le demandeur a produit une demande incidente au montant de $5,599.85, dans laquelle il a déclaré que ces dommages additionnels découlaient de

[1] [1960] Que. Q.B. 20.

1960

MARQUIS
v.
LUSSIER
et al.

Taschereau J.

l'accident survenu au mois d'octobre 1953, mais dont l'existence ne se serait manifestée que dans le cours de l'année 1955.

L'honorable juge au procès a, le 2 mai 1956, maintenu la demande principale jusqu'à concurrence de $3,639, et a aussi accordé sur la demande incidente la somme de $4,518.17, formant un total de $8,157.17. Après ce jugement, l'un des défendeurs originaires Patenaude est décédé et son épouse, Dame Gabrielle Robert, a repris l'instance devant la Cour du Banc de la Reine.

Ce dernier tribunal[1] a confirmé la condamnation conjointe et solidaire prononcée contre les défendeurs, a modifié cependant le montant accordé sur l'action principale, l'a réduit à $1,139, et a rejeté la demande incidente avec dépens.

Le montant accordé sur la demande principale a été réduit parce que l'incapacité de dix pour cent soufferte par le demandeur aurait été la conséquence des faits allégués dans la demande incidente, et non de ceux mentionnés dans la demande principale. La Cour, M. le Juge Bissonnette dissident, a été d'avis que la demande incidente devait être rejetée, puisqu'elle avait été formée alors que la prescription libératoire avait été acquise au bénéfice des intimés.

Devant cette Cour, la question de responsabilité conjointe et solidaire prononcée par la Cour Supérieure et la Cour du Banc de la Reine ne se présente pas, de sorte que deux seules questions sont soumises à notre considération.

La première, celle de savoir si les allégations contenues dans la demande principale sont suffisantes pour justifier le tribunal de conclure que le dix pour cent d'incapacité permanente doit être accordé sur cette demande principale, ou sur la demande incidente, ne présente qu'un intérêt secondaire, si cette dernière doit être maintenue. J'y reviendrai cependant plus tard.

Le point essentiel sur lequel cette Cour est appelée à se prononcer et dont dépendra le sort de ce litige, est donc de déterminer la date où s'est éteint le droit du demandeur, faute de diligence, d'exercer par demande incidente le recours additionnel en dommages pour lesquels il réclame une compensation.

[1] [1960] Que. Q.B. 20.

Il s'agit évidemment ici d'une réclamation pour lésions ou blessures corporelles. L'article 2262 du *Code Civil* donne à la victime une année pour exercer son recours en dommages contre l'auteur de l'accident, qui a été la cause du préjudice. C'est un cas de prescription abrégée où le législateur a substitué à la prescription trentenaire un plus court délai dans lequel la victime doit exercer son droit.

L'action principale a été instituée cinq mois et demi après l'accident, donc, dans le temps voulu; mais la demande incidente par laquelle le demandeur déclame des dommages additionnels n'a été produite que le 23 novembre 1955, soit deux ans et un mois après la date de l'accident, et un an et huit mois après la date de la demande principale.

Les intimés soutiennent que cette demande est tardive, que le droit du demandeur né du fait fautif de l'auteur du quasi-délit est totalement éteint par le laps de temps. On invoque l'art. 2262 C.C. qui se lit ainsi:

> 2262. L'action se prescrit par un an dans les cas suivants:
>
> 2. (Pour lésions ou blessures corporelles, sauf les dispositions spécialement contenues en l'article 1056; et les cas réglés par des lois spéciales.)

Et additionnellement on a recours à l'argument que si la prescription annale a été interrompue par l'institution de l'action principale, elle a recommencé à courir *pour le même temps* à cause de l'application de l'art. 2264 C.C. dont voici le texte:

> 2264. Après la renonciation ou l'interruption, excepté quant à la prescription de dix ans en faveur des tiers, *la prescription recommence à courir pour le même temps qu'auparavant,* s'il n'y a novation, sauf ce qui est contenu en l'article qui suit.

L'action instituée le 25 mars 1954 aurait donc interrompu la prescription, date où elle a recommencé à courir pour être définitivement acquise le 25 mars 1955. Or, comme la demande incidente n'a été produite que le 23 novembre 1955, il s'ensuivrait que le demandeur-appelant n'a pas exercé dans le temps prescrit par la loi, le droit auquel il pouvait prétendre. Ce défaut de montrer la diligence requise dans le délai légal le priverait ainsi de réclamer la réparation du préjudice, constaté en 1955 mais découlant de l'accident survenu en 1953.

1960

MARQUIS
v.
LUSSIER
et al.

Taschereau J.

Le juge au procès n'a pas reconnu la valeur légale de cette prétention, mais la Cour du Banc de la Reine, M. le Juge Bissonnette dissident, a conclu que le droit du demandeur de réclamer par voie de demande incidente un montant additionnel était éteint, parce que tardif.

Le jour même où le jugement de la Cour du Banc de la Reine a été rendu dans la présente cause, cette même Cour, dans une cause de *La Cité de Sherbrooke v. Fortin*[1], rendait une décision dans un sens opposé. Le Banc, formé de MM. les Juges Bissonnette, Casey et Choquette, prononçait l'arrêt suivant:

*Once the action has been instituted the plaintiff has the right, at any time before judgment, to introduce new items of damage or add to those already claimed.*

Mais, cette question controversée qui a créé de la confusion dans le monde légal à cause de ces deux jugements contradictoires de la Cour du Banc de la Reine, et des arrêts antérieurs des diverses juridictions de la province de Québec, ne présente plus le même intérêt vu l'amendement apporté au Code, à l'art. 2224, au cours de la dernière session, qui veut que l'interruption judiciaire se continue jusqu'au jugement définitif, et affecte tous les droits et recours résultant de la même source que la demande. Cet amendement longtemps souhaité, fait disparaître les conflits et les hésitations qui ont existé antérieurement.

Ainsi, deux écoles ont en effet entretenu des vues opposées. L'une a soutenu que la victime d'un accident doit exercer son droit dans l'année qui suit la date de l'acte fautif (C.C. 2262). Si ce droit n'est pas exercé, il y a déchéance totale. Si, d'autre part, le recours est exercé dans l'année de l'accident, le droit revit dans toute son intégralité pour *une nouvelle année,* computée de la signification de l'action (C.C. 2264). Si, au cours *de cette année,* la partie demanderesse réclame des dommages causés par le délit ou le quasi-délit, mais manifestés plus tard, elle aura le droit, par amendement ou demande incidente, de les recouvrer. Elle devra toutefois exercer ce recours dans l'année qui suit la signification de l'action, car c'est à partir de cette date que recommence à courir la prescription *pour le même temps qu'auparavant.*

[1] [1960] Que. Q.B. 110.

L'autre système de droit veut, au contraire, que quand l'action en réclamation pour délit ou quasi-délit est instituée dans le délai voulu, il y a interruption de prescription, qui recommence à courir, non pas depuis la date de la signification de l'action, *mais bien depuis la date du jugement final de l'instance.* Cette seconde école est évidemment inspirée de la doctrine de M. le Juge Mignault qui, à la page 436, vol. 9, s'exprime ainsi:

> Lorsqu'il y a eu demande en justice—et nous avons vu quels actes de procédure judiciaire sont équivalents à la demande en justice—la prescription est interrompue pendant toute la durée de la demande. C'est ce que le droit romain exprimait par la maxime: *actiones quae tempore pereunt, semel inclusae in judicio salvae permanent.*

Cet ancien adage du droit romain que l'on trouve au Digeste de Justinien nous vient de Gaïus, et peut se traduire ainsi: "Toutes les actions qui s'éteignent par la mort ou un certain espace de temps, subsistent par le moyen de la contestation en cause." Capitant l'exprime de la façon suivante: "Les actions qui s'éteignent par la mort ou par un délai sont conservées dès qu'elles ont été intentées par l'auteur." Et il signale que c'est ce principe que l'on a appliqué lors de la rédaction des arts. 330 et 957 du *Code Napoléon.*

On sait que la prescription peut être interrompue ou naturellement ou civilement (*Code Civil,* 2222), et qu'une demande en justice suffisamment libellée forme une interruption civile (C.C. 2224). L'article 2244 du *Code Napoléon* contient à peu près les mêmes dispositions.

En France comme ici, la prescription est donc interrompue par une demande en justice "suffisamment libellée". Quand cette prescription recommence-t-elle à courir après cette interruption civile? En France, la question ne présente pas de difficultés. La doctrine est à l'effet que l'interruption résultant d'une citation en justice, dure aussi longtemps que l'instance elle-même. Si le jugement est favorable au demandeur, la prescription reprend au jour où ce jugement a été rendu, et elle est revêtue des mêmes caractères que l'ancienne. (Paris, 18 fév. 1897) (Recueil Sirey, 1901, 1,289) (Dalloz, Nouveau Répertoire, vol. 3, p. 483, n$^{os}$ 83, 84 et 85). Cette doctrine est confirmée par les auteurs modernes qui

1960

MARQUIS
v.
LUSSIER
et al.

Taschereau J.

ont écrit en France sur ce sujet, et, parlant des effets de l'interruption, Planiol et Ripert (vol. 7, p. 781, 2e éd. 1954) s'expriment ainsi:

> Les effects de l'interruption se produisent d'abord pour le passé: le temps antérieurement couru est perdu pour le calcul du délai de prescription. Ils agissent aussi pour l'avenir, en déterminant un nouveau point de départ pour la prescription qui recommence à courir. Il varie suivant la durée de la cause d'interruption: celle-ci prend fin immédiatement en cas de commandement ou de reconnaissance, alors qu'elle se prolonge en cas de saisie ou de citation en justice, parce que chaque acte de la procédure la renouvelle. Tant que dure l'instance, l'interruption subsiste, sauf à disparaître complètement, si le jugement rejette la demande formée, s'il y a désistement ou péremption. Si le jugement est favorable au demandeur, la prescription va reprendre au jour où il a été rendu.

Mais en France, dit-on, il n'y a pas d'article dans le *Code Napoléon* qui correspond à l'art. 2264 de notre *Code Civil*. Ceci est parfaitement vrai, mais l'idée dominante demeure la même, et si on lit l'art. 2265 C.C. avec 2264 C.C. il faut nécessairement arriver aux mêmes conclusions. L'article 2265 dit en effet ceci:

> 2265. La poursuite non déclarée périmée et la condamnation en justice, forment un titre qui ne se prescrit que par trente ans, quoique ce qui en fait le sujet soit plus tôt prescriptible.

Si donc, l'action instituée dans le délai voulu est déclarée périmée ou rejetée, il n'y a pas d'interruption, à cause de l'effet combiné de 2226, rédigé en ces termes:

> 2226. Si l'assignation ou la procédure est nulle par défaut de forme;
> Si le demandeur se désiste de sa demande;
> S'il laisse obtenir péremption de l'instance;
> Ou si sa demande est rejetée;
> Il n'y a pas d'interruption.

Il faut nécessairement attendre le jugement final pour déterminer quand recommencera à courir la prescription.

M. le Juge Garneau de la Cour Supérieure de Montréal a, à mon sens, parfaitement résumé cette théorie quand, dans une cause de *Plouffe v. Guaranteed Pure Milk*[1], il écrivait:

> Les codificateurs citent aussi comme sources de ce dernier article des textes nombreux qui tous soutiennent que la demande en justice interrompt la prescription jusqu'au jugement final, ce qui est d'ailleurs conforme à l'art. 2226 C.C. qui dispose qu'il n'y a pas d'interruption si la demande est rejetée, et à l'art. 2265 C.C. qui dispose qu'il y a interruption jusqu'au jugement final puisque le jugement constitue un titre qui se prescrit que par trente ans.

[1] [1954] Que. P.R. 333.

J'endosse également l'opinion de M. le Juge St-Germain de la Cour du Banc du Roi de Québec, qui, dans une cause de *Richman v. Sabourin*[1], s'exprimait ainsi:

> Il est certain que l'action n'était pas prescrite lorsqu'elle a été intentée. Or, aux termes de l'art. 2224 C.C., qui correspond à l'art. 2244 du Code Napoléon, 'une demande en justice, suffisamment libellée, signifiée à celui qu'on veut empêcher de prescrire . . . forme une interruption civile', et suivant la doctrine et la jurisprudence française, cette interruption de la prescription n'a pas pour effet d'interrompre la prescription pour une autre année, à partir seulement de l'institution de l'action, mais ladite interruption se continue durant tout le cours de l'instance.

Et à la page 420 de la même cause, il disait:

> Dans la cause actuelle, le montant des dommages supplémentaires que la demanderesse demande à ajouter à son action découle de la même source de droit dont la prescription a été interrompue par l'action et, par conséquent, comme l'interruption conserve son efficacité tant que dure l'instance elle-même, ces dommages supplémentaires, à nom humble avis, ne sont pas prescrits.

M. le Juge St-Germain cite de nombreuses autorités à l'appui de sa prétention, entre autres (Aubry et Rau, Droit Civil, t. 2, 4e éd., p. 364) (Laurent, t. 32, p. 169) (Planiol et Ripert, (1931) t. 7, p. 699) (Juris Classeur, Vo Prescription, art. 2244, n° 79). Cette théorie est également admise par de nombreux jugements dans la province de Québec, tous cités au jugement de M. le Juge Bissonnette, dissident en Cour du Banc de la Reine[2].

Les autres décisions qui ont été rendues sur le point qui fait l'objet de cette cause sont, pour la plupart, basées sur un arrêt de la Cour Suprême du Canada dans une affaire de *La Cité de Montréal v. McGee*[3]. Avec déférence, je crois que ce jugement a été erronément interprété. En effet, dans cette cause, la Cour Suprême du Canada a décidé ce qui suit:

> The prescription of actions for personal injuries established by Article 2262 of the Civil Code of Lower Canada is not waived by failure of the Defendant to plead the limitation but the Court must take judicial notice of such prescription as absolutely extinguishing the right of action.
>
> The reservation of recourse for future damages in a judgment upon an action for tort is not an adjudication which can preserve the right of action beyond the time limited by the provisions of the Civil Code.
>
> When in an action of this nature there is but one cause of action, damages must be assessed once for all. *And when damages have been once recovered, no new action can be maintained for sufferings afterwards endured from the unforeseen effects of the original injury.*

[1] [1949] Que. K.B. 410 at 414. [2] [1960] Que. Q.B. 20 at 104.
[3] (1900), 30 S.C.R. 582.

1960

MARQUIS
v.
LUSSIER
et al.

Taschereau J.

La différence essentielle qui existe entre cette cause et celle qui nous intéresse, c'est que dans la première, celle de McGee, jugement avait été rendu le 12 juin 1896 pour la somme de $1,000. Le 3 décembre 1897, soit environ dix-huit mois plus tard, le demandeur institua *une nouvelle action* dans laquelle il réclama des dommages supplémentaires qui lui furent accordés jusqu'à concurrence de $5,000. C'est ce dernier jugement que la Cour a renversé avec raison.

Il est clair, en effet, comme l'a décidé la Cour Suprême dans cette affaire de McGee, que dans une cause de cette nature les dommages doivent être évalués une fois pour toutes. Quand les dommages ont été recouvrés, comme conséquence *d'un jugement rendu,* aucune autre action ne peut être accueillie pour accorder des dommages supplémentaires imprévus manifestés plus tard. On ne peut ainsi multiplier les réclamations judiciaires résultant de la même cause d'action. Dans cette cause de McGee, il n'y avait eu avant le jugement aucune demande incidente.

Dans la cause actuelle, la situation qui se présente est bien différente. L'action pour réclamer des dommages résultant d'un délit ou d'un quasi-délit se prescrit par une année; elle interrompt évidemment la prescription, mais elle ouvre une porte au demandeur et permet à ce dernier, tant que le jugement final n'est pas rendu, de réclamer des dommages additionnels résultant du même délit, mais constatés plus tard. Dans le cas de McGee, contrairement à la cause actuelle, cette porte était fermée par le jugement final sur la première action, et aucune réclamation additionnelle ne pouvait être accueillie.

Je crois donc que cette cause de McGee ne peut nous servir de guide à l'appui de la prétention des intimés. Au contraire, elle indique bien la justesse des remarques de MM. les Juges Bissonnette, Casey et Choquette de la Cour du Banc de la Reine dans la cause de *Cité de Sherbrooke v. Fortin* et de l'opinion dissidente de M. le Juge Bissonnette dans la cause actuelle.

L'erreur des intimés repose sur une interprétation erronée des art. 2264 et 2265 C.C. L'article 2264 nous dit bien qu'après la renonciation ou l'interruption, la prescription recommence à courir pour le même temps qu'auparavant,

*s'il n'y a novation.* Et 2265 C.C. est à l'effet que la *condamnation en justice* forme un titre qui ne se prescrit que par trente ans, quoique ce qui en fait le sujet soit plus tôt prescriptible. Il faut donc de toute nécessité attendre que le jugement soit rendu pour déterminer quel sera ce nouveau titre qui sera la base d'où la prescription devra recommencer à courir.

Il est certain que la prescription est interrompue et recommence à courir à partir de la date de l'interruption, *pour le même temps qu'auparavant,* lorsqu'il s'agit par exemple de renonciation (2264 C.C.), mais tel n'est pas le cas d'une interruption par citation en justice. Toute autre interprétation serait illogique, si l'on tient compte du fait que par jugement définitif le créancier obtient un titre nouveau qui se prescrit par trente ans et qui lui permet, dans ce délai, d'exécuter contre le débiteur le jugement qu'il a obtenu. C'est évidemment à partir de la date de ce jugement que doivent se computer les délais, car si l'action est déclarée périmée ou rejetée par le tribunal, il n'y a pas d'interruption.

Avec toute la déférence possible pour ceux qui partagent des vues contraires, je suis d'opinion que lorsqu'une action est instituée dans le temps voulu pour réclamer des dommages, elle interrompt la prescription, et ce n'est qu'à partir du jugement définitif qu'elle recommence à courir. Il s'ensuit qu'au cours de l'instance, le demandeur peut, selon le cas, par demande incidente ou amendement, réclamer des dommages additionnels résultant de la même cause d'action. Si j'entretenais une vue contraire, il me faudrait, me semble-t-il, ignorer les dispositions de l'art. 2265 C.C. En effet, s'il n'y a pas d'interruption de prescription quand la demande est rejetée, il s'ensuit nécessairement qu'il faut attendre jusqu'au jugement définitif qui détermine l'issue du procès, pour savoir quand la prescription doit cesser ou recommencer à courir.

Ceci me paraît conforme à l'enseignement des auteurs en France, où n'existent cependant pas les art. 2264 et 2265 de notre *Code Civil.* Mais je crois que nos codificateurs se sont inspirés de la doctrine des jurisconsultes qui ont écrit sur ce point. Il n'y a sûrement rien dans notre Code de

1960

MARQUIS v. LUSSIER et al.

Taschereau J.

nature à contredire cet enseignement. L'amendement récent fait par la Législature à l'art. 2224 C.C. sanctionne en substance ce qui, à mon sens, a toujours existé.

Comme j'en arrive à la conclusion que la demande incidente n'est pas prescrite, et comme je crois également que les dommages additionnels qui y sont réclamés découlent de l'accident survenu le 9 octobre 1953, je suis d'opinion que le jugement du juge au procès doit être rétabli. Il me semble totalement immatériel en l'espèce de déterminer si la compensation de dix pour cent doit être accordée à l'appelant sur la demande principale ou la demande incidente.

L'appel est donc maintenu avec dépens en Cour Supérieure et devant la Cour du Banc de la Reine. Devant cette Cour, l'appelant aura le droit aux frais d'un seul appel.

*Appeal allowed with costs.*

*Attorney for the plaintiff, appellant: J. Goyette, Granby.*

*Attorneys for the defendant Lussier, respondent: Holden, Hutchison, Cliff, McMaster, Meighen & Minnion, Montreal.*

*Attorneys for the defendant Robert, respondent: Phaneuf, Turgeon & Noël, Montreal.*

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CHARLES PAUL .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Appeals—Criminal law—Summary convictions—Leave to appeal—Jurisdiction of Supreme Court of Canada to hear application for leave to appeal from order of Court of Appeal refusing leave to appeal or alternatively from County Court—Whether refusal to grant leave tantamount to dismissal of appeal—The Supreme Court Act, R.S.C. 1952. c. 259, s. 41(1), (3) Criminal Code, 1953-54 (Can.), c. 51, Part XXIV.*

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie, JJ.

The accused was tried and summarily convicted of impaired driving. The County Court judge dismissed his appeal for want of jurisdiction because the grounds raised in the notice of appeal were insufficiently stated. Leave to appeal to the Court of Appeal for Ontario was refused by that Court, indicating orally that it was bound by its prior decisions with respect to the point decided by the County Court judge in conformity with these decisions. The accused applied for leave to appeal to this Court either from the judgment of the Court of Appeal or alternatively from the judgment of the County Court.

*Held* (Cartwright, Martland and Ritchie JJ. dissenting): The application for leave to appeal should be dismissed.

*Per* Taschereau and Abbott JJ.: This Court had no jurisdiction under s. 41(1) or (3) of the *Supreme Court Act* to entertain the application for leave to appeal. As the *Criminal Code* does not provide for an appeal to this Court in summary conviction matters, s. 41 is the only one under which leave could be granted. The Court of Appeal did not acquit or convict, set aside or affirm the conviction, but simply refused leave to appeal, there was, therefore, no judgment that could be appealed under s. 41(3). Furthermore, a refusal to grant leave to appeal is not tantamount to a dismissal of the appeal; it is not a disposal of the case on its merits. There was no alternative jurisdiction in s. 41(1) to allow this Court to grant the relief prayed for. In summary matters, jurisdiction to appeal to this Court is found in s. 41(3). The general proposition that matters which are not mentioned in s. 41(3) must be taken to be included in s. 41(1) was ruled out in *Goldhar v. The Queen*, [1960] S.C.R. 60. Consequently, since no appeal is given under s. 41(3) against a judgment refusing leave, it is not permissible to resort to s. 41(1) which gives an appeal with leave of the Court only from a final or other judgment of the highest Court of final resort in a province in which judgment can be had, but subject to s. 41(3).

Moreover, there was no jurisdiction to grant leave to appeal against the judgment of the County Court judge. Section 41(1) does not say the highest Court of final resort in a province in which judgment "was had" but in which judgment "can be had in the particular case", which meant, in this case, the Court of Appeal for Ontario.

*Per* Fauteux, Abbott and Judson JJ.: This Court had not jurisdiction to grant leave to appeal from either the judgment of the Court of Appeal or that of the County Court.

In 1949, by introducing, in s. 41(1), the words "in which judgment can be had in the particular case sought to be appealed", Parliament indicated that the Court referred to was the highest Court of final resort in the particular case and not generally. There could be only one Court so qualifying in a province. It could not be suggested that the Court of Appeal was not constituted by s. 743(1) of the Code as the highest Court of final resort in the province, in which judgment could be had in this case. The suggestion that the Court of Appeal disqualified itself as such highest Court by refusing leave and thereby qualified the County Court, could not be entertained. Section 41(1) refers to the Court which, under statute and not as a result of the proceedings made thereunder, is the highest Court in the particular case.

1960

PAUL
v.
THE QUEEN

The judgment of the Court of Appeal, which in this case was the highest Court of final resort, was not appealable under s. 41. It was not a judgment determining an appeal but a judgment refusing leave to appeal and as such was not within the terms of s. 41(3). Nor did it come within s. 41(1). The proposition that judgments not within the scope of s. 41(3) were necessarily embraced in s. 41(1) was ruled out in *Goldhar v. The Queen, supra.*

*Per* Cartwright, Martland and Ritchie JJ., *dissenting:* The order sought to be appealed was a "judgment" within the meaning of s. 2 of the *Supreme Court Act* and had the effect of "affirming a conviction . . . of an offence other than an indictable offence." That judgment came within the latter words of s. 41(3) and the provisions of s. 41(1) and could be the subject of an appeal to this Court since, in taking the position that as the outcome of the appeal was a foregone conclusion it would serve no useful purpose to grant leave, the Court of Appeal decided the question of law before it on the merits. The circumstances of this case were such as to make the reasoning employed in *Lane v. Easdaile,* [1891] A.C. 210, inapplicable. It was quite legitimate, in a case such as the present, to raise in the notice of appeal to the County Court the broader issue of whether or not the accused had been wrongly convicted. *R. v. Bamsey* [1960] S.C.R. . . . ; *R. v. Dennis* [1960] S.C.R. . . . Leave to appeal to this Court should therefore be granted, the appeal should be allowed, and as s. 46 of the *Supreme Court Act* is capable of being construed, and in this case should be so construed, as empowering this Court to give the judgment on the merits "that the Court, whose decision appealed against, should have given or awarded", the case should be remitted to the County Court judge to be heard on appeal by way of trial *de novo.*

*Per* Cartwright J., *dissenting:* Alternatively, on the assumption that the Court of Appeal refused leave to appeal simply in the exercise of its discretion and without having reached a decision as to how it felt itself bound to decide the appeal on the merits, this Court had jurisdiction to grant leave to appeal from the judgment of the County Court Judge.

Section 41(3) does not confer jurisdiction, but excepts certain matters which would otherwise be included in the jurisdiction conferred by s. 41(1). When, in 1949, Parliament for the first time introduced the words "in which judgment can be had in the particular case sought to be appealed to the Supreme Court", it intended to give to this Court power to grant leave to appeal from the judgment of whatever Court in the Province had become the highest Court of final resort in which judgment could be had in the particular case, regardless of whether that Court was or was not the highest Court of appeal having jurisdiction generally in the Province. In the present case, the judgment of the County Court judge was one affirming a conviction of an offence other than an indictable offence and the leave sought was to appeal from that judgment on a question of law and jurisdiction. There was therefore, under the combined effect of s. 41(1) and s. 41(3) jurisdiction since that judgment became that of the highest Court of final resort in this particular case when the Court of Appeal, as is assumed, in the exercise of its discretion, refused to grant leave. Leave should be granted and the appeal allowed.

1960

PAUL
v.
THE QUEEN

APPLICATION for leave to appeal from refusal of Court of Appeal to hear appeal or alternatively from dismissal of appeal by County Court judge in a summary conviction matter. Application dismissed, Cartwright, Martland and Ritchie JJ. dissenting.

*G. D. Finlayson,* for the appellant.

*W. C. Bowman, Q.C.,* for the respondent.

The judgment of Taschereau and Abbott JJ. was delivered by

TASCHEREAU J.:—The appellant was charged that on or about the third day of October, 1958, at the Town of Brockville in the United Counties of Leeds and Grenville, while his ability to drive a motor-vehicle was impaired by alcohol or a drug, he did unlawfully drive his motor-car, contrary to s. 223 of the *Criminal Code* of Canada.

In view of the election which was made by the prosecutor not to proceed under Part 17 of the *Criminal Code,* the trial was held under Part 24 (Summary Convictions). Magistrate Gordon H. Jermyn found the accused guilty of the said offence, ordered that he be detained in the County gaol at Brockville for the term of three days, ordered him to pay a fine of $100, and prohibited the accused from driving a motor-vehicle on the highway in Canada for a period of six months.

The accused, then, appealed to the County Court Judge, and the reasons for the appeal were the following:

1. That the conviction was against the evidence and the weight of evidence, and contrary to law.

2. That the learned Magistrate applied the wrong standard of care to the facts and circumstances of the alleged infraction.

3. On such further and other grounds as the evidence may disclose and that the Court may permit.

The learned County Court Judge, His Honour Judge Lewis, dismissed the appeal. Without hearing any evidence he declined jurisdiction in view of the Crown's preliminary objection to the wording used in the Notice of Appeal. His honour held that the grounds set out in cls. 1 and 3 referred

1960

PAUL v. THE QUEEN

Taschereau J.

to were substantially the same as those dealt with in *Regina v. Gillespie*[1], and that the second ground of appeal was irrelevant to an appeal from a conviction of driving while impaired. On an application for leave to appeal, the Ontario Court of Appeal refused leave, holding that it was bound by its own decision in *Regina v. Souter*[2], and that His Honour Judge Lewis was right in holding that the second clause was inapplicable to an appeal of this nature.

The appellant made an application for leave to appeal to this Court on May 25, 1959, and the judgment of the Court was that this application should be referred to the Court at its sittings in October, 1959, "for disposition in the event that it is held that there is jurisdiction in this Court to grant leave to appeal from an order of the Court of Appeal refusing leave to appeal, or in the event that it is held that there is jurisdiction in this Court to grant leave to appeal, from the decision of the County Court Judge."

The case was heard by the Court, and the first question which has to be resolved is whether the Supreme Court of Canada has jurisdiction under s. 41(1) or s. 41(3) of the *Supreme Court Act* to hear the application for leave to appeal.

It is only under s. 41 that such a leave may be granted to the applicant. Subsection (1) of s. 41 reads as follows:

> 41. (1) *Subject to subsection (3),* an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

Subsection (3) to which subs. (1) refers is in the following terms:

> (3) No appeal to the Supreme Court lies under this section from the judgment of any court *acquitting or convicting or setting aside or affirming a conviction or acquittal* of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

As the *Criminal Code* does not provide for an appeal to this Court in summary conviction matters, it follows that our only authority to grant leave to appeal in the present case, if it exists, must be found in s. 41 of the *Supreme Court Act.*

[1] (1958), 26 W.W.R. 36, 119 C.C.C. 192, 29 C.R. 44.
[2] [1959] O.W.N. 40, 123 C.C.C. 393, 29 C.R. 306.

Section 41(3) permits an appeal to this Court in summary conviction matters, against a judgment from any court acquitting or convicting, or setting aside or affirming a conviction or acquittal, *only on a question of law or jurisdiction.* Our powers are strictly limited, and we would exercise a legislative and not a judicial power if we went beyond what Parliament has decided.

The Court of Appeal for Ontario did not acquit or convict, did not set aside or affirm a conviction; it simply refused leave to appeal. There is no judgment that, under the Act, may be appealed from.

It is furthermore my strong view, that a refusal by a Court of Appeal to grant leave to appeal is not tantamount to a dismissal of the appeal. It simply means that the right of appeal which does not exist as of right, but only by leave, never came into being. A judgment on an application for leave to appeal *is one judgment,* and the disposal of the case on its merits when leave has been granted *is another judgment.* The refusal by the Court of Appeal to grant leave is not a disposal of the case on its merits.

It has been submitted that if s. 41(3) does not give jurisdiction to this Court to entertain the present application, s. 41(1) of the Act is sufficiently wide in its terms to allow this Court to grant the relief prayed for. In other words, if our jurisdiction in summary conviction matters cannot be found in 41(3), it is open to this Court to find it in 41(1).

With deference, I do not think so. Appeals against convictions or sentence in criminal matters are dealt with in s. 41(3). In matters of indictable offences, it confers no jurisdiction on this Court, and we must find in the *Criminal Code* the rules that govern such appeals. In summary matters, on the other hand, jurisdiction to appeal to this Court is given in s. 41(3). It was held in *Goldhar v. The Queen*[1], that if an appeal from a sentence was not given by 41(3), nor the *Criminal Code,* we could not find any authority in 41(1) to review a sentence imposed by the Courts below. In that case it was stated by Fauteux J. with whom all the members of the Court agreed, Cartwright J. dissenting, that in order to determine if a convicted person could appeal against a sentence in a matter of indictable offence, it was

[1] [1960] S.C.R. 60, 125 C.C.C. 209, 31 C.R. 374.

1960

PAUL
v.
THE QUEEN

Taschereau J.

not permissible to look to s. 41(1) for the authority to intervene, but only in the *Criminal Code* which does not permit an appeal against a sentence.

The general proposition that matters which are not mentioned in 41(3) must be taken to be included in 41(1) has been ruled out in *Goldhar, supra.* If it were otherwise the result would be that even if not given under 41(3), against a judgment acquitting or convicting, or setting aside or affirming a conviction or acquittal, in indictable offences, an appeal would, nevertheless, lie from a judgment of the Court of Appeal, refusing leave on a mixed *question of law and fact,* or on a pure question of fact. (Cr. C. 583(*a*)(2)).

Since no appeal is given under 41(3) against a judgment refusing leave, it is not permissible in my view to resort to s. 41(1) which, as I have said, gives an appeal with leave of the Court only from a *final* or other judgment of the highest court of final resort in a province in which judgment can be had, but *subject to subs. (3) of s. 41.*

Moreover, it is contended that if this Court has no jurisdiction to grant leave to appeal from the judgment of the Court of Appeal, it has jurisdiction to grant leave to appeal against the judgment of the County Court Judge. I think that this proposition is untenable. The highest court of final resort in Ontario is the Court of Appeal, which had jurisdiction, and although the matter had been referred to it, declined to entertain the application.

Section 41(1) states clearly that an appeal lies to this Court with leave from any final or other judgment of the *highest court of final resort in a province* or a judge thereof, in which judgment *can be had* in the particular case. The section does not say "in which judgment was had", but "can be had", which means "can be had" as a matter of law, and the expression "in the particular case" means in the particular class of cases to which the case belongs. If we were to entertain a different view, we would be confronted in this case with a judgment of the Court of Appeal refusing leave to appeal, and a judgment of this Court granting leave to appeal on the same matter. This would amount to a total disregard of the jurisdiction of the Court of Appeal, and the unauthorized bypassing of that tribunal.

Since writing this judgment I had the advantage of considering the reasons of my brother Fauteux with which I entirely agree.

I would refuse the application for leave to appeal. It becomes therefore unnecessary to deal with the other branches of this case.

CARTWRIGHT J. (*dissenting*):—I agree with the reasons and conclusion of my brother Ritchie and would dispose of the appeal as he proposes.

I wish, however, to state my opinion as to the disposition which should be made of this application on the assumption that the Court of Appeal refused leave to appeal simply in the exercise of its discretion and without having reached a decision as to how it felt itself bound to decide the appeal on the merits.

On this assumption, two questions arise; the first, whether we have jurisdiction to grant leave to appeal to this Court from the refusal of the Court of Appeal to grant the applicant leave to appeal to it from the decision of His Honour Judge Lewis; the second, whether we have jurisdiction to grant the alternative application for leave to appeal to this Court from the judgment of His Honour.

I have reached the conclusion that the second of these questions should be answered in the affirmative and that leave to appeal to this Court from the judgment of His Honour should be granted; consequently I do not find it necessary to answer the first question.

The words of subss. (1) and (3) of s. 41 of the *Supreme Court Act* are plain and unambiguous. They are as follows:

41. (1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

* * *

(3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

1960

PAUL
v.
THE QUEEN

Cartwright J.

It will be observed that subs. (3) does not confer jurisdiction. It excepts certain matters which would otherwise be included in the jurisdiction which subs. (1) confers in terms which, when read in the light of the definitions of "judgment" and "final judgment" contained in s. 2, could scarcely be more widely expressed. While it appears to me to be self-evident that it is subs. (1) of s. 41 which confers upon this Court the jurisdiction to grant leave, it may be observed that it was so declared in the unanimous judgment of this Court in *Parkes v. The Queen*[1].

In my view, when s. 41 is considered in the light of the history of the legislation defining, restricting and enlarging the jurisdiction of this Court it appears that the intention of Parliament in enacting the section in its present form was to give this Court the widest power in every case, subject only to the limitations imposed by subs. (3) of the section, to permit a litigant, who has exhausted all rights of appeal which are open to him in the provincial courts, to obtain the decision of this Court. No doubt this is a jurisdiction to be exercised with great care but, in my opinion, it ought not to be cut down by judicial decision.

The judgment of His Honour Judge Lewis is one affirming a conviction of an offence other than an indictable offence and the leave sought is to appeal from that judgment on a question of law and jurisdiction. We therefore clearly have jurisdiction under the combined effect of s. 41(1) and s. 41(3) if the judgment of His Honour is that of the highest court of final resort in the Province of Ontario in which judgment can be had in this particular case. When the applicant was convicted by the learned Magistrate he had an appeal as of right to the learned County Court Judge, provided he followed the procedure prescribed in the *Criminal Code*. When His Honour dismissed the appeal, the applicant had no further appeal as of right; but he could not, at that point, have applied for leave to appeal to this Court under s. 41, as it was then uncertain whether judgment could be had in a higher court in the province. When, however, he had applied for leave to appeal to the Court of Appeal and that Court, as is assumed, had, in the exercise of its discretion, refused to grant leave, it was established

[1] [1956] S.C.R. 134, 6 D.L.R. (2d) 449.

that *in the particular case* sought to be appealed to this Court the judgment of His Honour was that of the highest court of final resort in the province in which judgment could be had. It is *nihil ad rem* to point out that it would have been otherwise if the Court of Appeal had granted leave instead of refusing it. In this particular case that did not happen; and it is on the particular case and not on classes of cases that s. 41(1) concentrates attention.

If there were doubt as to the meaning of the phrase "the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court", it would be of assistance to consider the state of the law prior to 1949 when s. 41 was first enacted in substantially its present form by 1949 (2nd Sess.), 13 Geo. VI, c. 37, s. 2.

In *International Metal Industries Ltd. v. The Corporation of the City of Toronto*[1], an appeal to this Court was launched from a decision of a judge of the County Court of the County of York, affirming an assessment of the appellant in respect of income for the year 1936. The relevant sections of *The Assessment Act,* R.S.O. 1927, c. 238, gave a right of appeal to the County Court Judge but provided that no appeal should lie from his decision.

The respondent moved to quash the appeal on the ground that the judgment of the County Court Judge was not a judgment of the highest court of final resort established in the Province of Ontario within the meaning of the *Supreme Court Act,* R.S.C. 1927, c. 35, ss. 35 to 41, as amended by I Geo VI, c. 42. The appeal was quashed.

At that time s. 37(3) read as follows:

> (3) Save as provided by this section, but subject to section forty-four, no appeal shall lie to the Supreme Court except from the highest court of final resort having jurisdiction in the province in which the proceedings were originally instituted.

Duff C.J.C., at page 272, dealt with the point as follows:

> In *Farquharson v. Imperial Oil Co.* Strong C.J. said:
>
> In the case of *Danjou v. Marquis,* which was an appeal to this court from a judgment of the Court of Review in the Province of Quebec, instituted before the original Act had been amended by the addition of the provision now contained in subsection 3 of section 26, it was held that the words 'highest court of last resort' were to be

[1] [1939] S.C.R. 271, 2 D.L.R. 295.

1960

PAUL
v.
THE QUEEN

Cartwright J.

construed as meaning the highest Court of Appeal having jurisdiction generally in the province, and *not as referring to the highest Court of Appeal in the particular case sought to be appealed;* thus excluding jurisdiction in a case in which the court of Review was by provincial legislation made the court of last resort in the province.

The phrase "highest court of last resort" is not distinguishable from the phrase "highest court of final resort" in section 37(3) of the *Supreme Court Act* as it now stands. The words "whether the judgment or decision in such proceeding was or was not a proper subject of appeal to such highest court of final resort" appearing in the section as it formerly stood were discarded as being surplusage in the amending Act of I Geo. VI, ch. 42, s. 1. Nevertheless, their presence in the section in its earlier form would be sufficient to demonstrate that the words "highest court of final resort in the province" had and have the meaning ascribed to the "highest court of last resort" by Strong C. J. in the passage quoted.

A somewhat similar question arose in *Furlan v. City of Montreal*[1], where leave was sought to appeal to this Court from a judgment of Gibsone J. quashing a writ of certiorari. The relevant sections of the *Supreme Court Act* were in the same form as those considered in the *International Metal* case, *supra*. Leave was refused on the ground that the Court had no jurisdiction to grant it.

The unanimous judgment of the Court reads in part as follows, at page 218:

It is contended on behalf of the applicant that it is contemplated by section 36 that an appeal lies from a provincial court of original jurisdiction where, *for the purposes of the particular proceeding in question,* there is no further appeal. Even if there were any ambiguity in the language of that section (and we think there is not) such ambiguity would be resolved by the express language of section 37, subsection 3. In our opinion all that section 36 does is to make it immaterial whether "the highest court of final resort" has appellate or original jurisdiction, or both. In either event there is to be no appeal except from such highest court and not merely *from a court which may be the court of last resort in any particular proceeding.*

The question of the jurisdiction of this court in a matter such as this has already been determined adversely to the applicant's contention by the Privy Council in *James Bay Railway Company v. Armstrong.* Their Lordships in dealing with a similar argument there said:

> Now, unquestionably, the Court of Appeal in Ontario is the highest court of last resort having jurisdiction in the province. The High Court is not. It was argued that *in this particular case* the High Court becomes 'the highest court of last resort' when no appeal lies from it to the Court of Appeal, and it is placed by statute for the purpose in hand on an equal footing with the Court of Appeal. But their Lordships think that that result cannot be attained without

[1] [1947] S.C.R. 216.

unduly straining the words of the statute, and that, except in certain specified cases within which the present case does not come, an appeal to the Supreme Court lies only from the Court of Appeal."

Since the amendment of the *Supreme Court Act* in 1937, already referred to, this court has decided the same point in a similar sense in *International Metal Industries Limited v. The Corporation of the City of Toronto.*

It will be observed that in both of these cases and in the case of *James Bay Railway v. Armstrong*[1], quoted in the latter case, it had been submitted that an appeal lay to this Court provided that the judgment sought to be appealed was that of the highest court in which judgment could be had *in the particular case,* and, on the then wording of the Act, this submission was uniformly rejected. This appears particularly from the words, in the quotations above, which I have italicized.

The conclusion appears to me to be inescapable that when in 1949 Parliament for the first time introduced the words which appear in s. 41(1) "in which judgment can be had *in the particular case sought to be appealed to the Supreme Court"* it did so with the intention of changing the law which had been declared in the cases cited and of giving to this Court power to grant leave to appeal from the judgment of whatever court in the Province has become the highest court of final resort in which judgment can be had in the particular case, regardless of whether that court is or is not the highest court of appeal having jurisdiction generally in the province.

Having concluded that we have the necessary jurisdiction, I would, always on the assumption made above, have granted leave to appeal from the judgment of His Honour Judge Lewis, and would have allowed the appeal on the merits for the reasons given by my brother Ritchie.

It is because one of the bases (the most favourable from the point of view of the Crown) on which the appeal was argued was that the Court of Appeal refused leave simply in the exercise of its judicial discretion that I have examined the question as to how, on that basis, the appeal should be dealt with. In so doing I arrive at the same result as that reached by my brother Ritchie and I rest my judgment on the grounds above set out as well as on the reasons which

[1] [1909] A.C 624.

1960

PAUL
v.
THE QUEEN

Cartwright J.

he has given. I wish, however, to make it plain that in the peculiar circumstances of the case before us it is my opinion that the view of my brother Ritchie as to what was done by the Court of Appeal is the right one. We are concerned with substance rather than form.

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

The judgment of Fauteux, Abbott and Judson JJ. was delivered by

FAUTEUX J.:—The facts pertaining to the consideration of this case are detailed in the reasons for judgment of other members of the Court and need be stated here only briefly.

An appeal sought by Paul to the County Court from a conviction under Part XXIV of the *Criminal Code* was dismissed for want of jurisdiction, the grounds raised in the notice of appeal being considered insufficiently stated. Leave to appeal from that judgment to the Court of Appeal for Ontario was sought but refused, the members of the Court indicating orally that the Court was bound by its prior decisions with respect to the point decided by the County Court in conformity with these decisions. An application was then made for leave to appeal to this Court, either from the judgment of the Court of Appeal or alternatively from the judgment of the County Court. This application, allegedly made under s. 41 of the *Supreme Court Act,* was, upon first being considered, referred to the Bench hearing appeals on the merits, for disposition of the appeal itself in the event that our jurisdiction to grant leave from either the judgment of the Court of Appeal or that of the County Court, should be found to exist.

The primary question is that of our jurisdiction. The relevant parts of s. 41 read as follows:

> 41. (1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.
>
> (2) Leave to appeal under this section may be granted during the period fixed by section 64 or within thirty days thereafter or within such further extended time as the Supreme Court or a judge may either before or after the expiry of the said thirty days fix or allow.

(3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

The judgment from which an appeal may lie with leave under s. 41(1) is the judgment of the *highest court of final resort in a province, . . ., in which judgment can be had in the particular case.* That there can be only one Court in a province qualifying as "the highest court of final resort . . . in which judgment can be had in the particular case", and that the identification of such a Court, in any particular case, can only be ascertained by reference to the Act or Acts relevant to the case under consideration, goes without saying. Depending upon the law governing in the particular case, that highest Court of final resort in a province may be the Court of Appeal or may be a Court of lower jurisdiction if the judgment of the latter Court is not appealable to another Court in the province. In a criminal matter such as the one here involved, the *Criminal Code* governs and s. 743(1) thereof gives an appeal with leave to the Court of Appeal of the province. No one suggests that the Court of Appeal is not constituted by that section the highest Court of final resort in the province, in which judgment can be had in this case. However, it is said that the dismissal, by the Court of Appeal, of the motion for leave to appeal, had two consequences: it disqualified the Court of Appeal as the highest Court of final resort in the province and qualified the County Court as such. Thus, and on this view of the matter, the nature of the judgment rendered in this case by the highest Court of final resort, the Court of Appeal, becomes the determining factor of the question. With deference, I am unable to agree with this suggestion. The true test, in my opinion, is not one of result, i.e. the actual fate of the proceedings legally taken before the Court of Appeal, but whether the Court of Appeal is, in this case, the highest Court of final resort in the province, in which these proceedings could be taken.

The cases of *International Metal Industries Limited v. The Corporation of the City of Toronto*[1], *Furlan v. City of Montreal*[2], as well as the authorities quoted therein, and the

[1] [1939] S.C.R. 271, 2 D.L.R. 295. [2] [1947] S.C.R. 216.

1960

PAUL
v.
THE QUEEN

Fauteux J.

law under which they were decided as well as the subsequent amendment thereto have been considered but, in my view, supply no support for the proposition advanced for the appellant. When the above cases were decided, the relevant law was contained in s. 37(3) reading as follows:

> (3) Save as provided by this section, but subject to s. 44, no appeal shall lie to the Supreme Court except from the highest court of final resort having jurisdiction in the province in which the proceedings were originally instituted.

What these cases decided is that the highest Court of final resort referred to in this section was the Court which is generally, and not in a particular case, the highest Court of final resort in the province, i.e. the Court of Appeal. By introducing, in 1949, the following words in s. 41(1) "in which judgment can be had in the particular case sought to be appealed to the Supreme Court", Parliament indicated that the Court referred to in this amendment was the highest Court of final resort *in the particular case* and not *generally.*

Section 41(1) refers to the Court which, *under statute* and not *as a result of the proceedings made thereunder,* is the highest Court of final resort in the province in the particular case.

With deference, the suggestion that the County Court must, from the date of the dismissal by the Court of Appeal of the motion for leave to appeal be considered in this case as the highest Court of final resort brings a rather novel situation in appellate proceedings. For on the view that the judgment of the County Court is the judgment to be appealed to this Court, the delays within which proceedings in appeal to this Court are to be made, must, by force of s. 41(2) and s. 64 of the *Supreme Court Act,* be computed from the date of the signing or entry or pronouncing of the judgment of the County Court. Thus time for the exercise of the right of appeal begins to run while this conditional right does not yet exist and while it is still problematical whether it will ever exist.

Agreeing as I do that the highest Court of final resort in the province, in this particular case, is the Court of Appeal, the next point to consider is whether the judgment of that Court, which is here sought to be appealed, is appealable under s. 41.

As pointed out by our brother Taschereau, the judgment of the Court of Appeal is not a judgment determining an appeal but a judgment refusing leave to appeal and as such not within the terms of s. 41(3). The question is then whether it comes within s. 41(1). The proposition that judgments which are not within the scope of s. 41(3) are necessarily embraced in s. 41(1) has been ruled out in the *Goldhar* case[1], where a strict adherence to the rule of literal construction of s. 41 was, in the matter, shown to lead to repugnancy. Such a result would equally obtain if the judgment refusing leave to appeal, in this case, was held to come within s. 41(1). For on the same reasoning, one would have to hold that, for indictable offences, s. 41(1) authorizes an appeal to this Court from a judgment of the Court of Appeal refusing leave to appeal to its Court from the verdict or judgment of first instance on grounds of mixed law and facts or pure facts. Such a jurisdiction would be inconsistent with the limitation of our jurisdiction to pure questions of law in criminal appeals from convictions or acquittals of offences.

For all these reasons, I agree that this appeal should be dismissed for want of jurisdiction.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—The applicant in this case, having been charged with driving a motor vehicle while his ability to do so was impaired, was proceeded against by way of summary conviction before Magistrate Gordon M. Jermyn, and having been arraigned and pleaded "not guilty" he was tried, convicted and sentenced to be imprisoned for three days and to pay a fine of $100 together with costs and also to be prohibited from driving a motor vehicle on the highway in Canada for six months from the date of conviction. From this conviction the applicant gave Notice of Appeal to the County Court of the United Counties of Leeds and Grenville setting forth therein the following grounds of appeal:

1. That the conviction was against the evidence and the weight of evidence and contrary to law.

[1] [1960] S.C.R. 60, 125 C.C.C. 209, 31 C.R. 374.

1960

PAUL
v.
THE QUEEN

Ritchie J.

2. That the learned magistrate applied the wrong standard of care to the facts and circumstances of the alleged infraction.

3. On such further and other grounds as the evidence may disclose and this court doth permit.

At the hearing in the County Court, objection was taken by counsel for the Crown that these grounds of appeal were not sufficient to comply with s. 722(1)(a)(*i*) of the *Criminal Code*, and that the County Court, therefore, had no jurisdiction to hear the appeal. After hearing argument of counsel, the learned County Court judge delivered reasons for judgment in which he made reference to the cases of *Regina v. Souter*[1], *Regina v. Wisnoski*[2] and *Regina v. Gillespie*[3], and concluded by saying,

I find that the preliminary objection is well taken and on the preliminary objection I must dismiss the appeal for want of jurisdiction.

From this decision the applicant gave Notice of Application for Leave to Appeal to the Court of Appeal for Ontario upon the grounds following:

1. The learned County Court judge on appeal erred in finding that there were not sufficient grounds set forth in my Notice of Appeal to comply with s. 722 of the *Criminal Code*.

2. The learned County Court judge on appeal erred in finding that he had no jurisdiction to hear the said appeal by way of trial *de novo*.

The order of the Court of Appeal for Ontario, made on the return of this notice, directed "that leave to appeal should be and the same was thereby refused". Although no written reasons were given for this decision, an affidavit has been filed by the solicitor for the applicant as a part of the appeal case before this Court in which he states that

I am advised by counsel who appeared on his (Paul's) behalf and verily believe that leave to appeal was refused without written reasons being given on the grounds that the court felt it was bound by its previous decision in *Regina v. Souter* (1959) O.W.N. 40.

As will hereafter appear, this statement of fact is not disputed by counsel for the respondent.

[1] [1959] O.W.N. 40, 123 C.C.C. 393, 29 C.R. 306.
[2] (1957), 23 W.W.R. 217, 26 C.R. 392.
[3] (1958), 26 W.W.R. 36, 119 C.C.C. 192, 29 C.R. 44.

Application for leave to appeal from the judgment of the Court of Appeal for Ontario or alternatively from the said County Court was made to this Court on May 25, 1959, upon the following questions of law and jurisdiction:

1. Was the Court of Appeal for Ontario right in holding that there were not sufficient grounds set forth in the Notice of Appeal before His Honour, Judge Lewis, to comply with s. 722 of the *Criminal Code*?
2. Was the Court of Appeal for Ontario right in holding that His Honour, Judge Lewis, on appeal, had no jurisdiction to hear the said appeal by way of trial *de novo*?

and in the alternative, upon the following questions of law and jurisdiction:

1. Was the learned County Court judge on appeal right in holding that there were not sufficient grounds set forth in the Notice of Appeal to comply with s. 722 of the *Criminal Code*?
2. Was the learned County Court judge on appeal right in holding that he had jurisdiction to hear the said appeal by way of trial *de novo*?

On June 25, 1959, by order of this Court, the above applications for leave to appeal were adjourned to the sittings of the Court commencing in October 1959, and it was further ordered that these applications be

referred to this Court at its sittings in October 1959 for disposition in the event that it is held that there is jurisdiction in this Court to grant leave to appeal from an order of the Court of Appeal refusing leave to appeal or in the event that it is held that there is jurisdiction in this Court to grant leave to appeal from the decision of the County Court judge.

Sections 41(1) and 41(3) of the *Supreme Court Act*, pursuant to the provisions of which leave to appeal is now sought, read as follows:

41. (1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

* * *

(3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

1960

PAUL
v.
THE QUEEN

Ritchie J.

"Judgment" is defined by s. 2(*d*) of the *Supreme Court Act* as follows:

> "judgment," when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof; and when used with reference to the Supreme Court, includes any judgment or order of that Court;

I am of opinion that the order sought to be appealed from in this case is a "judgment" within the meaning of s. 2(*d*) of the *Supreme Court Act* and that it has the effect of "affirming a conviction . . . of an offence other than an indictable offence". *If it can also be said that the judgment is one "in respect of a question of law" and that it constitutes a determination of the merits of the questions raised by the Notice of Application for Leave to Appeal,* then I am of the opinion that it comes within the latter words of s. 41(3) and the provisions of s. 41(1) of the *Supreme Court Act* and can be made the subject of an appeal to this Court if it is considered an appropriate case in which to grant leave so to appeal.

Section 743 of the *Criminal Code* provides in part as follows:

> 743. (1) An appeal to the court of appeal, as defined in section 581, may, with leave of that court, be taken on any ground that involves a question of law alone, against
>
> (*a*) a decision of a court in respect of an appeal under section 727 . . .

In my opinion this section confers on the Court of Appeal a discretionary power to determine whether or not leave should be granted by that court in such a case as the present, and if it could be said that leave had been refused in this case simply in the exercise of that discretion then different considerations would apply. In the present case, however, it has been made to appear in this Court to my satisfaction that the learned judges of the Court of Appeal took the position that they were required to decide the questions of law sought to be raised by the application for leave to appeal adversely to the applicant in accordance with the earlier

decision of that court in *Regina v. Souter, supra,* and that as the outcome of the appeal was a foregone conclusion it would serve no useful purpose to grant leave for it to be heard.

In taking this position the Court of Appeal, in my opinion, decided the question of law raised before it on the merits and reached the same conclusion for the same reasons as it would have done if leave had been granted. The fact that formal expression was given to this decision by the granting of an order refusing leave to appeal does not detract from the result which is that for all practical purposes the merits of the appeal have been heard and determined. The Criminal Appeal Rules applicable in the Province of Ontario in such cases and to which further reference will hereafter be made provide that on an application for leave to appeal to the Court of Appeal for Ontario, if that court is of opinion that leave should be granted, the court may thereupon and without further delay hear the appeal upon its merits (Rule 19).

As has been said, the effect of the order granted in the present case was to dispose of the merits of the appeal without having granted leave, and I am of opinion that in a proper case leave should be granted to appeal to this Court from such an order. In the present case the order from which leave to appeal is sought is based on an earlier decision of the Court of Appeal for Ontario (*Regina v. Souter, supra*) which is at variance with decisions of some courts of other provinces and indeed somewhat difficult to reconcile with another decision of the same court to the opposite effect (*R. v. Kuusela*[1]) and it cannot be overlooked that the liberty of the applicant is involved in these proceedings.

It is true that in this case we are deprived of the benefit of having any written or recorded reasons of the Court of Appeal before us and that the formal record of the decision of its learned members is limited to the certificate of the Assistant Registrar of that Court which reads:

This Court did order that leave to appeal should be and the same was thereby refused.

[1] [1959] O.W.N. 136, 123 C.C.C. 401, 30 C.R. 130.

1960

PAUL
v.
THE QUEEN

Ritchie J.

However, we have been furnished not only with the affidavit of the applicant's solicitor which is referred to above but also with the following statement in the factum filed on behalf of the Attorney-General for Ontario whose representative appeared for the respondent herein:

> The issue is whether the Court of Appeal was right or wrong in refusing leave. *In the present case the position of the Court of Appeal was that the point in issue had already been decided by it and that the appeal, if leave were granted, must inevitably be dismissed. Therefore, to grant leave would serve no useful purpose.* In refusing leave, the Court of Appeal followed the principle enunciated by Chief Justice Duff in *Laing v. The Toronto General Trusts,* (1941) S.C.R. 32 dealing with a motion to quash an appeal, at p. 34:
>
> > "And it is also the settled course of this court that when on a motion to quash it plainly appears to the court that the appeal is one, which, if it came on in the ordinary way, must be dismissed, the court will on that ground quash the appeal." (The italics are mine.)

It has been very forcefully argued on behalf of the respondent that it would be inappropriate for this Court to grant leave to appeal from an order which takes the form of a refusal to grant leave by the Court of Appeal, and it was argued that the reasoning contained in the judgment of Lord Halsbury in *Lane v. Esdaile*[1], applied to the present circumstances and that the granting of such leave by this Court would defeat the very purpose of requiring leave to be granted by the Court of Appeal before asserting an appeal under s. 743 of the *Criminal Code* and that it would open the way to appeals being heard in this Court from the refusal of a provincial Court of Appeal to grant leave to appeal on questions of fact and of mixed fact and law in cases of indictable offences sought to be appealed under s. 583(*a*)(ii) of the *Criminal Code* which latter result was never intended by the legislature.

In my view the circumstances of this case are such as to make the reasoning employed in *Lane v. Esdaile, supra,* and the above arguments which are based, in part thereon, inapplicable. In that case what was decided by the House of Lords was that *where the Court of Appeal had exercised its discretion by refusing to grant leave* to appeal after the time limited therefor had expired, its decision was not susceptible of further appeal under the provisions of the *Appellate*

[1] [1891] A.C. 210 at 211 *et seq.*

*Jurisdiction Act, 1876*. It will be noted that the decision of the Court of Appeal there under consideration did not turn on the merits of the case which were overwhelmingly in the appellant's favour but rather on the ground that

> if people have deliberately elected to let the time for appealing go by, the Court should not give them leave to appeal without special circumstances. (Per Lindley L.J. in *Esdaile v. Payne*, 40 Ch.D. 520 at 535.)

In the present case, as has been said, although the order from which leave to appeal is now sought is in form simply an order refusing leave to appeal to the Court of Appeal, it is apparent from what has been said by both counsel that the merits of the questions raised were considered and found wanting because the learned judges of the Court of Appeal felt that the decision of that court in *Regina v. Souter, supra*, governed the circumstances. There would have been no difference in principle if the learned judges of the Court of Appeal had treated the questions as being governed by their view of some general principle of law. That such a decision is not one made in the exercise of judicial discretion is clear from what was said by Cannon J. in *Glesby v. Mitchell*[1], where the question was whether an order of a provincial Court of Appeal directing a new trial was made in the exercise of the discretion of that court, and Cannon J. said:

> These two learned judges exercised not a discretion but considered themselves bound by their previous decision and their interpretation of certain rules of law.

As has been indicated, I would grant leave to appeal to this Court in the present case, but it should be clearly understood that this decision is strictly confined to the circumstances here disclosed and is based on the assumption that the Court of Appeal dealt with and disposed of the merits of the questions of law raised before it on the application for leave to appeal to that court as fully and effectually and for the same reasons and with the same result as they would have done if leave to appeal had been granted. The granting of this application is not to be construed as a review of the discretion vested in the Court of Appeal by s. 743 of the *Criminal Code* and can have no bearing on the right of the Court of Appeal to refuse leave to appeal in indictable

[1] [1932] S.C.R. 260 at 277, 1 D.L.R. 641.

1960

PAUL
v.
THE QUEEN

Ritchie J.

offence cases under s. 583(*a*)(ii) because what is at issue here is a question of law and cases sought to be appealed under that section are concerned with fact or mixed fact and law. Nor can it be said that the considerations governing this case could apply to an application for leave to appeal to this Court from an order *granting* leave to appeal to the Court of Appeal because the effect of such an order can only be to pave the way for the questions of law to be decided on the hearing, and such an order cannot, therefore, have the effect of determining the merits of the appeal.

The real question of law raised by the grounds upon which leave is now sought is whether or not the grounds set forth in the Notice of Appeal from the summary conviction court were sufficient to comply with s. 722 of the *Criminal Code* and to clothe the County Court judge with jurisdiction to hear the appeal by way of trial *de novo*.

As will be seen from what has been said in the cases of *Regina v. Harry P. Bamsey*[1] and *Regina v. Raymond John Dennis*[2], I take the view that the provisions of s. 720 of the *Criminal Code* accord a right of appeal to any "defendant in proceedings under this Part (Part XXIV)" provided that s. 722 is complied with, and I am further of opinion that the grounds of appeal referred to in s. 722(*a*)(ii) are not required to be set forth with the same particularity as in appeals in indictable offences.

An appeal to the Court of Appeal in the case of an indictable offence is, except in a restricted number of cases, largely based upon the record of what has taken place in the court below and the grounds of appeal in such cases are, generally speaking, concerned with specific errors which are alleged to have occurred in the conduct of the trial. As the decision of the Court of Appeal is likely to turn on whether or not the errors so alleged justify the quashing of the conviction or the granting of a new trial, it is, of course, necessary that the grounds set forth in the Notice of Appeal should detail the errors upon which reliance is to be placed in such manner as to inform the respondent of the issues to be met on the appeal and to afford him an opportunity to prepare his case accordingly.

[1] [1960] S.C.R. . . ., 125 C.C.C. 329, 32 C.R. 218.
[2] [1960] S.C.R. ..., 125 C.C.C. 321, 32 C.R. 210.

In the case of an appeal by way of trial *de novo* under s. 727 the Appeal Court is not in the least concerned with specific errors in the conduct of the first trial for the very good reason that its decision must be based upon the evidence introduced at the second one, and, accordingly, it is, in my opinion, quite legitimate, in a case such as the present, for the Notice of Appeal under s. 722 to confine itself to raising the broader issue of whether or not the accused has been wrongly acquitted or convicted. I venture to say that the realities of the situation in such cases very often are that an accused who considers himself to have been wrongly convicted is simply launching his appeal in the hope that another judge may take a different view of the evidence from that taken by the magistrate who convicted him, and as I consider that an accused is entitled to do this under the provisions of ss. 722 to 727 of the *Criminal Code* I am of opinion that by saying "that the conviction was against the evidence and the weight of evidence and contrary to law" the applicant in this case has sufficiently designated the grounds upon which he seeks relief.

Notwithstanding the above, I am far from being of opinion that the statement of grounds required by s. 722 is a mere empty formality. As will appear from what has been said in the case of *Regina v. Bamsey, supra,* I consider that grounds which are obviously irrelevant, frivolous or irreconcilable with the record of the plea in the court below are unacceptable and that if the ground of appeal is that the accused wrongly or mistakenly pleaded guilty in the court below, the reasons which he proposes to urge for being allowed to change his plea in the Appeal Court should be set forth in the Notice of Appeal. I am also of opinion that if the appeal is based upon questions of law, those questions should also be set out in the Notice of Appeal and it is not enough for the applicant to simply say that the conviction was "contrary to law".

An example of a ground of appeal which does not meet the requirements of s. 722 because of irrelevance is afforded by the second ground set forth in the applicant's Notice of Appeal from the summary conviction court in this case. By that ground the applicant alleged that the magistrate

1960

PAUL
v.
THE QUEEN

Ritchie J.

"applied the wrong standard of care to the facts and circumstances of the alleged infraction" and as it was not "standard of care" but "degree of intoxication" which was at issue before the magistrate, this ground is bad on its face, not because it is lacking in particularity but because it is meaningless in the context in which it is employed.

It will be seen from the above that I do not agree with the decision of the Court of Appeal for Ontario in *Regina v. Souter, supra,* and that I am of opinion that the first ground of appeal set forth in the Notice of Appeal to the County Court in this case was effective to clothe the County Court judge with jurisdiction to hear the appeal by way of trial *de novo.*

The appeal should, therefore, be allowed, but there remains to be considered the question of what order this Court is entitled to grant in the circumstances.

The Criminal Appeal Rules applicable in the Province of Ontario in such cases (see ss. 586 and 743 of the *Criminal Code*) include the following:

*RULE 19:*

Where upon an application for leave to appeal the court is of the opinion that leave should be granted, the court may thereupon and without further delay hear the appeal upon its merits or may, if it sees fit, direct the case to be placed upon the list for hearing at such future time as the court may determine.

Section 46 of the *Supreme Court Act* provides that:

The Court may dismiss an appeal or give the judgment and award the process or other proceedings that the court, whose decision is appealed against, should have given or awarded.

Without having any further material before it and without it being necessary for the applicant to file a Notice of Appeal, the Court of Appeal in the present case could, and in my opinion should, have heard and allowed the appeal on its merits and the judgment which should have been given was to order the case to be remitted to the County Court.

What has been said by counsel enables me to conclude that what in fact happened was that the Court of Appeal reached a decision upon the merits of the appeal, and although its judgment took the form of an order refusing leave to appeal it was in fact a judgment on the merits. I

am of opinion that s. 46 of the *Supreme Court Act* is capable of being construed and on the particular facts of this case should be construed as empowering this Court to give the judgment *on the merits* "that the court, whose decision is appealed against, should have given or awarded".

I would accordingly allow the appeal, set aside the orders of the Court of Appeal and the County Court judge and remit the case to the County Court judge to be heard on appeal by way of trial *de novo*.

*Application for leave to appeal dismissed,* CARTWRIGHT, MARTLAND *and* RITCHIE JJ. *dissenting.*

*Solicitors for the applicant: Stewart, Corbett & Musclow, Brockville.*

*Solicitor for the respondent: The Attorney-General for Ontario.*

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

1959
*Jun. 10, 11
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Mar. 8

AND

EDMUND HOWARD SMITH AND MONTREAL TRUST CO. ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Succession duty—Residue of estate left to wife with power of disposal—Undisposed portion to go to named legatees—Disclaimer of right of disposal made in favour of named legatees within 8 years of death—Whether disclaimed residue taxable as part of wife's estate—Whether disclaimer a gift inter vivos—Whether substitution created by will—Whether "succession" within Dominion Succession Duty Act, R.S.C. 1952, c. 89, s. 3(1)(c) and (4)—Civil Code, arts. 925 et seq., 960, 962.*

By his will, the testator bequeathed the residue of his estate to his wife for her free use and disposal, and to the extent that she had not disposed of it during her life, to named legatees. The testator died in 1938 and his wife in 1954. During her life, the wife received the income from the residue but no part of the capital. In 1951, the wife executed a deed of disclaimer of her right to dispose of the

*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Judson JJ.

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

residue of her husband's estate delivering over the capital to the named legatees but reserving the income for her own use. In assessing the wife's estate for succession duty at her death, the Minister added the residuary estate of the testator on the ground that it was deemed to form part of her estate and a succession from her to her husband's heirs was deemed to have occurred within the meaning of s. 3(1)(*c*) and (4) of the *Dominion Succession Duty Act*. The Exchequer Court of Canada reversed the decision of the Minister, and the Crown appealed to this Court.

*Held:* (Fauteux and Judson JJ. dissenting): The residuary estate was not subject to succession duty.

*Per* Kerwin C.J. and Taschereau and Abbott JJ.: A fiduciary substitution having been created by the testator's will, the named legatees received the property directly from the testator pursuant to art. 962 C.C. and consequently that property was excluded from the wife's estate. The three elements necessary to create a substitution were present in the testator's will: two successive benefits were conferred, one to the institute and the other to the substitutes, and there was to be a period between the enjoyment of the institute and the opening of the substitution. The fact that the institute could dispose of the property was no obstacle, as art. 952 provides for a substitution *de residuo*. Furthermore, an institute can, as was done in this case, deliver over the property in anticipation pursuant to art. 960, and it would be erroneous to think that such a delivery of substituted property constitutes a gift *inter vivos*. Consequently, as the wife, institute, was not invested with a general power of designation or disposition at her death, s. 3(4) of the Act had no application. Section 3(*c*) had also no application, since no property was taken under a disposition operating or purporting to operate as an immediate gift *inter vivos*.

*Per* Fauteux and Judson JJ., *dissenting*: There was, within the technical meaning ascribed to it by the *Dominion Succession Duty Act*, a succession from the testator's wife concerning the residuary property delivered over pursuant to the deed of disclaimer.

By the terms of the testator's will, the wife was given a general power of disposal within the meaning of s. 3(4) of the Act, and her failure to exercise this power would result in the named legatees receiving at her death the property. The fact that under the *Civil Code*, a substitution might have been created by the testator's will, could not prevent the application of the Act. What constitutes a succession under the Act is the receipt of the property by the benficiary as a consequence of the failure on the part of the institute to exercise the general power of designation or disposition.

The submission that s. 3(4) of the Act had no application since, by virtue of the deed of disclaimer, the named legatees received at the time of the making of the deed and not at the time of the wife's death, could not be entertained. Whether art. 960 of the Code applied or not, whether the deed of disclaimer was effective or not to transfer or deliver the property, there was a succession either under s. 3(4) or under s. 3(1)(*c*). If art. 960 applied and the legatees received at the time of the wife's death, there was within s. 3(1)(*c*) a gift *inter vivos* within three years of the wife's death. On the other hand, if the deed of disclaimer did not constitute within art. 960 a delivery in anticipation, there was either, if the property was transferred, a gift within s. 3(1)(*c*) or, if the property was not transferred, a succession was deemed to have taken place under s. 3(4).

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

APPEAL from a judgment of Kearney J. of the Exchequer Court of Canada[1], reversing a decision of the Minister for the payment of succession duties. Appeal dismissed, Fauteux and Judson JJ. dissenting.

*G. Favreau, Q.C.*, and *M. Paquin, Q.C.*, for the appellant.

*J. de M. Marler, Q.C.*, for the respondents.

The judgment of Kerwin C.J. and of Taschereau J. was delivered by

TASCHEREAU J.:—Edgar Maurice Smith, décédé à Montréal le 4 septembre 1938, a par les termes de son testament fait certains legs particuliers, et par la cl. 9 dudit testament, il a donné et légué

> . . . the rest, residue and remainder of my Estate and property, real and personal, moveable and immoveable, including any Life Insurance payable to my Estate, and not specifically distributed or apportioned, . . . to my dear wife, the said DAME HELEN RICHMOND DAY, to have, hold, use, enjoy and dispose of the same as fully and freely as if the next following disposition had not been contained in this my Last Will and Testament.

La clause suivante est la clause 10, à laquelle le testateur a référé dans la clause précédente, et elle se lit ainsi:

> *IN THE EVENT* that my said dear wife, *DAME HELEN RICHMOND DAY,* should predecease me, or to the extent that my said dear wife has not *during her lifetime disposed of the residue* of my Estate hereinabove bequeathed to her, I will and bequeath to my friend and partner, Alfred Kirby, . . . the sum of Five Thousand Dollars ($5,000); and to Cecil Ernest French, nephew of my said wife, and to Isabel Beatrice Day and to Grace Valentine Day, nieces of my said wife, each the sum of Two Thousand Dollars ($2,000); and the then rest, residue and remainder of my Estate and property to the following persons and in the following proportions . . ."

Le testateur, par la clause 15 de son testament, a nommé comme exécuteurs testamentaires son épouse Helen Richmond Day, son neveu Edmund Howard Smith, et le Montreal Trust Company. Leurs pouvoirs ont été étendus au delà de l'an et jour, et dans le cas de décès de son épouse ou de son neveu, le ou les survivants devaient continuer à agir avec le Montreal Trust Company.

Helen Richmond Day, bénéficiaire en vertu des clauses ci-dessus citées, et épouse du testateur, est décédée à Montréal le 20 juin 1954, laissant un testament, exécuté devant H. A. Larivière et un des ses collègues, mais ce dernier n'a

[1] [1958] Ex. C.R. 29, [1957] C.T.C. 434, 58 D.T.C. 1015.

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

Taschereau J.

aucune importance dans la présente cause. Cependant, avant son décès, Dame Helen Richmond Day, veuve de feu Edgar Maurice Smith, a le 24 août 1951, devant Dakers Cameron, Notaire Public, signé un document où elle apparaît comme partie de première part, où également sont signataires les exécuteurs testamentaires de son époux décédé, et tous les autres héritiers éventuels mentionnés au testament, comme parties de seconde et de troisième part. Il est déclaré ce qui suit:

1. The Party of the First Part hereby disclaims, refuses to accept and repudiates purely and simply, with effect as from the death of the said Testator, any and all right granted to her or which she might have under the provisions of the said Last Will and Testament or by law to dispose of the property comprising the residue of the Estate of the said Testator or any part of the said residue, and the Parties of the First, Second and Third Parts agree that this disclaimer, refusal and repudiation shall be and remain irrevocable.

2. The Party of the First Part hereby delivers over to the *Substitutes under the said substitution in anticipation* of the term appointed for the opening thereof the naked ownership of the property comprising the residue of the Estate of the said Testator, and the Parties of the Second and Third Parts acknowledge to have received and accept the said delivery.

Les exécuteurs testamentaires ont accepté au même acte, de recevoir la délivrance par anticipation des biens faisant l'objet du document du mois d'août 1951, et ont consenti à détenir les biens substitués pour les appelés à la substitution, durant la vie de la partie de première part, et à lui payer les revenus nets provenant de ces biens, jusqu'à sa mort. Evidement, les parties ont cru qu'il s'agissait d'une substitution, et que la grevée Madame Smith pouvait, en vertu de l'art. 960 du *Code Civil*, faire la remise par anticipation des biens aux appelés. C'est ce qui a été fait, car ceux à qui ces biens ont été remis étaient les héritiers éventuels en qualité d'appelés à la mort de Madame Smith.

A la mort de Edgar Maurice Smith en 1938, la Loi des successions fédérales n'existait pas, et seuls les droits provinciaux ont été payés par ses exécuteurs testamentaires. Mais au décès de Dame Helen Richmond Day Smith, les exécuteurs testamentaires ont, le 20 juin 1954, produit un état au Département du Revenu National constatant que la valeur nette de sa succession était de $428,504.20. Cependant, le 30 mai 1955, les exécuteurs de cette dernière ont été

avisés par le Département du Revenu National que la succession, pour fins d'impôt, était de $609,303.80. L'augmentation de $180,799.60 représentait la valeur des biens substitués de la succession de Edgar Maurice Smith, et transportés aux appelés par Madame Helen Richmond Day Smith en vertu de la déclaration du 24 août 1951.

Les exécuteurs testamentaires ont appelé de cette décision au Ministre, et ce dernier, le 9 février 1956, a confirmé l'acte de ses officiers, et a rendu la décision suivante:

as having been made in accordance with the provisions of the Act and in particular on the ground that the said Helen Richmond Day Smith was at the time of her death competent to dispose of the property which she was given power to appropriate by the Will of the late Edgar Maurice Smith and the said property has been properly subjected to duty under the provisions of subsection (4) of section 3 of the Act.

Les exécuteurs ont appelé à le Cour de l'Échiquier, et l'honorable Juge Kearney a renversé cette décision, et a maintenu que ces biens substitués ne faisaient pas partie de la succession de Dame Edgar Maurice Smith, et qu'en conséquence, ils n'étaient pas sujets à l'impôt.

En effet, en vertu des dispositions du *Code Civil* de la province de Québec, s'il s'agit d'une substitution, les appelés auraient reçu ces biens directement du testateur, et ils seraient en conséquence exclus de la succession de Madame Day Smith. L'article 962 est redigé dans les termes suivants:

962 C.C.—L'appelé *reçoit les biens directement du substituant* et non du grevé.

Si tel est le cas, et s'il s'agit véritablement de biens substitués, la prétention du Ministre est erronée. La Couronne soutient *qu'il n'y a pas de substitution* et que ces biens sont sujets à l'impôt parce que le document où Madame Day Smith aurait, le 24 août 1951, renoncé à la substitution par anticipation et remis les biens aux appelés, était une donation *inter vivos* et faite dans les trois ans précédant la mort de la défunte. Il s'agirait donc d'une "succession" visée par l'art. 3(1) (*c*) et (4) de la *Loi fédérale sur les droits successoraux* de 1945 et amendements.

L'article de la *Loi fédérale sur les droits successoraux* pertinent, et affectant la présente cause se lit ainsi:

3. (1) Une 'succession' est censée comprendre les dispositions de biens suivantes, et le bénéficiaire et le défunt sont réputés le 'successeur' et le 'prédécesseur', respectivement, à l'égard de ces biens.

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

Taschereau J.

c) les biens recueillis en vertu d'une disposition produisant ou tendant à produire les mêmes effets qu'une donation immédiate entre vifs, par voie de transfert, délivrance, déclaration de fiducie ou autrement, faite le ou après le 29 avril 1941 et dans les trois années antérieures au décès du de cujus.

3. (4) *Lorsque, au décès d'une personne ayant un pouvoir général de désignation ou de disposition de biens,* une personne recueille un intérêt bénéficiaire dans les biens en conséquence du défaut, par le de cujus, d'exercer le pouvoir en question, le fait de recueillir l'intérêt dans les biens est censé constituer une succession, et le bénéficiaire et le de cujus sont respectivement réputés le 'successeur' et le 'prédécesseur' à l'égard des biens.

Il est bon de noter dès maintenant que, durant son vivant, *Helen Richmond Day Smith n'a touché à aucune partie du capital laissé au décès du mari,* qui faisait partie de sa succession, et que depuis la mort de son mari jusqu'à son propre décès, elle n'a perçu que les revenus de ces biens.

La première question qu'il importe de déterminer est celle de savoir si les biens dont les appelés ont été investis, font l'objet d'une substitution dont ces derniers auraient hérité directement de Edgar Maurice Smith, le testateur, en vertu des dispositions de l'art. 962 C.C. cité précédemment.

Dans le droit de la province de Québec, les substitutions existent en vertu des art. 925 et suivants du Code. Mignault a défini la substitution comme étant "une disposition par laquelle, en gratifiant quelqu'un, on le charge de rendre la chose donnée à un tiers que l'on gratifie en second ordre." Il résulte de cette définition que la substitution comprend au moins trois personnes: celle qui dispose, celle qui est gratifiée à charge de rendre (grevée), et celle à qui l'on doit rendre (appelée). La substitution porte donc sur une chose que le grevé reçoit pour la rendre à l'appelé. Il y a par conséquent trois éléments dans la substitution: deux libéralités, un ordre successif, et un trait de temps que les Romains appelaient le *tractus temporis.* Si l'un de ces éléments fait défaut, il n'y a pas de substitution.

C'est d'ailleurs ce que Pothier exprimait dans des termes à peu près identiques quand il a ainsi défini la substitution fidéicommissaire:

C'est la disposition que je fais d'une chose au profit de quelqu'un par le canal d'une personne interposée, que q'ai chargée de lui rendre.

Thévenot d'Essaule de Savigny qui, comme Pothier, a écrit avant la codification du *Code Napoléon* de 1804, et qui aussi s'est inspiré de la Grande Ordonnance sur les substitutions de 1747, promulguée par Louis XV, donne à son tour la définition suivante:

> C'est une disposition de l'homme, par laquelle, en gratifiant quelqu'un expressément ou tacitement, on le charge de rendre la chose à lui donnée, ou une autre chose, à un tiers qu l'on gratifie en second ordre.

Nous avons chez nous, comme on le sait, deux sortes de substitutions: la substitution vulgaire et la substitution fidéicommissaire (925 C.C.) et en vertu de l'art. 926, la substitution fidéicommissaire comprend toujours la substitution vulgaire.

Il ne faut pas confondre les substitutions telles qu'elles existent en France et les substitutions qui ont été acceptées par nos codificateurs. Comme nous l'avons vu, ici nous avons la substitution vulgaire et la substitution fidéicommissaire, mais en France, en vertu des disposition de l'art. 896 du *Code Napoléon,* les substitutions sont prohibées, mais cette prohibition ne s'applique qu'aux substitutions fidéicommissaires. En effet, l'art. 898 du *Code Napoléon* permet la substitution vulgaire, c'est-à-dire la disposition par laquelle un tiers est appelé à recueillir le don, l'hérédité ou le legs, dans le cas où le donataire, l'héritier institué ou le légataire ne peut recueillir. La raison est que les codificateurs en France ont voulu accorder aux citoyens français la plus complète liberté de tester. Cette liberté n'est pas entravée quand il existe une substitution vulgaire, mais elle l'est au contraire dans la substitution fidéicommissaire, vu qu'il existe un *ordre successif* qui est un élément essentiel à la substitution fidéicommissaire et qui, à cause de la double libéralité du substituant, prive le grevé du droit de tester. Dans la province de Québec, cependant, nous n'avons aucun article correspondant aux art. 896 et 898 du Code français, et la substitution vulgaire comme la substitution fidéicommissaire font partie intégrante de notre droit civil. En France, on admet, en outre de la substitution vulgaire, un fidéicommis *de residuo* ou *de eo quod supererit,* mais qui se distingue clairement de la substitution fidéicommissaire du droit de Québec.

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

Taschereau J.

Ainsi, la jurisprudence française veut que le fidéicommis *de eo quod superit,* par lequel le donataire ou le légataire est chargé de rendre à son décès ce qui lui restera des biens donnés ou légués, est valable, car il n'emporte pas la charge de conserver. (Vide Dalloz, Nouv. Rep., vol. 4, p. 333, n° 11). Mais, ce qui empêche en France une semblable disposition de créer une substitution et rend la disposition valide, c'est que la substitution est prohibée. Mais ici, tel n'est pas le cas, car nous avons l'art. 952 qui stipule le contraire. Cet article n'a pas d'article correspondant dans le Code français.

Ce serait donc une erreur de s'inspirer des auteurs français qui ont écrit depuis la codification en France, pour chercher des directives légales sur les substitutions fidéicommissaires. C'est plutôt vers Ricard, Pothier et Thévenot d'Essaule, qui ont écrit avant la codification, qu'il faut se tourner pour voir quelle est chez nous la véritable doctrine que la France a rejetée en 1804, mais que nos codificateurs et l'Union ont acceptée en 1866.

J'ai dit précédemment que l'un des éléments essentiels de la substitution fidéicommissaire, telle que comprise dans la province de Québec, est que le substituant fasse deux libéralités. Il y a en premier lieu une libéralité envers le grevé et, en second lieu, une libéralité envers l'appelé. Dans le cas de l'usufruit, il y a également deux libéralités simultanées, en ce sens que l'usufruitier a le droit de jouir de la chose, *dont une autre personne est en même temps propriétaire.* Dans la substitution, ces libéralités sont successives, en ce sens que le grevé possède pour lui-même, à titre de propriétaire (C.C. 944), et ce n'est que lorsqu'il a rendu la chose à l'appelé, que ce dernier en devient le propriétaire subséquent. Il y a donc un *ordre successif* et un trait de temps qui sont aussi les éléments essentiels de la substitution.

Dans le cas qui se présente, le testateur a donné le résidu de ses biens à son épouse avec droit d'en disposer avant son décès, et s'il n'y a pas de telle aliénation ou disposition de biens, le résidu est dévolu à des appelés que le testateur a expressément nommés. Il y a donc double libéralité successive, et un espace de temps, un *tractus temporis,* entre la période où l'épouse du testateur a la propriété des biens, et le temps où elle doit devenir celle des appelés.

On objecte ici que l'obligation de conserver les biens n'existe pas, car la grevée peut en disposer, et il s'ensuivrait qu'il n'y a donc pas de substitution. Mais, comme le faisait remarquer M. le Juge Demers dans une cause de *Deguire v. Despatie,* il y a des substitutions qui diffèrent de la substitution ordinaire. C'est l'idée que Pothier exprimait dans son Traité des Substitutions, vol. 8, p. 502, art. 140 et 141:

> Par exemple un héritier est quelquefois grevé de restituer après son décès ce qui reste des biens de la succession, *quod ex haeriditate superfuerit.*
>
> *Cette substitution est différente des substitutions universelles ordinaires,* en ce qu'elle ne comprend pas tous les biens qui ont été laissés au grevé, mais seulement *ceux qui lui restent lors de son décès.*

Évidemment, nos codificateurs ont accepté cette opinion de Pothier, car l'art. 929 C.C. dit ce qui suit:

> La disposition qui substitue peut être conditionnelle comme toute autre donation ou legs.

Mais il me semble que l'art. 952 du *Code Civil* doit définitivement déterminer la solution de ce litige. Cet article, très clair, est redigé dans les termes suivants:

> Le substituant peut indéfiniment permettre l'aliénation des biens substitués; la substitution n'a d'effet en ce cas que si l'aliénation n'a pas eu lieu.

Il est clair que si les biens sont tous aliénés par le grevé, qui a le droit de le faire, il n'y a plus de substitution, car il ne reste plus alors d'objet dont pourrait être saisi l'appelé. Mais lorsqu'il reste des biens, à la mort du grevé, la substitution a lieu pour les biens qui demeurent. C'est précisément ce que veut l'art. 952 C.C. C'est ce qu'on est convenu d'appeler une substitution *de residuo;* que le résidu comprenne la totalité des biens substitués ou la partie seulement qui n'a pas été aliénée, et dont le grevé, dûment autorisé par le substituant, n'a pas disposé durant la période de temps pendant laquelle il était propriétaire des biens.

A ce propos, Mignault, vol. 5, p. 92, dit ceci:

> Sans méconnaître la force des raisons que l'on invoque aujourd'hui en France afin de soustraire le fidéicommis *de residuo* à la prohibition que les auteurs du Code Napoléon ont portée contre la substitution fidéicommissaire, je crois que nous pouvons accueillir dans notre droit la tradition de l'ancienne jurisprudence qui reconnaissait à ce fidéicommis le caractère de substitution fidéicommissaire.

[1] [1944] Que. S.C. 1 at 2.

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

Taschereau J.

Commentant l'art. 952, Trudel, vol. 6, p. 273, dit:

> Il suffit de dire que le Code permet de faire valablement une substitution fidéicommissaire de cette nature, laissant au grevé la liberté d'aliéner, puisque le grevé n'est chargé de rendre et ne doit conserver que ce qui restera lors de l'ouverture de la substitution.
>
> Thévenot d'Essaule a posé la question dans son ouvrage sur Les Substitutions et a répondu: non, il n'est pas de l'essence de la substitution fidéicommissaire que le grevé n'ait pas la liberté indéfinie d'aliéner; une substitution contenant pareille clause est valable vu qu'il y a obligation de rendre dans le cas où le grevé n'aurait pas aliéné.
>
> Cette substitution est différente des substitutions universelles ordinaires, en ce qu'elle ne comprend pas tous les biens qui ont été laissés au grevé, mais seulement ceux qui lui restent lors de son décès.

Vide également 2 Ricard, p. 453; 8 Pothier, "Substitutions", n° 140.

Normalement, le grevé a la jouissance et la propriété des biens substitués sa vie durant, ou à l'arrivée d'un terme fixé par le substituant. Le grevé peut cependant, à son choix, à moins qu'un délai n'ait été établi pour l'avantage de l'appelé, faire la remise des biens par anticipation (960 C.C.). C'est ce qui est arrivé dans le présent cas, le 24 août 1951, quand Madame Helen Richmond Day Smith, par acte notarié, a renoncé purement et simplement en faveur des appelés mentionnés au testament, à tous les droits qui lui étaient conférés par le testament de son mari, *y compris à celui de disposer des biens substitués, faisant par là une remise du résidu de tous les biens aux appelés à la substitution.*

C'est une erreur de penser que cette remise des biens faite par la grevée en faveur des appelés avant son décès, constitue un avantage *inter vivos* consenti par Madame Smith aux appelés. L'article 960 cité plus haut autorise cette remise par anticipation, et d'ailleurs, Mignault, vol. 5, p. 124, commentant cet article, dit ce qui suit:

> Le grevé, tenu de restituer les biens aux appelés à l'époque de sa mort ou à un autre temps, anticipe sur le terme fixé par le substituant, renonçant, par là, en faveur des appelés, au titre même en vertu duquel il détenait les biens substitués.
>
> Cette restitution des biens entraîne l'ouverture de la substitution, pourvu qu'elle soit faite en faveur de tous les appelés.

Je suis donc d'opinion qu'il s'agit d'une substitution fidéicommissaire dans le présent cas, et que par conséquent les appelés ont hérité directement d'Edgar Maurice Smith. Je pense aussi que la remise des biens faite par anticipation par l'épouse du testateur est valide, et que les biens auxquels

elle a renoncé en 1951, ne font pas partie de sa propre succession ouverte en 1954, et qu'il ne peut s'agir d'une donation *inter vivos,* consentie par Madame Smith.

La seule conclusion logique qui, à mon sens, s'impose, est qu'à son décès, l'épouse n'avait pas *un pouvoir général de désignation ou de disposition de biens,* parce qu'elle y a renoncé irrévocablement en 1951. C'est l'art. 960 C.C. qui lui a permis d'agir ainsi.

La loi fédérale autorisant le prélèvement de droits successoraux (art. 3(4) *supra*), sur des biens qu'une personne possède à son décès, et affectés d'un pouvoir de désignation qui n'a pas été exercé, n'a donc aucune application. A sa mort, Madame Smith, la grevée, n'avait aucun droit de désignation.

Il me paraît clair également que l'art. 3(*c*) ne peut affecter ce litige. Il ne s'agit pas, en effet, de biens recueillis en vertu d'une disposition produisant ou tendant à produire les mêmes effets qu'une donation immédiate entre vifs.

Pour les raisons ci-dessus, et pour celles données par M. le Juge Kearney de la Cour de l'Échiquier, je suis d'opinion que cet appel doit être rejeté avec dépens.

The judgment of Fauteux and Judson JJ. was delivered by

FAUTEUX J. (*dissenting*):—L'appelant se pourvoit à l'encontre d'un jugement de la Cour de l'Échiquier[1] annulant une cotisation imposée en vertu de la *Loi fédérale sur les droits successoraux* (1940-41), 4-5 George VI, c. 14 et ses amendements, et ordonnant la revision de cette cotisation conformément à la décision de la Cour sur la question litigieuse divisant les parties. Les circonstances donnant lieu à ce litige sont les suivantes.

Aux termes de son dernier testament, Edgar Maurice Smith, après avoir pourvu au paiement de ses dettes, autorisé certaines dépenses et fait certains legs particuliers, disposait comme suit du résidu de ses biens, aux arts. 9 et 10 de cette dernière expression de volontés.

*NINTH*

AS to the rest, residue and remainder of my Estate and property, real and personal, moveable and immoveable, including any Life Insurance payable to my Estate, and not specifically distributed or apportioned,

[1] [1958] Ex. C.R. 29, [1957] C.T.C. 434, 58 D.T.C. 1015.

1960

MINISTER OF NATIONAL REVENUE
*v.*
SMITH
*et al.*

Fauteux J.

I hereby will, devise and bequeath the same to my dear wife, the said DAME HELEN RICHMOND DAY, to have, hold, use, enjoy and dispose of the same as fully and freely as if the next following disposition had not been contained in this my Last Will and Testament.

*TENTH*

IN THE EVENT that my said dear wife, DAME HELEN RICHMOND DAY, should predecease me, or to the extent that my said dear wife has not during her lifetime disposed of the residue of my Estate hereinabove bequeathed to her, I will and bequeath to .....

Suit alors la mention de personnes susceptibles de devenir bénéficiaires advenant l'une des éventualités conditionnant la mise en opération de cette clause 10.

Smith décéda le 4 septembre 1938. Son épouse, lui survivant, accepta la succession qui lui était ainsi dévolue. De cette date à celle de son propre décès, survenant quelque seize ans plus tard, soit le 20 juin 1954, elle toucha tous les revenus de ces biens.

Le 24 août 1951, près de treize ans après le décès de son époux, et moins de trois ans avant le sien, Madame Smith, les exécuteurs testamentaires de feu son époux, et certaines personnes mentionnées à la clause 10 comparaissaient devant notaire et signaient respectivement, comme partie de première, deuxième et troisième part, un acte portant minutes intitulé DEED OF DECLARATION AND ACCEPTANCE, qu'il convient de citer au texte, en numérotant en chiffres romains, pour fins de référence ultérieure, les divers paragraphes:

*WHICH SAID PARTIES DECLARED AS FOLLOWS:—*

i. *THAT* said late Edgar Maurice Smith died on or about the fourth day of September, One thousand nine hundred and thirty-eight, leaving his said Last Will and Testament, whereby he bequeathed the residue of his Estate as provided in Articles *NINTH* and *TENTH* thereof.

ii. *THAT* the provisions of said Last Will and Testament constitute under the laws of the Province of Quebec a substitution *de residuo*, under which substitution the Party of the First Part is the Institute and the Parties of the Third Part are the Substitutes;

iii. *THAT* the Party of the First Part acknowledges that the right which she as Institute under such a substitution would have to dispose of the substituted property, being the residue of the Estate of the said Testator, is limited to alienation by one onerous title for the sole purpose of providing for her needs of support and maintenance;

iv. *THAT* the said Testator did not extend the said power of disposal beyond the limits aforesaid as appears from the provisions of Article *THIRTEENTH* of the said Last Will and Testament which provided that all property bequeathed by the said Will was intended for the support and maintenance of the beneficiaries;

v. *THAT* the said right to dispose of the residue of the Estate of the said Testator has never been accepted or acted on or availed of in any way by the Party of the First Part and the substituted property, being the residue of the Estate of the said Testator, has since his death always remained in the physical possession of and been administered by the Parties of the Second Part;

vi. *THAT* although under the terms of the said Last Will and Testament the opening of the said substitution would only take place at the death of the Party of the First Part at which time the substituted property would be delivered over to the substitutes, the Party of the First part has a right to deliver over the substituted property in anticipation of the term appointed for the opening of the substitution;

vii. *THAT* the Party of the First Part desires to record a disclaimer and repudiation of any and all right to dispose of the substituted property and desires to deliver over the naked ownership of the substituted property in anticipation of the term appointed for the opening of the substitution;

*NOW, THEREFORE, THESE PRESENTS AND THE SAID NOTARY WITNESS:—*

viii. 1. The Party of the First Part hereby disclaims, refuses to accept and repudiates purely and simply, with effect as from the death of the said Testator, any and all right granted to her or which she might have under the provisions of the said Last Will and Testament or by law to dispose of the property comprising the residue of the Estate of the said Testator or any part of the said residue, and the Parties of the First, Second and Third Parts agree that this disclaimer, refusal and repudiation shall be and remain irrevocable.

ix. 2. The Party of the First Part hereby delivers over to the Substitutes under the said substitution in anticipation of the term appointed for the opening thereof the naked ownership of the property comprising the residue of the Estate of the said Testator, and the Parties of the Second and Third Parts acknowledge to have received and accept the said delivery.

x. 3. The Parties of the Second Part hereby consent to the foregoing delivery in anticipation and agree to hold the said substituted property for the Substitutes under the said substitution during the lifetime of the Party of the First Part and to pay to her the net revenue to be derived therefrom during her lifetime.

Après la mort de Madame Smith, la détermination de la valeur nette de sa succession, aux fins des droits successoraux exigibles sous le régime de la *Loi fédérale sur les droits successoraux,* donnait lieu au présent débat entre, d'une part, le Ministre du Revenu National, et d'autre part, les exécuteurs testamentaires de Madame Smith et personnes mentionnées à la clause 10 du testament de son époux intimés en cette cause.

Suivant les intimés, la valeur nette de cette succession doit être fixée à $428,504.20; alors qu'aux vues de l'appelant, cette valeur est de $609,303.80. L'excédent de $180,799.60

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

Fauteux J.

représente la valeur admise de la nue-propriété des biens dont Madame Smith disposa le 24 août 1951, d'après le DEED OF DECLARATION AND ACCEPTANCE.

En droit, la question à résoudre est de savoir si, contrairement aux prétentions des intimés accueillies au jugement de la Cour de l'Échiquier mais conformément à celles de l'appelant, il y a eu,—au sens de la *Loi fédérale sur les droits successoraux,*—une succession venant de Madame Smith, en ce qui concerne les biens livrés aux intimés d'après le DEED OF DECLARATION AND ACCEPTANCE.

A la date de l'ouverture de la succession de Madame Smith, aussi bien qu'à celle du DEED OF DECLARATION AND ACCEPTANCE, la Loi précitée,—édictée postérieurement au décès de son époux,—statuait, à l'art. 3, ce que, pour les fins de cette loi, il faut entendre par le terme "succession". Telles qu'amendées à la session 1944-45 par 8 George VI, c. 37, les dispositions pertinentes de cet article se lisent comme suit:

3. (1) Une 'succession' est censée comprendre les dispositions de biens suivantes, et le bénéficiaire et le défunt sont réputés le 'successeur' et le 'prédécesseur', respectivement, à l'égard de ces biens.

(*c*) les biens recueillis en vertu d'une disposition produisant ou tendant à produire les mêmes effets qu'une donation immédiate entre vifs, par voie de transfert, délivrance, déclaration de fiducie ou autrement, faite le ou après le 29 avril 1941, et dans les trois années antérieures au décès du de cujus.

3. (4) Lorsque, au décès d'une personne ayant un pouvoir général de désignation ou de disposition de biens, une personne recueille un intérêt bénéficiaire dans les biens en conséquence du défaut, par le de cujus, d'exercer le pouvoir en question, le fait de recueillir l'intérêt dans les biens est censé constituer une succession, et le bénéficiaire et le de cujus sont respectivement réputés le 'successeur' et le 'prédécesseur' à l'égard des biens".

Ces dispositions, comme d'ailleurs plusieurs sinon toutes les autres contenues en l'art. 3, illustrent manifestement qu'aux fins de la *Loi fédérale sur les droits successoraux,* le Parlement a donné au terme "succession" un sens technique débordant et même en conflit avec le sens qui lui est propre sous le régime de la Common Law ou du Droit Civil de

Québec. C'est donc au regard de l'extension ainsi donnée au terme que doivent être considérés le testament de Smith, le DEED OF DECLARATION AND ACCEPTANCE, et que la question en litige doit être déterminée.

LE TESTAMENT DE SMITH. A la clause 9, Smith, ci-après appelé le testateur, a disposé de tous ses biens non spécifiquement distribués ou répartis. Suivant les termes de cette clause, il les a légués à son épouse

> ...to *have, hold, use, enjoy* and *dispose of* the same as fully and freely as if the next following disposition (la clause 10) had not been contained in this my Last Will and Testament.

Les mots ici soulignés ne peuvent plus adéquatement correspondre à la définition même du droit de propriété à l'art. 406 du *Code Civil*. Et c'est là la nature du droit conféré aux termes de cette clause. Conjurant même la possibilité de toute interprétation contraire qu'on pourrait chercher à fonder sur les dispositions de la clause 10, le testateur a expressément précisé qu'il entendait donner à son épouse le pouvoir et le droit d'exercer en toute liberté et plénitude les droits qu'il lui conférait par cette clause 9, tout comme si la clause 10 n'eût pas été contenue dans son testament.

A la clause 10, le testateur a prévu l'éventualité du prédécès de son épouse et la caducité de la clause 9 en résultant. Il a aussi prévu l'éventualité où, dans la cas de la survie de cette dernière, elle n'aurait pas, de son vivant, disposé suivant son pouvoir général et absolu de ce faire, du résidu à elle légué par la clause 9. Il a alors pourvu à la distribution et répartition de tout ce résidu, dans le cas de pré-décès, ou, au cas de survie, de ce qui pourrait en rester lors du décès de son épouse.

Il résulte des clauses 9 et 10 que, de son vivant, Madame Smith avait droit de jouir et de disposer en tout ou en partie du résidu, comme propriétaire absolue. Elle ne pouvait, cependant, en disposer par voie de testament. De son vivant, et comme tout propriétaire, elle pouvait à son gré aliéner

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

Fauteux J.

ces biens à titre onéreux ou à titre gratuit. Elle avait donc, au sens de l'art. 3(4) de la Loi précitée, d'après les clauses 9 et 10 du testament de son époux, un pouvoir général de disposition des biens mentionnés et son défaut d'exercer ce pouvoir de son vivant avait, à son décès, la conséquence de permettre aux personnes mentionnées à la clause 10 de recueillir ces biens suivant les parts et répartitions y indiquées.

Contrairement à ces vues sur l'interprétation du testament de Smith quant aux droits qui y sont donnés à son épouse, les intimés ont soumis que le pouvoir donné à Madame Smith ne pouvait être un pouvoir général de disposition, mais un pouvoir limité parce que, disent-ils, (i) suivant la clause 13, son droit de disposer était restreint à des aliénations à titre onéreux pour fins d'aliments, (ii) suivant la clause 15, elle n'avait pas un pouvoir exclusif de disposition puisque semblable pouvoir était donné aux exécuteurs testamentaires de son époux et (iii) dans la mesure où elle pouvait aliéner, son droit de ce faire était attribuable au droit de propriété qu'elle avait sur ce résidu et non à un pouvoir général de disposition au sens de la *Loi fédérale sur les droits successoraux.*

La clause 13 du testament. La partie pertinente de cette clause se lit comme suit:

*THIRTEENTH*

ALL property hereby bequeathed being intended for the alimentary support and maintenance of the beneficiaries under this Will, is hereby given upon the condition that the same and the revenues derived therefrom shall be at all times exempt from seizure, and shall be *insaisissable* without the written consent of my Executors provided that after such beneficiaries have received their shares in my Estate nothing herein contained shall prevent any beneficiary hereunder from voluntarily alienating or hypothecating any of the property to which he or she is entitled under this Will;

Assumant que cette disposition s'applique au résidu attribué à Madame Smith et que ce résidu lui ait été légué à titre d'aliments et soit, pour cette raison, insaisissable, ce fait ne limite aucunement le pouvoir général de disposition

qui lui est conféré par la clause 9, avec le droit de l'exercer librement et en plénitude, comme si la clause 10 n'était pas contenue au testament. L'insaisissabilité et l'incessibilité sont deux choses différentes, la première ne comportant pas la seconde. Une disposition testamentaire déclarant que des biens légués le sont à titre d'aliments et sont, pour cette raison, insaisissables, a toujours été interprétée par les tribunaux, non pas comme limitant le droit du bénéficiaire de disposer, à son gré, de la propriété léguée, mais comme ayant pour seul but d'empêcher des tiers de prendre possession des biens par voie de saisie, sans le consentement du bénéficiaire. *Nolin v. Flibotte*[1]; *Delisle v. Vallières*[2]; *Caisse Populaire de Lévis v. Maranda*[3]. Il en pourrait être autrement si le pouvoir général de disposition du résidu, donné à la clause 9, était limité, par la clause 13, à ce qui est nécessaire pour aliments et soutien, en vue et afin d'assurer que, pour le surplus si aucun, la clause 10 opère au bénéfice des personnes y mentionnées. Mais telle n'est pas la fin de la clause 13, et une telle ou toutes autres semblables limitations du pouvoir de disposition sont expressément écartées par la clause 9.

La clause 15 du testament. La partie pertinente de cette clause se lit comme suit:

> I empower my Executors to sell, alienate and dispose of the whole or any part or parts of my Estate and property, whether moveable or immoveable, for such prices, and subject to such terms and conditions as they alone may deem proper; to receive the consideration price of any and all such sales and to give valid discharges therefor. I further empower my Executors to invest and re-invest the proceeds of such sales and the cash assets of my Estate, as they may arise from time to time in such investments as they may choose without being limited as to the character of the investment which they may make nor as to the proportion of the investment to the security, notwithstanding Article 981° of the Civil Code of Lower Canada.

L'auteur d'un testament est présumé être conséquent avec lui-même et il s'ensuit que si, dans une clause, il a clairement exprimé sa volonté, comme l'a fait le testateur en l'espèce à la clause 9 en ce qui concerne les biens attribués à son épouse, on doit présumer qu'il n'a pas modifié cette

[1] (1934), 56 Que. K.B. 315. [2] (1939), 77 Que. S.C. 277.
[3] [1950] Que. K.B. 249.

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

Fauteux J.

volonté dans une clause subséquente à moins qu'il ne s'en soit clairement exprimé. Ni en la clause 15 ou autre partie du testament trouve-t-on l'expression d'une pareille intention. Le testament prévoit d'ailleurs d'autres situations où les dispositions de la clause 15 peuvent recevoir une application. Ces pouvoirs d'aliénation que le testateur a, par cette disposition de la clause 15, donnés, pour fins administratives, à ses trois exécuteurs testamentaires, soit, son épouse, Edmund Howard Smith et la Montreal Trust Company, n'affectent aucunement le droit de Madame Smith de disposer de son vivant, librement et en plénitude, de ses biens, tel qu'expressément prévu à la clause 9.

L'article 3(4) de la Loi. Comme dernier moyen (iii), quant à l'interprétation, les intimés se sont contentés d'affirmer que le pouvoir d'aliénation de Madame Smith découle de son droit de propriété et n'équivaut pas à un pouvoir général de disposition au sens de l'art. 3(4) de la *Loi fédérale sur les droits successoraux.* Ce pouvoir général de disposition est accordé à Madame Smith aux termes mêmes du testament de son époux où il est prévu qu'à défaut de l'exercer de son vivant, les personnes mentionnées en la clause 10 recueilleront ce qui pourra en rester à son décès. C'est là une des situations prévues au para. 3(4) de la Loi.

Mais, prétendent les intimés, même si le testament doit recevoir l'interprétation qui précède, les dispositions des arts. 3(1) et 3(4) ne peuvent s'appliquer en l'espèce. Indépendamment de l'effet que peut avoir le DEED OF DECLARATION AND ACCEPTANCE sur la question, disent-ils, en vertu du *Code Civil,* les clauses 9 et 10 créent une substitution, les intimés reçoivent alors les biens, non du *de cujus*—en l'espèce, Madame Smith—mais directement du testateur et ces biens sont, en conséquence, exclus de la succession de Madame Smith.

Du fait que, sous le *Code Civil,* les prémisses et la conclusion de ce raisonnement puissent se justifier, il ne s'ensuit aucunement que les dispositions de ces deux articles de la

Loi fédérale n'aient pas d'application en l'espèce. La question à déterminer est de savoir si, au sens de cette Loi fédérale, et non au sens du *Code Civil,* il y a eu, au décès de Madame Smith, une succession venant d'elle en ce qui concerne les biens qui lui furent légués par son époux, avec la limitation quant au droit d'en disposer par testament.

A mon avis, il est parfaitement indifférent et c'est nullement une condition d'application de ces arts. 3(1) et 3(4) que, sous le régime de la Common Law ou du Code Civil, le bénéficiaire recueille directement du *de cujus.* Il suffit qu'il recueille comme conséquence du défaut de ce dernier d'avoir exercé le pouvoir général de désignation ou le pouvoir général de disposition qu'il avait, suivant le cas. C'est le fait, dit l'article, pour une personne de recueillir, au décès d'une personne ayant pareils pouvoirs, comme conséquence du défaut de cette dernière de les exercer, qui constitue une "succession" et constitue le bénéficiaire et le *de cujus* respectivement "successeur" et "prédécesseur" à l'égard de ces biens. Ce texte est clair, ne souffre d'aucune ambiguïté et nous devons lui donner son effet. D'ailleurs, et si le fait que le bénéficiaire recueille de l'auteur de l'acte de libéralité et non du *de cujus* était suffisant pour empêcher l'application des dispositions pertinentes du para. 3(4), il en résulterait que ces dispositions seraient lettre morte et n'auraient jamais d'application dans le cas où le pouvoir donné serait un pouvoir de désignation.

En effet, sous la Common Law, le pouvoir général de désignation est celui qui est donné à une personne, dans un acte de libéralité, de désigner comme bénéficiaire, toute personne, incluant même la personne à qui ce pouvoir est donné; le pouvoir spécial de désignation étant celui qui peut être exercé en fonction seulement de certains objets spécifiés. Celui qui recueille, comme conséquence de l'exercice ou du non exercice de ce pouvoir de désignation, ne reçoit pas de celui à qui le pouvoir a été donné mais de celui qui l'a créé, à moins que, en ce qui concerne le cas de non exercice, il ne résulte de l'acte de libéralité créant le pouvoir, une indication au contraire.

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

Fauteux J.

Les constatations qui précèdent paraissent décisives sur le point. On peut ajouter, cependant, que le même raisonnement et la même conclusion valent aussi, je crois, sous le Droit Civil où la faculté générale d'élire, c'est-à-dire de choisir, sans objets spécifiés, un ou plusieurs bénéficiaires, correspond généralement au pouvoir de désignation de la Common Law. Et sous les mêmes réserves en ce qui concerne le cas du non exercice du pouvoir, celui qui recueille reçoit également du substituant et non du grevé. Sur le point, les auteurs suivants, cités avec approbation au jugement de cette Cour dans *Lussier v. Tremblay*[1], s'expriment ainsi:

*Thévenot d'Essaule, Traité des Substitutions, N° 1013, p. 319:*

*Le grevé, en élisant, n'est point censé exercer une libéralité envers celui qu'il choisit. Il ne peut par conséquent le soumettre à aucune charge de substitution, ni autre quelconque.*

*Ricard, Des Donations, vol. 2, p. 448:*

*C'est pourquoi le grevé qui a fait ce choix, ne peut pas, pour raison de ce seul choix, imposer aucune charge à la personne qu'il a choisie: car, en la choisissant, il n'a proprement exercé aucune libéralité envers elle, il ne lui a donné rien du sien.*

*Mignault, vol. 5, p. 145:*

*Le choix fait par le grevé ne constitue pas une disposition en faveur de la personne choisie; c'est un pur choix et la personne choisie tiendra les biens du substituant et non pas du grevé. Ce dernier ne peut donc à raison de ce seul choix, imposer aucune charge à la personne qu'il a choisie, car il n'exerce envers elle aucune libéralité.*

Il est donc immatériel que les biens recueillis au décès d'une personne nantie d'un *pouvoir général de désignation* soient exclus des biens de la succession de cette dernière et rien dans le texte des arts. 3(1) et 3(4) de la Loi fédérale n'autorise l'adoption d'une vue différente dans le cas où le pouvoir donné est un *pouvoir général de disposition*. Au contraire, dit l'article, dans les deux cas, c'est le fait pour une personne de recueillir, au décès d'une personne ayant pareils pouvoirs, comme conséquence du défaut de cette dernière de les exercer, qui constitue une "succession" et constitue le bénéficiaire et le de cujus, respectivement, "successeur" et "prédécesseur" à l'égard de ces biens.

[1] [1952] 1 S.C.R. 389 at 421.

Aussi bien et en tout respect pour les tenants de l'opinion contraire, je suis d'avis que si on écarte de la considération l'existence du DEED OF DECLARATION AND ACCEPTANCE,—comme l'ont fait les intimés pour les fins de cet argument,—il ne fait aucun doute qu'au sens de ces articles de la Loi fédérale, il y a eu, au décès de Madame Smith, une succession venant d'elle en ce qui concerne les biens qui lui furent légués par son époux.

*DEED OF DECLARATION AND ACCEPTANCE.* La conclusion qui précède, poursuivent les intimés, ne vaut plus si l'on donne effet au DEED OF DECLARATION AND ACCEPTANCE. En vertu de cet acte, exécuté le 24 août 1951, Madame Smith, disent-ils, a fait, tel que le permet l'art. 960 C.C., une remise anticipée des biens substitués; une telle remise équivaut à une renonciation à tout pouvoir général de disposition qu'elle pouvait avoir en vertu du testament, et il en résulte que les intimés ont recueilli ces biens, non pas *au décès* de Madame Smith mais *le 24 août 1951,* et dès lors le para. 3(4) n'a pas d'application.

Cet argument présuppose que la disposition de biens contenue à l'acte constitue une remise anticipée, au sens de l'art. 960 C.C. Avant d'examiner le mérite de cette prémisse, dont le bien-fondé est contesté par l'appelant, quelques commentaires s'imposent sur le contenu de cet acte.

Cet acte du 24 août 1951 contient, en effet, des déclarations qui sont notoirement injustifiées en droit et qui, pour cette raison, sont pour le moins extraordinaires sinon révélatrices d'un doute entretenu, par les parties à l'acte, sur l'application de l'art. 960 C.C. ou du procédé par elles adopté pour donner, à la face de l'acte, une apparence de justification à le fonder sur cet article. Ainsi, par exemple, on affirme, et argumente même, aux paras. (iii) et (iv) respectivement, que le pouvoir de disposition donné à Madame Smith est limité à ce qui est nécessaire aux aliments; ce qui, pour les raisons ci-dessus données, est mal fondé. On ne conçoit guère, d'ailleurs, l'intérêt que pouvait avoir Madame Smith d'affirmer une limitation de ses droits dans un acte par lequel elle prétend en faire l'abandon.

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

Fauteux J.

L'affirmation, au para. (v), que le droit de disposer du résidu n'a jamais été accepté par Madame Smith, est insoutenable; ayant, à ce temps, retiré pendant plus de treize ans tous les revenus, elle a fait indubitablement un acte d'acceptation, non seulement des revenus, mais de tous les droits qui lui sont conférés au testament. Au para. (vi), on affirme qu'elle a le droit de faire une remise par anticipation; ce droit est ici précisément en question.

En soi, un procédé adopté pour éviter le paiement des droits n'est pas condamnable du seul fait qu'il puisse être ultérieurement considéré inefficace à réaliser cette intention. Mais, en l'espèce, l'interprétation que les parties à l'acte ont cru devoir donner au testament de Smith et aux droits résultant du testament ainsi interprété n'affecte en rien l'interprétation que ce testament doit recevoir exclusivement suivant la teneur de ses dispositions, et n'affecte aucunement les droits de l'appelant.

Pour décider si la remise des biens faite d'après le DEED OF DECLARATION AND ACCEPTANCE constitue une remise au sens de la remise anticipée à laquelle pourvoit l'art. 960 C.C. ou, en d'autres termes, si les dispositions de cet article ont, entre autres objets, une disposition testamentaire de la nature de celle résultant des clauses 9 et 10, il convient d'apprécier la nature et le caractère de cette disposition testamentaire.

Le fidéicommis *de residuo* vient du droit romain et est reconnu sous notre droit par l'art. 952 C.C., lequel se lit comme suit:

952. Le substituant peut indéfiniment permettre l'aliénation des biens substitués; la substitution n'a d'effet en ce cas que si l'aliénation n'a pas eu lieu.

952. The grantor may indefinitely allow the alienation of the property of the substitution which takes place in such case only when the alienation is not made.

Il ne faut voir en cet article, dit Mignault, vol. 5, p. 93, qu'une formule générale qui peut se rapporter à tous les cas où le grevé a le pouvoir d'aliéner, sans en restreindre

ou en étendre les effets particuliers, lesquels, en dernière analyse, dépendront des termes dont le substituant s'est servi. Le fidéicommis *de eo quod supererit* autorisé par cet article et qu'on dit résulter des clauses 9 et 10 du testament, se distingue particulièrement de la substitution fidéicommissaire ordinaire en ce que celle-ci impose au grevé l'obligation de *conserver et de rendre,* au terme fixé par le testateur pour l'ouverture de la substitution, alors que le fidéicommis *de eo quod supererit* n'impose aucune obligation de conserver mais une *obligation de rendre* limitée aux biens non disposés par le grevé, au jour fixé pour l'ouverture de la substitution. Dans le cas qui nous occupe, ce fidéicommis a pour unique objet les biens que Madame Smith pourrait ne pas avoir aliénés de son vivant, nonobstant son pouvoir de ce faire, tout comme si la clause 10, établissant ce fidéicommis, était inexistante. Ce fidéicommis, comme l'obligation de rendre en résultant, est conditionnel. Il est laissé exclusivement et entièrement à la volonté de Madame Smith d'empêcher la réalisation de la condition et de mettre à néant cette substitution par simple aliénation. Du jour de l'acceptation de la succession de son époux à celui de son décès, elle n'a aucune obligation vis-à-vis des personnes mentionnées à la clause 10, et celles-ci n'ont, vis-à-vis d'elle, aucun droit à l'égard de ces biens. Elle peut en faire l'aliénation, comme toute propriétaire, que ce soit à titre onéreux ou à titre gratuit. Elle peut aliéner ces biens à toute personne, y compris celles mentionnées à la clause 10 sans être, en ce dernier cas aucunement gênée par les règles et conséquences qui régissent et frappent respectivement la remise anticipée prévue par l'art. 960 C.C. Les acquéreurs, auxquels elle peut, de son vivant, faire la remise de ces biens, qu'ils soient ou non les personnes mentionnées à la clause 10, ne sont pas sujets à éviction, comme peuvent l'être les tiers acquéreurs par les appelés existant au jour de l'ouverture d'une substitution fidéicommissaire ordinaire. A mon avis, ce n'est nullement là une situation qu'envisage l'art. 960 C.C., ainsi qu'il appert du texte de cet article, des commentaires des codificateurs et de ceux faits par Mignault:

960. Le grevé peut faire la remise des biens par anticipation, à moins que le délai n'ait été établi pour l'avantage de l'appelé; sans préjudice aux créanciers du grevé.

1960

MINISTER OF NATIONAL REVENUE
*v.*
SMITH *et al.*

Fauteux J.

960. The institute may, but without prejudice to his creditors, deliver over the property in anticipation of the appointed term, unless the delay is for the benefit of the substitute.

Sur cet article, les codificateurs, au vol. 2, p. 196, des Substitutions, section III, ont fait le commentaire suivant:

La restitution des biens par anticipation est permise sous des modifications expliquées.

Cet article permet donc, dans le cas y prévu, de faire la remise des biens avant le terme fixé par le testateur. La remise permise par cet article est assujettie à des règles et entraîne des effets juridiques en ce qui concerne le grevé, les appelés, les créanciers et les tiers. Il suffit, je crois, de référer à ces règles et effets dont parle Mignault au vol. 5, pp. 129 *et seq.*, pour se rendre compte que leur donner une application dans le cas d'un fidéicommis de la nature et du caractère de celui résultant des clauses 9 et 10 produirait des résultats incompatibles et en conflit avec ceux découlant des droits conférés à Madame Smith par la disposition testamentaire établie par son époux. Ainsi, par exemple, la remise anticipée permise par l'art. 960 est sans effet sur les aliénations consenties par le grevé avant cette remise et les tiers acquéreurs ne peuvent être évincés jusqu'à l'ouverture de la substitution que par les appelés qui existeront à ce temps. Mignault, vol. 5, p. 131. Il ne peut être douteux qu'une aliénation partielle des biens qu'aurait pu faire Madame Smith, avant le 24 août 1951, ne pouvait être attaquée par les appelés existant à son décès. A l'égard de ces biens ainsi aliénés, le fidéicommis aurait été annulé par le fait même de l'aliénation, et, par suite, il n'y aurait eu ni grevé, ni appelés éventuels. *Article 952 C.C.* Aussi bien, à mon avis et tel que le soumet l'appelant, l'art. 960 C.C. n'a pas d'application.

Mais que cette dernière conclusion soit mal fondée ou non ne peut affecter la question de savoir si, en l'espèce, il y a eu succession au sens de la loi fédérale.

Dans la première alternative. Si l'art. 960 C.C. s'applique et qu'il y a eu, au sens de cet article, une remise anticipée, il s'ensuit que les intimés peuvent avoir raison de dire qu'ils

n'ont pas recueilli *au décès* de Madame Smith, mais *le 24 août 1951,* et que dès lors les dispositions de l'art. 3(4) ne s'appliquent pas; il ne s'ensuit pas, cependant, que cette conclusion affecte l'opération de l'art. 3(1)(*c*).

Ce dernier article prévoit que les biens recueillis en vertu d'une disposition produisant ou tendant à produire les mêmes effets qu'une donation immédiate entre vifs par voie de transfert, délivrance, déclaration de fiducie ou *autrement,* faite le ou après le 29 avril 1941 et dans les trois années antérieures au décès du *de cujus,* constituent une succession. L'article 960 permet mais n'impose pas l'obligation de faire la remise anticipée. Celui qui, dans le cas d'une substitution fidéicommissaire ordinaire, fait cette remise envisagée par l'art. 960, ne fait peut-être pas une donation au sens strict de ce terme suivant le *Code Civil*; mais il fait une espèce de donation qui entre dans le cadre des actes prévus à l'art. 3(1)(*c*). Qu'il s'agisse, même dans le cas d'une substitution fidéicommissaire ordinaire—et *a fortiori,* dans le cas d'un fidéicommis de la nature de celui qui nous occupe,—d'une espèce de donation, c'est Ricard qui l'affirme dans son Traité des Donations, tome 2, p. 451. Il s'en exprime comme suit:

> .....: de sorte que la remise que fait l'héritier avant le temps au profit du fidéicommissaire, étant une espèce de donation, d'autant que par cette restitution avancée, il a abandonné la jouissance d'un bien qui lui était acquis à juste titre, il semble qu'il n'y ait pas de difficulté à conclure que la donation (l'action) révocatoire doit avoir lieu en cette occasion comme au cas d'une donation pure et simple; et ce, d'autant plus qu'il peut arriver quelquefois que cette restitution prématurée aura non seulement effet pour la jouissance, mais aussi pour la propriété; comme si la substitution étant faite pour avoir lieu au cas de la mort, le fidéicommissaire venait à décéder avant celui qui était chargé de restituer.

Rien de ce que dit Mignault sur l'art. 960 C.C. ne met en doute cet enseignement de Ricard sur lequel, d'ailleurs, il s'appuie particulièrement, en matière de substitution.

Dans la seconde alternative. Si, au contraire, l'acte du 24 août 1951 ne constitue pas une remise anticipée au sens de l'art. 960, on peut bien se demander si l'acte est efficace

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

Fauteux J.

à opérer le transfert ou la délivrance des biens. Mais la réponse à cette question n'affecte pas celle de savoir si, au sens de la Loi fédérale, il y a eu succession. Car s'il y a eu transfert ou délivrance, ce transfert ou cette délivrance équivaut à une donation, au moins dans le sens étendu que l'art. 3(1)(*c*) donne à cette expression. Et, comme ce transfert ou cette délivrance a été fait après le 29 avril 1941 et dans les trois années antérieures au décès de Madame Smith, il y a succession aux termes de ce dernier article. Si, au contraire, il n'y a pas eu de transfert ou de délivrance résultant du DEED OF DECLARATION AND ACCEPTANCE, il s'ensuit que Madame Smith n'ayant pas autrement disposé de ces biens, de son vivant, les intimés les ont recueillis à son décès et non le 24 août 1951; et, dans cette alternative, c'est l'art. 3(4) qui reçoit son application et il y a succession.

En résumé, que l'art. 960 C.C. s'applique ou non, que le DEED OF DECLARATION AND ACCEPTANCE soit efficace ou non au transfert ou à la délivrance des biens, il y a eu succession, soit sous l'art. 3(4) ou soit sous l'art. 3(1)(*c*).

Dans ces vues, il n'est pas nécessaire de poursuivre ultérieurement les autres arguments soumis par l'appelant au soutien de la proposition qu'il y a eu succession.

Je maintiendrais l'appel et rétablirais la cotisation imposée par l'appelant, le tout avec dépens.

ABBOTT J.:—I have had the advantage of considering the reasons of my brother Taschereau with which I am in agreement, and I desire to add only a few brief comments.

I share the view which my brother Taschereau has expressed that the will of the late Edgar Maurice Smith created a substitution *de residuo* and indeed this was the basis upon which the appeal was argued before us. The unlimited power to alienate the substituted property during her lifetime, which was given to the widow as institute, was solely for her benefit and could therefore be renounced by her at any time. In fact, such renunciation was made by the deed of August 24, 1951, and the substitution thereupon

became unconditional. Under the terms of the same document and in virtue of the provisions of art. 960 C.C., the institute also delivered over the substituted property in anticipation of the appointed term.

The institute, some three years prior to her death, having effectively renounced any right to dispose of the substituted property, s. 3(4) of the *Dominion Succession Duty Act* could have no application. It follows, therefore, that in my view, the sole question at issue in this appeal is whether the act of the institute in renouncing her right to alienate and her "delivery" of the substituted property pursuant to art. 960 C.C. comes within s. 3(1)(*c*) of the said Act. That section reads as follows:

> 3. (1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:
>
> * * *
>
> (*c*) property taken under a disposition operating or purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, made on or after the twenty-ninth day of April, one thousand nine hundred and forty-one, and within three years prior to the death of the deceased.

This section which purports to bring into a succession, for duty purposes, property taken under a disposition of property made within three years of the death of the person making such disposition, must of course be strictly interpreted. In order to meet its requirements three conditions must be fulfilled:

(1) There must have been a "disposition" of property within three years prior to the death of the deceased.

(2) Such property must have been *taken* under such disposition.

(3) Such disposition must operate or purport to operate as an immediate gift *inter vivos*.

1960

MINISTER OF NATIONAL REVENUE v. SMITH et al.

Abbott J.

Even if it be assumed—which I think is not free from doubt—that Mrs. Smith's action in (i) renouncing her right to alienate and (ii) delivering the substituted property in anticipation of the appointed term, was a "disposition" of property within the meaning of the section, in my view the other two conditions were not fulfilled. The physical custody of the substituted property had remained at all times with the executors as provided under the will. The substitutes did not take under any disposition made by Mrs. Smith, they took under the will of her late husband. Moreover, in my opinion, the action taken by Mrs. Smith did not operate or purport to operate as an immediate gift *inter vivos*. She exercised no choice in the selection of the persons benefitted, and, in law, they received no benefit from her or from her estate. It follows from what I have said that, in my opinion, s. 3(1)(*c*) could have no application.

I would dismiss the appeal with costs.

*Appeal dismissed with costs,* FAUTEUX *and* JUDSON JJ. *dissenting.*

*Solicitor for the appellant: A. A. McGrory, Ottawa.*

*Solicitors for the respondents: Common, Howard, Cate, Ogilvy, Bishop & Cope, Montreal.*

HER MAJESTY THE QUEEN .....APPELLANT;

AND

BEAVER LAMB AND SHEARLING COMPANY LIMITED (*Suppliant*) RESPONDENT.

1959
*Nov. 30
Dec. 1
1960
Apr. 11

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Excise tax—Taxpayer under mistake of law paid excise on "mouton"—Petition of Right to recover amounts paid—Whether payment made under duress or compulsion—Excise Tax Act, R.S.C. 1927, c. 179 as amended, ss. 80A, 105(1)(5)(6). (Excise Tax Act, R.S.C. 1952, c. 100, ss. 24, 46(1)(5)(6)).*

The respondent company paid the Department of National Revenue $24,605.26 prior to June 30, 1953, as excise taxes on processed sheepskins known as "mouton". In the following September, the Department having threatened legal proceedings five months earlier, the respondent agreed to make a further payment of $30,000 as a final settlement of it tax arrears. In October, 1957, by petition of right, it sought to recover these amounts as having been paid in error, and referred to the 1956 decision of this Court in *Universal Fur Dressers and Dyers Ltd. v. The Queen*, [1956] S.C.R. 632, that "mouton" was not a fur and therefore not subject to excise tax. The claim as to the first amount was dismissed on the ground that it was made voluntarily, and no application for refund had been made within the time specified in the *Excise Tax Act*. As to the second amount, the trial judge found that the respondent was entitled to recover because, on the evidence adduced, it was paid under duress or compulsion. The Crown appealed the latter ruling to this Court.

*Held* (Taschereau J. dissenting): The appeal should be allowed.

*Per* Kerwin C.J., Fauteux and Ritchie JJ.: The payment in question was made long after the alleged, but unsubstantiated, duress or compulsion. It was paid under a mistake of law, and no application for a refund was made in writing within the two year time limit as prescribed by s. 105(6) of the *Excise Tax Act*.

In notifying the insurance companies and the respondent's bank not to pay over any moneys due to it, the Department was merely proceeding according to the authority given it by the Act.

*Per* Locke and Ritchie JJ.: The respondent carried out a calculated and deliberate plan to defraud the Crown of moneys which it believed were justly payable. A compromise was agreed upon fixing the amount to be paid at $30,000. In the absence of any evidence on the matter, it could not be inferred that the threat made by an officer of the Department either induced or contributed to inducing or influenced the payment of the $30,000. The moneys clearly were paid under a mistake of law and were not recoverable. *Brisbane v. Dacres*, 5 Taunt. 143, referred to.

*PRESENT: Kerwin, C.J. and Taschereau, Locke, Fauteux and Ritchie JJ.

1960

THE QUEEN
v.
BEAVER LAMB AND SHEARLING CO. LTD.

*Per* Ritchie J.: Whatever may have been the nature of the threats exerted by the Department the payment of the $30,000 was not made "under immediate necessity and with the intention of preserving the right to dispute the legality of the demand" and it could not be recovered as money paid involuntarily or under duress.

*Per* Taschereau, J., *dissenting:* The respondent did not make the $30,000 payment voluntarily. Threats of imprisonment and actual seizures of bank account and insurance moneys were made to bring about the settlement. This kind of pressure amounted to duress, *Maskell v. Horner,* [1915] 3 K.B. 106, *Knutson v. The Bourkes Syndicate,* [1941] S.C.R. 419. S. 105 of the *Excise Tax Act* did not apply, as that section finds its application only when the payment has been made as a result of mistake of law or fact. Such was not the case here.

APPEAL from a judgment of Cameron J., of the Exchequer Court of Canada[1], granting in part a petition of right. Appeal allowed.

*D. S. Maxwell* and *D. H. Aylen,* for the appellant.

*H. J. Plaxton, Q.C.,* and *R. H. McKercher,* for the suppliant, respondent.

The judgment of the Chief Justice and of Fauteux J. was delivered by

THE CHIEF JUSTICE:—The substantial point in issue in this appeal is whether a payment by the respondent of a sum of $30,000 was made under duress or under compulsion. I have arrived at the conclusion that it was not so made.

The circumstances are detailed elsewhere and I do not propose to repeat them. For my purpose it is sufficient to emphasize that such payment was made long after the alleged duress or compulsion. The basis for the allegation is the evidence of Berg, the respondent's president, that in April 1953, in a conversation with the Assistant Deputy Minister of Excise the latter "took the attitude that he was definitely out to make an example of me in this case. He said: 'The situation has been prevalent in the industry for many years,' He said he is taking this case and making an example if he has to prosecute to the fullest extent." It is true that the Assistant Deputy Minister of Excise was not called to deny the alleged statement and, while the trial judge found Berg unworthy of credence in several respects when his testimony was contradicted by that of others, he found that in this particular case Berg was telling the truth.

[1] [1958] Ex.C.R. 336, 59 D.T.C. 1089.

I proceed on the assumption that Berg did tell the truth as to what he was told in April 1953, but even so I find it impossible to believe that that conversation had any effect on the settlement arrived at in September 1953. Furthermore when the petition of right in this matter to recover a large sum of money, including the $30,000 in question, was filed on October 31, 1957, no such claim as that now before us was raised. That was done only on September 25, 1958, at the commencement of the trial.

According to the judgment of this Court in *Universal Fur Dressers and Dyers, Limited v. Her Majesty the Queen*[1] it was held that there was no excise tax payable upon mouton. It was long before this that the $30,000 had been paid. That sum was paid under a mistake of law and, furthermore, under subs. (6) of s. 105 of The Excise Tax Act, no application for a refund was made in writing within two years after the money was so paid. Subs. (6) reads as follows:

> 6. If any person, whether by mistake of law or fact, has paid or overpaid to Her Majesty, any monies which had been taken to account, as taxes imposed by this Act, such monies shall not be refunded unless application has been made in writing within two years after such monies were paid or overpaid.

These conclusions dispose of all matters in controversy, except for the defence raised by the amendment at the trial, which, in my view, cannot be substantial.

The other claims raised by the respondent were disposed of by the trial judge quite properly against it. Before us it was stressed that there was duress because the Department notified the insurance companies and the respondent's bank not to pay over any monies due to it. No such claim was ever alleged but, in any event, what the Department did was merely to proceed according to the authority given it by the Act.

Each case must be decided on its particular facts and there is nothing inconsistent in this conclusion and that arrived at in *Maskell v. Horner*[2] and *Knutson v. The Bourkes Syndicate et al*[3].

[1] [1956] S.C.R. 632, 56 D.T.C. 1075.
[2] [1915] 3 K.B. 106.
[3] [1941] S.C.R. 419, [1941] 3 D.L.R. 593.

1960

THE QUEEN v. BEAVER LAMB AND SHEARLING CO. LTD.

Kerwin C.J.

The appeal should be allowed with costs and the petition of right dismissed with costs.

TASCHEREAU J. (*dissenting*):—The suppliant-respondent is a company incorporated under the laws of the Province of Ontario, having its head office at Uxbridge. The nature of its business was the processing of shearlings and lambskins. Shearlings are sheepskins that have been shorn. The wool is clipped off and used for lining in garments, galoshes, etc. When the wool is left on the skin, after being processed, it is transformed in what in the trade is called "mouton".

Shearlings were not at the relevant time excise taxable, but it was thought that "mouton" was attracting such a tax, under s. 80(A) of the Excise Tax Act as amended, which reads in part as follows:—

"80(A). (1) There shall be imposed, levied and collected, an excise tax equal to fifteen per cent of the current market value of *all dressed furs, dyed furs and dressed and dyed furs,*—

(i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer; or

(ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him.

(2) Every person liable for taxes under this section shall, in addition to the returns required by subsection one of section one hundred and six of this Act, file each day a true return of the total taxable value and the amount of tax due by him on his deliveries of dressed furs, dyed furs, and dressed and dyed furs for the last preceding business day, under such regulations as may be prescribed by the Minister.

(3) The said return shall be filed and the tax paid not later than the first business day following that on which the deliveries were made."

From June 1951, to the end of June 1953, the respondent paid to the Department of National Revenue, Customs and Excise Division, a sum of $24,605.26. It is clear that the respondent company made false returns to the Department, and billed "mouton" products which were thought taxable, as "shearlings" products which were not subject to taxation. Mr. Berg, who was the president of the respondent company, is quite frank on this point and does not try to escape his responsibility. In his evidence, he says:—

"Q. Now, Mr. Berg, I understand that during 1951 and 1952, it frequently developed that excise tax returns supplied to the department by Beaver Lamb and Shearling were not correct and falsified. Is that a correct statement?

A. Yes.

Q. That being so do you assume any responsibility for that result?

A. Yes.

Q. I see. Now, would you be good enough to tell me just what you did in that connection?

A. We sent out mouton products and billed them as shearlings.

BY HIS LORDSHIP:

Q. Would you repeat that?

A. We sent out mouton products and billed them as shearlings.

Q. To your knowledge?

A. Yes, sir.

BY MR. MAXWELL:

Q. Why did you do this?

A. It was quite prevalent in the industry, and other firms were doing the same procedure and we had to stay in business."

On or about the first week of June, 1953, the respondent was informed by Mr. Phil Duggan, president of Donnell and Mudge, a company operating the same business as the respondent's, that they were claiming with others a refund for excise taxes paid to the Department of National Revenue on "mouton", as in their opinion, "mouton" not being *a fur,* but a *processed product of a wool-bearing animal,* was not subject to excise tax under 80(A) of the Act. The respondent was asked to join with them, and it was suggested that it should write a letter to the Department claiming such a refund.

In the meantime, the Department had, on the 13th of April 1953, before the Exchequer Court of Canada, sought to recover from the Universal Fur Dressers and Dyers Limited, $573.03 alleging that the defendant being a dresser and dyer of furs, was liable for the tax. It was held by this Court[1], reversing the judgment of the Exchequer Court, that the merino sheep is a wool-bearing animal and not a fur-bearing one, that its skin although with the wool attached is not a fur, and is not, and could not be, transformed into a fur by the processes to which it was subjected. It is obvious that this applied not only to "mouton", but also to "shearlings".

The respondent discontinued making any further daily and monthly reports at the end of June, and in July its premises were destroyed by fire, and the company ceased to operate.

During the course of a routine audit, carried out by one Thomas G. Belch, an auditor employed by the Department of National Revenue, in March 1953, very wide fluctuations

[1] [1956] S.C.R. 632.

1960

THE QUEEN v. BEAVER LAMB AND SHEARLING CO. LTD.

Taschereau J.

in the respondent's inventory were discovered, and further investigations revealed a scheme of operations whereby the respondent's invoices were prepared so as to indicate sales of shearlings where, in fact, mouton had been sold. In April, 1953, the Department issued an assessment against the respondent in the amount of $61,722.20 including penalties, over and above the amount of $24,605.26 which it had already paid.

Following receipt of the assessment, Berg, the president of the respondent company, went to Ottawa to see a high official of the Department. He returned a second time with a Montreal lawyer, but obtained no practical results. Finally, a Toronto lawyer succeeded in obtaining a final settlement on the 15th of September, 1953, upon payment of a sum of $30,000. It was also understood that the company would be prosecuted for having made false returns, would plead guilty, pay a penalty of $10,000 and a fine of $200. All this was complied with.

In October, 1957, the respondent, by petition of right, claimed from Her Majesty the sum of $54,605.26, being $24,605.26 paid up to June, 1953, and $30,000 paid in final settlement in September of the same year. Mr. Justice Cameron, in the Exchequer Court, dismissed the claim for $24,605.26, but granted the relief prayed for as to the $30,000.

The claim as to the first amount was dismissed on the ground that the payment was made voluntarily and that, in the alternative, in order to succeed, the respondent should have made, pursuant to s. 105 of the Act, an application to obtain such refund within a period of two years. The relevant parts of this section read as follows:—

"105. 1. A deduction from, or refund of, any of the taxes imposed by this Act may be granted

(*a*) where an overpayment has been made by the taxpayer;

(*b*) where the tax was paid in error;

6. If any person, whether *by mistake of law or fact,* has paid or overpaid to Her Majesty, any monies which had been taken to account, as taxes imposed by this Act, such monies shall not be refunded unless application has been made in writing within two years after such monies were paid or overpaid.

5. No refund or deduction from any of the taxes imposed by this Act shall be paid unless *application in writing for the same is made by the person entitled therto within two years* of the time when any such refund or deduction first became payable under this Act, or under any regulation made thereunder."

The trial judge found as a fact, after analysing all the evidence, that no "application" had been made within the period of two years, and that, therefore, the respondent was barred from recovering this sum of $24,605.26. But this issue is immaterial before this Court, as the respondent did not cross-appeal, and the matter is therefore finally settled.

But, the respondent alleges that it is entitled, as found by the trial judge, to a refund in the amount of $30,000 because, on the evidence adduced, it was made *under duress or compulsion.* There is no doubt that when an act is done under duress, under constraint, by injury, imprisonment or by threats, it is invalid. Coercion and compulsion negative the exercise of a free will, and vitiate a consent given under the fear that the threats will materialize. The parties then do not deal on equal terms.

When the president of the respondent company received the additional assessment in April, 1953, in the sum of $61,722.20, he immediately went to Ottawa where he saw a high official of the Department, and he was flatly told that he would be, as well as his bookkeeper, *criminally prosecuted and sent to jail.* This is how Berg testifies:

"He said to me 'Berg, I am very sorry for you, but I intend to prosecute you as this has been going on too long in this industry and it is unfortunate you have to be the one'. He said *'Unless we get fully paid, if I have to we will put you in gaol'."*

And, as to his bookkeeper, Berg says in his evidence:—

"Q. What did you infer from the remarks of these two auditors when they spoke of prosecuting Mrs. Forsyth?

A. Because she signed falsified returns.

Q. Did they indicate that it was a matter of civil proceedings or criminal?

A. Criminal.

BY HIS LORDSHIP:

Q. What did they say?

A. They said she could be prosecuted for signing falsified returns and was liable for imprisonment."

Further in his evidence, Berg, speaking of his first interview with the official of the Department, testifies as follows:—

"Q. And what position did he take in regard to your representations in that connection?

1960

THE QUEEN v. BEAVER LAMB AND SHEARLING CO. LTD.

Taschereau J.

A. He took the attitude that he was definitely out to make an example of me in this case. He said: 'This situation has been prevalent in the industry for many years'. He said he is taking this case and making an example if he has to *prosecute* to the fullest extent."

Some time later, the president of the respondent company, accompanied by his Montreal lawyer, went to see another official of the Department. This official spoke to a higher authority and reported that "he was very sorry but he could not do anything for us. It was out of his hands; they definitely intended to take the *fullest measures to make an example in this case.*"

At that time, which was approximately at the end of April, 1953, *the respondent company owed nothing to the Department.* "Shearlings" were not taxable, but it was thought erroneously that "mouton" was, as the decision of this Court in the *Universal Fur Dressers* case had not yet been rendered. But Berg had previously made the mistake of making false returns by billing as "shearlings" part of the merchandise which he had sold as "mouton".

Berg then contacted the Toronto lawyer previously referred to, who endeavoured to settle with the Department, and while the negotiations were being carried out in Ottawa, another pressure was exercised upon Berg. After the fire which destroyed the respondent's premises at the end of July, 1953, the Department seized the bank account and the insurance monies, until the amount claimed was fully paid. It is true that, in certain cases under the Act, the appellant has the right to exercise such a recourse, but in the present case, it is obvious that this move coupled with the previous threats that had been made, substantially added to respondent's fears and embarrassment.

Finally, a settlement was arrived at in September, 1953. The respondent paid $30,000, the company was prosecuted *and not Berg personally,* for making false returns, a penalty, as agreed upon, amounting to $10,000, and a fine of $200, were imposed and paid.

After a thorough examination of all the evidence, I have come to the conclusion that this appeal must fail. I am firmly convinced that the respondent did not pay this amount of $30,000 voluntarily, as claimed by the appellant, and that the trial judge was right when he negatived that

submission. Duress and pressure were exercised by threats of imprisonment and actual seizures of bank account and insurance monies were made to bring about the settlement to which Berg eventually consented. In his uncontradicted evidence, he says:—

"BY MR. MAXWELL:

Q. Yes; I think, my Lord, that is it. Now, I want to talk for a moment about the $30,000 that was paid apparently some time in September 1953. Why was that $30,000 paid?

A. To relieve the pressure that the department brought to bear, that they intended to put me in gaol if I did not pay that amount of money.

BY HIS LORDSHIP:

Q. Would you repeat that.

A. The department threatened to put me in gaol if there was not a complete settlement made at that time and rather than have them take further action we settled for that."

It flows from well regulated principles that this kind of pressure to which the president of the respondent company was subject, amounts to duress, that it was a direct interference with his personal freedom and that, therefore, the agreement which resulted was not an expression of his free will. He obviously feared imprisonment and the seizure of his bank account and insurance monies for an indefinite period of time.

To support my views, I refer to what has been said by Lord Reading in *Maskell v. Horner*[1],

"Upon the second head of claim the plaintiff asserts that he paid the money not voluntarily but under the pressure of actual or threatened seizure of his goods, and that he is therefore entitled to recover it as money had and received. If the facts proved support this assertion the plaintiff would, in my opinion, be entitled to succeed in this action.

If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction (per Lord Abinger C. B. and per Parke B. in *Atlee v. Backhouse*, 3 M & W. 633, 646, 650). The payment is made for the purpose of averting a treatened evil and is made not with the intention of giving up a right but under immediate

[1] [1915] 3 K.B. 106 at 118.

1960

THE QUEEN v. BEAVER LAMB AND SHEARLING CO. LTD.

Taschereau J.

necessity and with the intention of preserving the right to dispute the legality of the demand (per Tindal C.J. in *Valpy v. Manley*, 1 C.B. 594, 602, 603). There are numerous instances in the books of successful claims in this form of action to recover money paid to relieve goods from seizure."

The law, as so clearly stated by the Court of Appeal of England, applies in the instant case. See also *Knuston v. The Bourkes Syndicate*[1] where Mr. Justice Kerwin (now Chief Justice of Canada) reviews the leading authorities.

The appellant also relies on s. 105 of the Excise Act which is to the effect that no relief may be granted by the Courts, if no application in writing has been made within two years. This provision of the law surely applies to the amounts that were paid previous to the 30th of June, 1953, as found by the learned trial judge, but surely not to the payment of $30,000 paid *under duress or compulsion.* This section finds its application only when the payment has been made as a result of *a mistake of law or fact.* This is not the case here.

In the result, I entirely agree with the findings of Mr. Justice Cameron, and particularly with the last two paragraphs of his reasons where he says[2]:—

"In the instant case, I have no hesitation in finding on the uncontradicted evidence of Berg that the payment of $30,000 was made under duress or compulsion. It will be recalled that legal proceedings were threatened against the suppliant, that Berg was threatened with imprisonment, that the main assets of the company namely, its bank account and its right to receive payment from the fire insurance company—were under seizure by the Department. There is no evidence to indicate that up to the time of the settlement, the officials of the Department had withdrawn their threats of criminal proceedings against Berg. The seizure of the bank account and of the insurance monies remained in effect until after the payment of $30,000 was made; and the Department insisted as a term of the settlement that the suppliant should be charged and would plead guilty to making fraudulent returns.

As has been stated above, the demand for payment of the taxes was illegal. For the reasons stated, I am of the opinion that the payment of $30,000 was not a voluntary payment but was made under duress or compulsion and that the suppliant is therefore entitled to recover that sum from the respondent."

The appeal should be dismissed with costs.

LOCKE J.:—The petition of right in this matter was filed on October 31, 1957 and by it the respondent sought to recover a sum of $24,605.27, said to have been paid by it

[1] [1941] S.C.R. 419, [1941] 3 D.L.R. 593.
[2] [1958] Ex. C.R. 336, 353.

as excise taxes on the delivery of mouton on and prior to June 1st, 1953, and a further sum of $30,000 "as and on account of excise taxes relative to delivery of like products" said to have been paid on February 11, 1954. The basis of the claim for the recovery of these amounts as pleaded was that they had been paid in error, without specifying the nature of the error, and it was said that a refund of the said amounts had been demanded on or about June 1, 1953. It was further alleged that, by a judgment of this Court delivered on June 11, 1956 in the case of *Universal Fur Dressers and Dyers Ltd. v. Her Majesty The Queen*,[1] it had been decided that excise tax was not payable upon mouton.

By the defence filed on November 29, 1957 these various allegations, other than that relating to the judgment of this Court which was referred to, were put in issue and, alternatively, it was alleged that if any of the said sums were paid by mistake such payments were made under a mistake of law and were paid voluntarily.

It was not until the trial that the petition of right was amended to include an alternative claim that the sum of $30,000 was paid to the Department of National Revenue involuntarily and under duress, such duress consisting of the threat of criminal proceedings and the imposition of large penalties and fines against the suppliant and the president thereof. It was further claimed that the sum was paid under protest. This amendment was made on September 25, 1958.

The allegations made by this amendment were put in issue by amendments made to the statement of defence. The amended pleading alleged that the sum of $30,000 had been paid voluntarily by the respondent with a view of settling its excise tax liability with the Department and that effect had been given to the settlement by order-in-council.

The statute under which the excise tax referred to was imposed appears as c. 179, R.S.C. 1927, under the name of *The Special War Revenue Act*. In 1947, by c. 60, the name was changed to *The Excise Tax Act*. The Act, as originally passed, imposed, *inter alia*, a consumption or sales tax on a variety of goods produced or manufactured in Canada, and by s. 106 a person liable for tax under Part XIII of the Act

[1] [1956] S.C.R. 632, 56 D.T.C. 1075.

1960

THE QUEEN v. BEAVER LAMB AND SHEARLING CO. LTD.

Locke J.

was required to file each month a true return of his taxable sales for the last preceding month in accordance with regulations made by the Minister. The Act has been repeatedly amended. By c. 32 of the Statutes of 1942-43 s. 80A was added which imposed an excise tax equal to 25% of the current market value of furs dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him, and required that every person liable for taxes under this section should, in addition to the monthly returns required by s-s.(1) of s. 106, file each day a true return of the total taxable value and the amount of the tax due by him on his deliveries of dressed and dyed furs for the last preceding day, such returns to be filed and the tax paid not later than the last business day following that on which the goods were delivered.

By c. 60 of the Statutes of 1947 the rate of the tax was reduced and s. 112 of the Act was repealed. The section which was substituted provided that every person required by, or pursuant to, any part of the Act (with an exception that is immaterial) to file a return, who failed to do so was guilty of an offence and liable to a penalty. Further, it was provided that when a return is filed as required "every person who makes, or assents or acquiesces in the making of, false or deceptive statements in the return, is guilty of an offence" and liable to a prescribed penalty. By the same enactment an amendment to s. 113(9) was made declaring, *inter alia,* that any person making, or assenting or acquiescing in the making of, false or deceptive entries in books as records of account required to be kept was guilty of an offence.

During the period between June 1st, 1951 and June 30, 1953 the respondent paid to the Department of National Revenue a sum of $24,605.26 as excise tax payable upon mouton sold during that period. The learned trial judge held as a fact that this money was paid under a mistake of law and that no application for a refund had been made by the respondent within two years of the time when such refund might have become payable and that, accordingly, by virtue of s. 105(6) of the Act, the claim failed. As there is no cross-appeal, this aspect of the case need not be further considered.

The claim for the refund of the sum of $30,000 is based entirely upon the facts alleged in the amendment to the petition, and to deal with the matter requires some extended reference to the evidence.

On February 5, 1953 Thomas G. Belch, an excise tax auditor employed by the Department of National Revenue, examined the records of the respondent company for the purpose of verifying the taxes which had been paid. In doing so he found that, according to the company's records, they had sold some 20,000 to 23,000 skins more than they had available for sale. A subsequent investigation showed that the respondent had over a long period been selling mouton which was considered to be subject to the excise tax but showing on its own records that the sales were of shearlings, which were in value only about one-half that of mouton and which were not subject to the tax.

In order to carry out this fraudulent scheme it was necessary for Herbert Berg, the president of the respondent company, to have the assistance of Mrs. Marie Forsyth, the bookkeeper and stenographer for the respondent, who typed the sales invoices. In addition, Berg had apparently the co-operation of numbers of firms who purchased mouton from the respondent. The procedure followed with such firms was to show the goods delivered as being shearlings on the invoice delivered and upon the duplicate retained and, as these skins were free of excise, such sales were excluded from the daily and monthly returns made to the Department. In the case of certain customers who were not co-operating with the respondent in perpetrating the fraud, while the original sales invoice rendered to the customer showed purchases of mouton as being such, Mrs. Forsyth would place in the company's records what purported to be a second copy of the invoice showing the sale as being of shearlings and the taxable value of the mouton delivered was then omitted from the daily and monthly returns. This was an offence against s. 113 (9) of the Act.

Apparently, the original returns which were made for the period in question were filed in the Police Court when the criminal charge hereinafter mentioned was heard by the presiding magistrate and, in some unknown manner, these records disappeared and were not available at the time

1960

THE QUEEN v. BEAVER LAMB AND SHEARLING CO. LTD.

Locke J.

of the trial of the action. From the date of the discovery of these frauds, however, the Department of National Revenue insisted that the daily and monthly returns made by the respondent to the Department which showed the total taxable value of the goods delivered should be signed by Berg personally instead of by Mrs. Forsyth, as had been done during the period when the taxable values were falsely stated. These returns were made upon a form specified by the Department for making excise tax returns and showed in each case the total taxable value of the goods delivered and the amount of excise tax paid or payable in respect of such sales. At the foot of each form there appears a form of certificate whereby an official of the company is required to certify that the amount stated truly represents all the tax due on furs dressed and/or dyed delivered on the date or during the month for which the return is made.

Between April 1, 1951 and January 31, 1953 the payment of excise taxes in an amount of $56,082.60 on mouton delivered was avoided in the above mentioned manner. On April 7, 1953 the Department of National Revenue demanded payment of the sum of $61,722.36 for excise tax on deliveries made on April 14 and 15, 1953, and a sum of $4,502.16 for penalties.

Berg apparently before retaining a lawyer came to Ottawa and it was during a discussion he then had with Mr. V. C. Nauman, Assistant Deputy Minister of Excise, according to Berg, that Nauman told him that he intended to prosecute him and that "unless we get fully paid if I have to we will put you in gaol", and said that this situation had been prevalent in the industry for many years, presumably meaning the making of false returns to avoid the payment of excise tax, and that he intended to make an example "if he has to prosecute to the fullest extent." This conversation appears to have taken place shortly after the receipt of the demand of April 17. On cross-examination, when asked why the $30,000 had been paid in September, he said it was to "relieve the pressure that the department brought to bear, that they intended to put me in gaol if I did not pay that amount of money." Thereafter, Berg said that he retained a

Montreal solicitor who endeavoured apparently to settle the matter, and later at some unspecified date retained Mr. David Croll, Q.C. to act for the respondent.

The only evidence given as to the negotiations which resulted in the claim for excise taxes being settled is a copy of a letter written by the Deputy Minister of Excise to Mr. Croll dated September 15, 1953, which acknowledged the receipt of three certified cheques totalling $30,000 and said that:—

> at our last meeting it was agreed that Berg would plead guilty to a charge of evasion in the amount of the $5,000 in behalf of his company, Beaver Lamb & Shearling Co. Limited. The penalty which the Court will impose will be double the amount of the $5,000 plus a fine of from $100 to $1,000. The Department, however, will be satisfied with a fine of $200 or $300. You asked this morning that the action (sic) be taken against the company instead of Berg personally but you said that there would be no question about his pleading guilty to the charge.

Neither Mr. Croll nor the Deputy Minister gave evidence.

On October 23, 1953 an Information was laid by Belch on behalf of the Minister against the respondent company, charging that between the 1st day of August 1952 and the 6th day of October 1952 the respondent:—

> did make or assent or acquiesce in the making of false or deceptive statements in the monthly sales and excise tax returns of Beaver Lamb and Shearling Co. Ltd. required to be filed by the Excise Tax Act. . . contrary to section 112(2) of the said Act.

the false returns alleged to have been made being for the months of August and September 1952. To this charge Berg pleaded guilty on behalf of the company in the Toronto Police Court on November 14, 1953 when a penalty in the sum of $10,000, being double the amount of the tax evasion charged, and a fine of $200 were imposed. Thereafter, by order-in-council made on January 31, 1954 under the provisions of s. 22 of the *Financial Administration Act*, c. 116 R.S.C. 1952, c. 116, the sums of $17,859.04 excise taxes and $7,587.34 interest and penalties were remitted.

Nauman was not called as a witness on behalf of the Crown and the evidence given by Berg as to the threats made to him in April is not contradicted by any oral evidence. The mere fact, however, that this statement was said by Berg to have been made is not, in my opinion, in the circumstances of this case decisive of the matter.

1960

THE QUEEN v. BEAVER LAMB AND SHEARLING CO. LTD.

Locke J.

It is to be borne in mind that Berg was throughout the period between April 1st 1951 and January 31, 1953, during which time this scheme was carried out, of the belief that excise tax was payable upon mouton delivered by the company and that it was a calculated and deliberate plan to defraud the Crown of moneys which he believed were justly payable, a fact which he admitted at the trial. It was upon his instructions that Mrs. Forsyth made false returns to the Department of National Revenue during this period and recorded sales of mouton as shearlings for the purpose of perpetrating the fraud. This fact was also acknowledged by Mrs. Forsyth to Inspector Simmons of the Ontario Fire Marshal's Office, during the course of his enquiry into the fire which destroyed the respondent company's premises at Uxbridge on January 19, 1953 and, while Mrs. Forsyth denied that she had made these statements to the Inspector and that she had admitted to Belch that she knew the returns that were made were false, the learned trial judge did not believe her and said that he accepted the evidence of Simmons and Belch wherever it conflicted with that of Mrs. Forsyth and Berg. The latter had sworn to the fact that in June 1953 he had written a letter to the Department of National Revenue demanding a refund of the taxes paid on mouton prior to June 1, 1953 and Mrs. Forsyth had sworn that she had typed and mailed the letter making the application, but it was shown that no such letter was received by the Department. Cameron J. said that he did not believe either of them. Berg swore positively that he was not present in the Police Court in Toronto on November 14, 1953, when the plea of guilty was entered on behalf of the respondent company, but Belch and Mr. E. F. Denton, an excise tax auditor for the Department, were present and swore that he was there.

In view of the learned trial judge's finding that the evidence of the witness Berg is unworthy of belief, the question as to whether the statement said to have been made in April by Nauman induced or contributed to inducing the respondent to make the payment of the sum of $30,000 five months later is a matter to be determined by such inferences as may properly be drawn from the scant evidence that is available.

It is to be remembered that the claim to recover the money on the footing that it was paid in consequence of the threats appears to have been an afterthought which was introduced into the case only at the commencement of the trial, nearly a year after the petition of right was filed. Up to that time it appears to have been assumed that the fact that the moneys had been paid in the mistaken belief that mouton was subject to excise tax was a sufficient basis for recovery, even though that mistake was one of law. If it be accepted that the threats were in fact made by Nauman, they were made in the month of April and it was not until nearly five months thereafter that the settlement was made.

According to Berg, the amount claimed in the Notice of Assessment sent to the respondent in April 1953, which showed the sum payable including penalties and interest as being $61,722.36, was excessive and included excise tax upon shearlings delivered in respect of which no tax was payable. This directly conflicts with the evidence of Belch. The respondent, however, elected not to give any evidence as to the negotiations between its solicitor and the Deputy Minister, other than that afforded by the letter of September 15, 1953 above mentioned.

In the absence of other evidence, I would infer that the liability of the respondent for excise taxes on the quantities of mouton delivered during the period was admitted by Mr. Croll and a compromise was agreed upon fixing the amount to be paid at $30,000 for reasons which do not appear and with which we are not concerned. It is perfectly clear that the solicitor was informed that the Crown proposed to lay an Information against Berg for breaches of s. 112(2) of the *Excise Tax Act* and to propose to the magistrate that a penalty of $10,000 and a fine should be imposed, and that it was at the request of the solicitor that the Deputy Minister had agreed that the Information should be laid against the respondent company rather than against Berg. The civil claim of the Crown for the taxes which Berg, the respondent's solicitor and the Deputy Minister believed to be payable and the criminal offences which had admittedly been committed under Berg's instructions were entirely

1960

THE QUEEN v. BEAVER LAMB AND SHEARLING CO. LTD.

Locke J.

distinct matters. Berg disclaimed any knowledge of the negotiations carried on by the respondent's solicitor who made the arrangements on its behalf.

In the absence of any evidence on the matter, we are asked to infer that the threat which had been made by Nauman in the previous April either induced or contributed to inducing or influenced Mr. Croll to agree to the payment of the sum of $30,000 in September, a compromise which on the face of it was a most favourable one for the respondent. For my part I refuse to draw any such inference.

It is apparently the fact that after the fire which destroyed the respondent's premises at Uxbridge the Department notified the insurance companies and the respondent's bank at Uxbridge not to pay over any moneys due to the respondent, this being done under the provision of s. 108(6) of the *Excise Tax Act*. It is suggested in argument that in some way this amounted to duress. However, this is not pleaded and the matter was not in issue at the trial and need not be considered.

There is no pretense that the moneys claimed were paid under protest, as would undoubtedly have been the case had Berg written the letter in June 1953 claiming a refund of the amounts paid which was the subject of part of the claim. A mere demand as of right for payment of money is not compulsion and money paid in consequence of it, with full knowledge of the facts, is not recoverable (*Brisbane v. Dacres*[1]; *Barber v. Pott*[2]).

These moneys clearly were paid under a mistake of law and are, in my opinion, not recoverable.

I would allow this appeal with costs and dismiss the petition of Right with costs.

RITCHIE J.:—The facts of this case have been thoroughly reviewed in the reasons of other members of the Court, all of which I have had the benefit of reading.

As the Chief Justice has said, the substantial point in issue in this appeal is whether the $30,000 paid by the respondent to the Department of National Revenue in September 1953 was paid involuntarily and under duress or compulsion.

[1] (1813), 5 Taunt. 143.

[2] (1859), 4 H. & N. 759, 768.

The evidence indicates that the Department exerted the full pressure which the fraudulent action of the respondent's president and the provisions of the statute then thought to be applicable made available to it, but I am of opinion that even if this pressure did have any effect on the final settlement such effect was limited to hastening the conclusion of the transaction and was, in no sense, the reason for the respondent's recognition of the right to tax "mouton" which was at all times accepted wrongly, as the event turned out, by both parties.

The following excerpt from Mr. Berg's evidence at p. 33 of the Appeal Case clearly indicates that his objection to paying the full assessment of $61,722.36 which was originally claimed was based on the contention that this amount wrongly included taxes in respect of "shearlings" which were not subject to tax:

BY HIS LORDSHIP:

Q. I am not clear about that. You were processing shearlings. Are they young sheep?

A. Yes, sir.

Q. And you were processing mouton?

A. Yes, sir; from the sheepskins.

Q. And is it something different?

A. Yes.

Q. You were protesting part of the assessment. Were you doing anything other than processing shearlings so as to produce mouton?

A. No.

Q. That is all?

A. Yes.

Q. *Then you were protesting only part of the assessment?*

A. That assessment they gave me for $61,000.00 which was not correct.

Q. *What part?*

A. *It was that they claimed I should have paid excise tax on all the products which I manufactured.*

Q. What were you manufacturing other than mouton?

A. *Just shearlings and mouton. Shearlings were not excise taxable; mounton was.*

Q. *Are you protesting that the assessment you received included both shearlings and mouton?*

A. *Yes, sir.*

Q. *You protested shearlings as not being within Section 80(A)?*

A. Yes. (The italics are mine.)

In this regard it is of interest to record the following finding of the learned trial judge:

It will be noted that the item of $30,000 now claimed, while less than the total amount originally claimed by the Department, relates entirely to taxes which the suppliant by its fraudulent records and returns had endeavoured to escape paying.

1960

THE QUEEN v. BEAVER LAMB AND SHEARLING CO. LTD.

Ritchie J.

It seems to me to follow from this finding that the $30,000 in question was money which was thought to be justly due to the Department and which the suppliant had endeavoured to escape paying.

The case of *Brocklebank, Limited v. The King*[1], is cited by the learned trial judge as an authority applicable to the present circumstances and he draws particular attention to the language used by Bankes L.J. at pp. 61-62 in holding that the money there paid was recoverable:

> The payment is best described, I think, as one of those which are made grudgingly and of necessity, but without open protest, because protest is felt to be useless.

That decision is based in part on the fact that the money was paid to an official *colore officii* as is disclosed by the following observation of Scrutton L.J. in the Court of Appeal where he said at p. 67:

> Further, I am clear that the payment by the petitioners in this case was not a voluntary payment so as to prevent its being recovered back. It was demanded by the Shipping Controller colore officii, as one of the only terms on which he would grant a licence for the transfer.

In this regard it seems appropriate to refer to what was said by Macdonald J.A., speaking in the same connection on behalf of the Court of Appeal of British Columbia in *Vancouver Growers Limited v. Snow Limited*[2], where he said:

> If payments made pursuant to an invalidated Act are to be regarded as made involuntarily because presumably the parties making the payments were not on equal terms with the authority purporting to act under the statute it may be difficult to procure officials willing to assume the necessary risk. A declaration of invalidity may be made after many years of operation and large amounts might be recoverable if it is enough to show in a literal sense that "the payments were made under circumstances which left the party no choice," or that "the plaintiff really had no choice and the parties . . . were not on equal terms." Every Act for taxation or other purposes, whether valid in fact, or for the time being thought to be valid, compels compliance with its terms under suitable penalties. The payee has no choice and the authorities imposing it are in a superior position. It does not follow, however, that all who comply do so under compulsion, except in the sense that every Act imposes obligations, or that the respective parties in the truest sense are not "on equal terms." It should be assumed that all citizens voluntarily discharge obligations involving payments of money or other duties imposed by statute.

[1] [1925] 1 K.B. 52.
[2] [1937] 4 D.L.R. 128, 131, [1937] 3 W.W.R. 121, 52 B.C.R. 32.

In that case there was no threat of imprisonment and no freezing of any of the plaintiff's assets, but what was said in that judgment is nonetheless pertinent in considering the extent to which the fact that the demand in the present case was made by officials of the Department is to be treated as giving rise to a situation in which the payment may be considered involuntary. The case has particular relevance to the circumstances here disclosed in that the statute there in question had been invalidated by a subsequent decision of the courts just as the provisions of *The Excise Tax Act* under which the present assessment was made were subsequently found to be inapplicable to "mouton" (see *Universal Fur Dressers & Buyers Limited v. The Queen*[1],).

The generally accepted view of the circumstances which give rise to an action for the return of money paid under pressure or compulsion is expressed by Lord Reading in the case of *Maskell v. Horner*[2], which has been approved by this Court in *Knutson v. Bourkes Syndicate*[3], and *The City of Saint John et al. v. Fraser-Brace Overseas Corporation et al.*[4]

In my view the whole of Lord Reading's decision in that case must be read in light of the following description of the reasons for holding that such a payment can be recovered. Lord Reading there said at p. 118:

> Payment under such pressure establishes that the payment is not made voluntarily to close the transaction. . . . The payment is made for the purpose of averting a threatened evil *and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand* . . . .
>
> (The italics are mine.)

In the present case, according to Mr. Berg's own testimony, as soon as he received the assessment of $61,722.36 he came to Ottawa to protest it on the ground that it included a tax on "shearlings" and he was then met by the threat "unless we get fully paid, if I have to we will put you in gaol." If such full payment had at once been made pursuant to this statement, then it might indeed be said to have been

[1] [1956] S.C.R. 632, 56 D.T.C. 1075.
[2] [1915] 3 K.B. 106.
[3] [1941] S.C.R. 419, [1941] 3 D.L.R. 593.
[4] [1958] S.C.R. 263, 282, 13 D.L.R. (2d) 177.

1960

THE QUEEN v. BEAVER LAMB AND SHEARLING CO. LTD.

Ritchie J.

made "for the purpose of averting a threatened evil", but this is not what happened. On the contrary, the interview at which this statement was made turned out to be but the prelude to a prolonged series of negotiations in which two lawyers participated and which lasted from the end of April to the middle of September, culminating in the respondent paying only $30,000 and the company, not Berg, being prosecuted and subjected to a $10,000 penalty together with a fine of $200.

In the case of *Knutson v. Bourkes Syndicate, supra*, as in the case of *Maskell v. Horner, supra,* the payments were found to have been made under conditions amounting to protest, and although it is appreciated that actual protest is not a prerequisite to recovery when the involuntary nature of the payment can be inferred from the circumstances, it must nonetheless be observed that the prolonged negotiations for settlement which characterized this case are a poor substitute for "open protest" and in my view this serves to distinguish it from the cases above referred to.

With the greatest possible respect for the learned trial judge, I take the view that whatever may have been the nature of the threats exerted by the Department the payment of the $30,000 in question in this case which was made in September 1953 was not made "under immediate necessity and with the intention of preserving the right to dispute the legality of the demand" and that it cannot be recovered as money paid involuntarily or under duress.

For these reasons, as well as those stated by the Chief Justice and Mr. Justice Locke, I am of opinion that this appeal should be allowed with costs.

*Appeal allowed with costs,* TASCHEREAU J. *dissenting.*

*Solicitor for the appellant: W. R. Jackett, Q.C., Ottawa.*

*Solicitors for the suppliant, respondent: Plaxton and Company, Toronto.*

HER MAJESTY THE QUEEN .....APPELLANT;

AND

FLORENCE CRAWFORD .....RESPONDENT.

1960

*Mar. 11, 14
Apr. 11

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Expropriation—Validity—Whether land taken required to be laid out by metes and bounds on the ground—Deposit of plan and description—Whether necessary to show each owner's land separately—The Expropriation Act, R.S.C. 1927, c. 64, s. 9(1) (R.S.C. 1952, c. 106, s. 9(1)).*

The Crown in right of Canada expropriated the lands of several persons, including the respondent, by depositing in the Registry Office a plan and description covering these lands. The respondent contended that the expropriation was invalid, *inter alia*, because these lands were not laid off by metes and bounds as required by s. 9(1) of the *Expropriation Act*, R.S.C. 1927, c. 64. The trial judge declared the expropriation invalid on that ground. The Crown appealed to this Court.

*Held:* The appeal should be allowed.

*Per* Kerwin C.J.: Under the *Expropriation Act*, there are two distinct methods of taking land required by the Crown: (*a*) by the fact of the taking physical possession thereof and (*b*) by the filing of the plan and description. When the second method is used, as in the present case, the deposit of the plan and description, signed as provided by the Act, is sufficient.

*Per* Taschereau, Locke, Cartwright, Fauteux, Martland and Ritchie JJ.: What s. 9 of the Act requires is that the lands proposed to be taken shall be laid down or marked out on a map or plan and shall also be described by metes and bounds in a written verbal description, which plan and description shall then be deposited in the office of the registrar of deed. It is immaterial whether any work is done by a surveyor or whether any visible marks are placed at the boundaries. All that is required is that the plan and description make clear what land is being expropriated, and, in this case, that requirement was fulfilled.

*Per* Curiam: The other grounds on which the respondent sought to have the expropriation declared invalid, were rightly rejected by the trial judge.

APPEAL from a judgment of Thorson P. of the Exchequer Court of Canada[1], declaring an expropriation of land invalid. Appeal allowed.

*D. S. Maxwell* and *P. M. Troop,* for the appellant.

*K. E. Eaton* and *W. T. Green,* for the respondent.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Martland and Ritchie JJ.

[1] (1960), 20 D.L.R. (2d) 694.

1960

THE QUEEN v. CRAWFORD

THE CHIEF JUSTICE:—This is an appeal on behalf of Her Majesty the Queen against a judgment of the President of the Exchequer Court[1] delivered after the trial of a petition of right and declaring "that the alleged expropriation of the Suppliant's land on November 3, 1947 was invalid and that the deposit of the plan and description on the third day of November 1947 did not have the effect of vesting the land or lands of the Suppliant in His late Majesty the King in right of Canada."

The suppliant is the widow, executrix and sole devisee of Lawrence A. Crawford, who died January 16, 1958, and who, in November 1947, was the owner of part of lot 2, concession 4, Rideau Front, of the Township of Gloucester, in the County of Carleton, in the Province of Ontario, and was registered as such in the office of the Registrar of Deeds for the said county. On November 3, 1947, there was registered in the said Registry Office a notice of expropriation reading as follows:

NOTICE OF EXPROPRIATION

Land to be Acquired for Government Control Purposes in the Township of Gloucester, County of Carleton, Province of Ontario.

TAKE NOTICE that the parcels of land and property described in the description hereto annexed and shown coloured red on the plan hereto attached, being situate in the Township of Gloucester, County of Carleton and Province of Ontario, have been taken possession of for the use of His Majesty the King, in right of Canada, the said land and premises being required for Government purposes, and that the said lands and property are vested in His Majesty the King, His Heirs and Successors, by virtue of the "Expropriation Act", R.S.C. 1927, Chapter 64.

"J. M. Somerville",
Secretary of the Department of
Public Works of Canada.

The description annexed included a great number of parcels of land, but the land of Lawrence A. Crawford (part of lot 2, concession 4, Rideau Front, of the Township of Gloucester) was included in the following:

ALL and Singular those certain parcels or tracts of land and premises, situate, lying and being in the Township of Gloucester, County of Carleton and Province of Ontario, and being composed of.....

The whole of Lots 2, 3, 4, and 5 of Concession IV (Rideau Front), and Parts of Lots 2, 3, 4, 5 and 6 of Concession III (Rideau Front),

[1] (1960), 20 D.L.R. (2d) 694.

All in the above-mentioned Township of Gloucester.

After setting out all the parcels of land these words appear:

All of which may be more particularly described as follows:—

(Then follows a detailed description at the end of which is)

ALL AS SHOWN coloured red on the accompanying plan dated July 8th, 1947.

.....

The above is a plan and description of certain lands and premises shown coloured red or delineated in red, taken for the use of His Majesty the King, in right of Canada, under the provisions of the Expropriation Act, Chapter 64 of the Revised Statutes of Canada, 1927.
Ottawa, August 8th, 1947.

S. E. Farley, O.L.S.

The first complaint of the suppliant is dealt with satisfactorily by the President who stated that the Registrar of Deeds for the County of Carleton testified "that he received the plan and description, and also a notice of expropriation, as one document and recorded it as such", although by the lapse of time the plan and description had become separated and were filed as separate exhibits. Another attack made on the validity of the expropriation was that a plan and description of each individual's land by itself must be registered or in any event that the land of each such person must be shown separately on the plan and appear separately in the description. I agree with the President's judgment that this cannot be substantiated. While the land of Lawrence A. Crawford was not shown separately, there is no doubt from all the evidence that it was included in the land covered by the plan and description.

It was alleged that the plan and description were not signed as required by the *Expropriation Act*. Here also I agree with the President that it is shown by the evidence that the plan is a print of the plan drawn by Mr. S. E. Farley and that the latter was an Ontario land surveyor duly licensed and sworn in and for the Province of Ontario. Mr. Farley's signature appeared upon the original plan and his signature was reproduced on the print. The evidence of Mr. Arthur Cordes who, in 1947, was the principal clerk in the Secretary's Branch of the Department of Public

1960

THE QUEEN v. CRAWFORD

Kerwin C.J.

Works, shows that he typed the certificate that appears on the back of the plan and that he saw Mr. Somerville sign it after it was pasted on the back.

By an amendment permitted at the trial, para. 9 was added to the petition of right:

> 9. The purported expropriation referred to in paragraph 2 of this petition was invalid in law by reason of the fact that the land described in the plan and description referred to in the said paragraph was not laid off by metes and bounds, at the instance of an authority acting for the respondent, as required by section 9 of the Expropriation Act.

It was upon this ground that the President gave the judgment now before us. He came to that conclusion because he considered that two judgments of this Court, *Kearney v. Oakes* (decided November 10, 1890)[1] and *Kearney v. The Queen*, decided April 30, 1889, but not reported, were in conflict. The latter judgment was given on an appeal from the judgment of Burbidge J. in the Exchequer Court (decided September 24, 1888)[2], at the end of which report appears this note:

> On appeal to the Supreme Court of Canada by the claimant, the amount of compensation awarded by the Exchequer Court was increased on the ground that it did not appear that such compensation was assessed in view of the *future* damage that may result from the want of a crossing.

The reasons for judgment in this Court cannot be located but the entry in the Registrar's Book, on April 30, 1889, with reference to this appeal reads:

> Appeal allowed with costs and compensation awarded by Exchequer Court increased to $4,000, Gwynne J. dissenting,

although in *Kearney v. Oakes*, Gwynne J. says that the damages were fixed in this Court at $5,131.60.

While *Kearney v. The Queen* was decided before *Kearney v. Oakes*, the trespass giving rise to the litigation which culminated in the last named decision occurred in September 1884. The action was brought in Nova Scotia and the reasons of the trial judge, Chief Justice MacDonald, delivered in May 1886 are to be found in volume 57 of the bound Cases Filed in the Supreme Court of Canada. The claim was for damages for trespass against Government contractors concerned in the construction of a branch line of the Intercolonial Railway more than one mile in length. On

[1] (1890), 18 S.C.R. 148.

[2] (1888), 2 Ex. C.R. 21.

August 13, 1884, there had been filed in the Office of the Registry of Deeds at Halifax a plan and description in presumed compliance with subs. (1) of s. 10 of the *Government Railways Act,* 1881 (Can.), c. 25. This subsection in all relevant respects is the same as s. 9(1) of the *Expropriation Act* of Canada with which we are concerned. The plan and description indicated the centre line of the proposed railway and designated the land to be expropriated "as embracing a width" of a certain number of feet on each side of the line. By s. 6 of the *Government Railways Act* the Minister of Railways and Canals might for certain purposes, but by and with the authority of the Governor-in-Council, build, make and construct a branch line of railway not to exceed in any one case six miles in length. There was a proviso that where the branch, or siding, did not exceed one mile in length, the Minister might construct such branch, or siding, without an Order-in-Council. The Order-in-Council put in evidence as authority to the Minister to construct the branch, purported to have been made on December 12, 1884, which, of course, was after the filing of the plan and description in the Registry of Deeds and as already stated the branch line was more than one mile in length. Chief Justice MacDonald said in part:

> If this Order-in-Council be sufficient to justify and legalise an entry upon the plaintiff's land by the Minister of Railways and his servants at any period antecedent to this date, then I find that in all other respects the proceedings to expropriate the plaintiff's land have been in accordance with the statute and sufficient to invest title in Her Majesty and the justification of the defendants is sustained.

However, his conclusion was:

> Here the entry was originally wrongful without lawful authority and a trespass by every person who invaded the plaintiff's possessions against her will, and I cannot hold that the subsequent confirmation by the Order-in-Council made that legal which before was illegal and unwarranted.

The Supreme Court of Nova Scotia *en banc*[1] allowed an appeal on the ground that the contractors were employees of the Government department and that under s. 109 of the *Government Railways Act* they were entitled to one month's notice in writing before bringing the action, which notice had not been given. This Court allowed Mrs. Kearney's

[1] (1887), 20 N.S.R. 30.

1960

THE QUEEN v. CRAWFORD

Kerwin C.J.

appeal. Chief Justice Ritchie dissenting, agreed with the Nova Scotia Court *en banc*. Gwynne J. dissenting, held that the passing of the Order-in-Council was not necessary because the requisite authority was to be found in the *Public Works Act*. He also held that the contractors were employees of the Government. A careful examination of the reasons of Patterson J. shows that he agreed with Chief Justice MacDonald, that "the fundamental difficulty in his way (that is, in the way of counsel for the defendants) is the absence of legal authority to enter on the lands of the plaintiff in September 1884"; (18 S.C.R. p. 177). Subsequently, at p. 180, he said:

> It is argued that the effect of the deposit of the plan was under section 10 to vest the lands in the Crown making the entry lawful and confirming the right of the plaintiff to her claim for compensation. I am inclined to think that that would be so if the section had been fully complied with but I have not examined the statute closely enough to speak more decidedly on the point. It seems clear, however, that the plan and description must be of territory laid off by metes and bounds. It is upon "such lands" that the statutory conveyance operates and the essential work on the ground is here wanting.

It is quite clear that Mr. Justice Patterson did not examine the statute closely on this point because, if he had, he would have found subs. (3) of s. 10 of the *Government Railways Act* reading as follows:

> (3) Such plan and description may be deposited at any time either before entry upon the lands, or within twelve months thereafter.

However, whether his views that "the plan and description must be of territory laid off by metes and bounds" and "the essential work on the ground is here wanting" be *obiter* or not there is no doubt that the only member of the Court who agreed with him was Mr. Justice Fournier. It has already been explained that Chief Justice Ritchie and Mr. Justice Gwynne would have dismissed the appeal. The fifth member of the Court, Taschereau J., stated merely: "I am also of opinion that the appeal should be allowed". This cannot be taken as a concurrence in the reasons of Patterson J. This is, therefore, not a decision that "lands taken for the use of Government railways shall be laid off by metes and bounds" means that the lands to be taken have to be marked on the ground.

There is no inconsistency between the decision which has just been considered and that of this Court in *Kearney v. The Queen,* because in that case the Minister of Railways and Canals had referred the claim of the owner for compensation to the Exchequer Court and by arrangement between the Crown and the claimant this was without prejudice to the appeal to this Court in *Kearney v. Oakes.* By that time, of course, as mentioned above, the Order-in-Council of December 12, 1884, had been passed. As Burbidge J. stated[1]:

> The only question arising on the reference is as to the amount of compensation that should be awarded to the claimant for the land taken from her for the Dartmouth Branch Railway, and for damages in respect of her property being injuriously affected by the construction of such railway.

We are, therefore, untrammelled by any previous decision of this Court as to the meaning to be ascribed to subs. (1) of s. 9 of the *Expropriation Act,* R.S.C. 1927, c. 64.

Section 9 must not be considered in isolation but must be read in connection with other sections. Section 3 enacts in part:

> 3. The Minister (which is defined as meaning the head of the department charged with the construction and maintenance of the public work) may by himself, his engineers, superintendents, agents, workmen and servants,
>
> (*a*) enter into and upon any land to whomsoever belonging, and survey and take levels of the same, and make such borings, or sink such trial pits as he deems necessary for any purpose relative to the public work;
>
> (*b*) enter upon and take possession of any land, real property, streams, waters and watercourses, the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto;

Section 7 provides:

> 7. The minister may employ any person duly licensed or empowered to act as a surveyor for any province of Canada or any engineer, to make any survey, or establish any boundary and furnish the plans and descriptions of any property acquired or to be acquired by His Majesty for the public work.
>
> 2. The boundaries of such properties may be permanently established by means of proper stone or iron monuments planted by the engineer or surveyor so employed by the minister.
>
> 3. Such surveys, boundaries, plans and descriptions shall have the same effect to all intents and purposes as if the operations pertaining thereto or connected therewith had been performed and such boundaries had been

[1] (1888), 2 Ex. C.R. 21 at 24.

1960

THE QUEEN
v.
CRAWFORD

Kerwin C.J.

established and such monuments planted by a land surveyor duly licensed and sworn in and for the province in which the property is situate.

4. Such boundaries shall be held to be the true and unalterable boundaries of such property, if, . . . . (certain conditions are complied with).

5. It shall not be incumbent on the minister or those acting for him to have boundaries established with the formalities in this section mentioned, but the same may be restored to whenever the minister deems necessary.

Section 9 reads:

9. Land taken for the use of His Majesty shall be laid off by metes and bounds; and when no proper deed or conveyance thereof to His Majesty is made and executed by the person having the power to make such deed or conveyance, or when a person interested in such land is incapable of making such deed or conveyance, or when, for any other reason, the minister deems it advisable so to do, a plan and description of such land signed by the minister, the deputy of the minister or the secretary of the department, or by the superintendent of the public work, or by an engineer of the department, or by a land surveyor duly licensed and sworn in and for the province in which the land is situate, shall be deposited of record in the office of the registrar of deeds for the county or registration division in which the land is situate, and such land, by such deposit, shall thereupon become and remain vested in His Majesty.

2. When any land taken is required for a limited time only, or only a limited estate or interest therein is required, the plan and description so deposited may indicate, by appropriate words written or printed thereon, that the land is taken for such limited time only, or that only such limited estate or interest therein is taken, and by the deposit in such case, the right of possession for such limited time, or such limited estate or interest, shall become and be vested in His Majesty.

3. All the provisions of this Act shall, so far as they are applicable, apply to the acquisition for public works of such right of possession and such limited estate or interest.

(Subsections (2) and (3) were enacted for the first time in 1903 by 3 Edward VII, c. 22, s. 1.)

Sections 11, 12, 22(1) and 23 are as follows:

11. A plan and description of any land at any time in the occupation or possession of His Majesty, and used for the purposes of any public work, may be deposited at any time in like manner and with like effect as herein provided, saving always the lawful claims to compensation of any person interested therein.

12. In all cases, when any such plan and description, purporting to be signed by the deputy of the minister, or by the secretary of the department, or by the superintendent of the public work, or by an engineer of the department, or by a land surveyor duly licensed as aforesaid, is deposited of record as aforesaid, the same shall be deemed and taken to have been deposited by the direction and authority of the minister, and as indicating that in his judgment the land therein described is

necessary for the purposes of the public work; and the said plan and description shall not be called in question except by the minister, or by some person acting for him or for the Crown.

* * *

22. If any resistance or opposition is made by any person to the minister, or any person acting for him, entering upon and taking possession of any lands, a judge of the Court, or any judge of any superior court may, on proof of the execution of a conveyance of such lands to His Majesty, or agreement therefor, or of the depositing in the office of the registrar of deeds of a plan and description thereof as aforesaid, and after notice to show cause given in such manner as he prescribes, issue his warrant to the sheriff of the district or county within which such lands are situate directing him to put down such resistance or opposition, and to put the minister, or some person acting for him, in possession thereof.

* * *

23. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or encumbrance upon such land or property shall, as respects His Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in His Majesty.

I agree with the submission of counsel for the appellant that there are two distinct methods of taking land required for Her Majesty, namely, (a) by the fact of the taking physical possession thereof (s. 3) and (b) by the filing of the plan and description (s. 9). If the taking is under the latter, the deposit of the plan and description, signed as provided, is sufficient. If this were not so, the expropriation of the land for Camp Gagetown in New Brunswick would not have been feasible: *Gagetown Lumber Company v. The Queen*[1], as is shown by the evidence in this case of Ross W. Arnett, an Ontario land surveyor and civil engineer. The following words in s. 23, and particularly those italicized, appear to me to be conclusive of the matter:

Any claim to or encumbrance upon such land or property shall, as respects His Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, *or the filing of the plan and description,* as the case may be, become and be absolutely vested in His Majesty.

[1] [1957] S.C.R. 44, 6 D.L.R. (2d) 657.

1960

THE QUEEN v. CRAWFORD

Kerwin C.J.

A reading of the French version of all the sections noted above leads to the same conclusion.

The appeal should be allowed, the judgment below set aside and the petition of right dismissed with costs. Under the circumstances there should be no costs of the appeal.

The judgment of Taschereau, Locke, Cartwright, Fauteux, Martland and Ritchie JJ. was delivered by

CARTWRIGHT J.:—The questions raised on this appeal and the relevant statutory provisions are set out in the reasons of the Chief Justice.

I agree with the conclusion of the Chief Justice that the learned President[1] was right in rejecting all of the grounds, other than those set out in para. 9 of the petition, on which the respondent sought to have the expropriation of the lands owned by her declared invalid.

The sole ground on which the learned President proceeded in declaring the expropriation invalid was set out in para. 9, which was added to the petition by amendment made at the trial, and reads as follows:

> 9. The purported expropriation referred to in paragraph 2 of this petition was invalid in law by reason of the fact that the land described in the plan and description referred to in the said paragraph was not laid off by metes and bounds, at the instance of an authority acting for the respondent, as required by section 9 of the *Expropriation Act*.

The learned President makes it clear that, in his opinion, this ground also ought to be rejected, but in view of certain observations made in the reasons of Patterson J. in *Kearney v. Oakes*[2], he deemed it advisable to make the declaration of invalidity sought by the petitioner so that the question of law raised as to the true construction of s. 9(1) of the *Expropriation Act* might be passed on by this Court.

Section 9(1) of the *Expropriation Act*, R.S.B.C. 1952, c. 106, is in the same words as s. 9(1) of the *Expropriation Act*, R.S.C. 1927, c. 64, which was the Statute in force at the date of the expropriation here in question, it reads as follows:

> 9(1) Land taken for the use of Her Majesty shall be laid off by metes and bounds; and when no proper deed or conveyance thereof to Her Majesty is made and executed by the person having the power to make such deed or conveyance, or when a person interested in such land

[1] [1960], 20 D.L.R. (2d) 694.
[2] (1890), 18 S.C.R. 148.

is incapable of making such deed or conveyance, or when, for any other reason, the Minister deems it advisable so to do, a plan and description of such land signed by the Minister, the deputy of the Minister or the secretary of the department, or by the superintendent of the public work, or by an engineer of the department, or by a land surveyor duly licensed and sworn in and for the province in which the land is situate, shall be deposited of record in the office of the registrar of deeds for the county or registration division in which the land is situate, and such land, by such deposit, shall thereupon become and remain vested in Her Majesty.

In *Kearney v. Oakes, supra,* consideration was given to the meaning of s. 10 of the *Government Railways Act,* 1881 (Can.), c. 25. The opening words of this section were:

Lands taken for the use of Government railways shall be laid off by metes and bounds;

The remainder of the section was in substantially the same words as s. 9(1) of the *Expropriation Act,* quoted above.

The passage in the reasons of Patterson J. on which the judgment of the learned President is founded appears at page 180 of the report and is as follows:

It is argued that the effect of the deposit of the plan was, under section 10, to vest the lands in the crown, making the entry lawful and confirming the right of the plaintiff to her claim for compensation. I am inclined to think that that would be so if the section had been fully complied with, but I have not examined the statute closely enough to speak more decidedly on the point. It seems clear, however, that the plan and description must be of territory laid off by metes and bounds. It is upon "such lands" that the statutory conveyance operates, and the essential work on the ground is here wanting.

I do not find it necessary to form a final opinion as to whether this pronouncement should be regarded as obiter, for I am in agreement with the Chief Justice that it did not form part of the judgment of the majority of the Court and is not binding upon us.

It is apparent from the paragraph quoted from the reasons of Patterson J. and from the three paragraphs immediately preceding that quotation that he construed the words "shall be laid off by metes and bounds" as meaning "shall have the boundaries thereof marked physically *on the ground* by stakes or other visible indicia".

1960

THE QUEEN v. CRAWFORD

Cartwright J.

In my opinion this construction was incorrect and involved reading into the section some such words as "on the ground" which do not appear in it.

The phrase "lay off" is given the following meanings, amongst others, in the *Oxford English Dictionary* (1933), vol. 6, p. 130: "to mark or separate off (plots of ground etc.); to plot out land in some way or for some purpose". An example given of its use is: "They directed that the streets should be laid off obliquely". Among the meanings assigned in the Oxford Dictionary to the verb "to plot" are: "to make a plan, map or diagram of;" "to lay down on a map"; "to make a plan of".

The phrase, "by metes and bounds" is defined in The *Dictionary of English Law,* by Earl Jowitt (1959), p. 1169, as "by measurements and boundaries". In *Words and Phrases, Permanent Edition,* vol. 27, the phrase "metes and bounds" is given the meanings "boundary lines or limits"; "the boundary lines of land with their terminal points and angles".

In my opinion on the true construction of the opening sentence of s. 9(1), read in the context of the remainder of the sub-section and of the whole act, what is required is that the lands proposed to be taken shall be laid down or marked out on a map or plan and shall also be described by metes and bounds in a written verbal description, which plan and description shall then be deposited in the office of the proper registrar of deeds. It is in my opinion immaterial whether any work is done by a surveyor on the lands or whether any visible marks are placed at the boundaries thereof. The maximum requirement of the sub-section is fulfilled if the plan and description deposited make clear exactly what land is being expropriated. It is plain that in the case at bar this requirement was fulfilled. It appears from the petition and from the deed to Lawrence Crawford filed as an exhibit that the lands of the respondent are part of lot 2 in the 4th concession, Rideau Front, of the Township of Gloucester. The plan and description filed in the Registry office pursuant to s. 9(1) show clearly what lands are taken and that these include the whole of the said lot 2.

If the true meaning of the words of section 9(1) were doubtful it would be proper to consider the apparent purpose of Parliament in enacting them as disclosed by the whole act. That purpose appears to be two-fold: (i) to permit the Crown in the cases envisaged by the Act to expropriate lands making due compensation therefor; and (ii) to ensure that the lands taken are identified with certainty.

If certainty of description of the lands taken can be achieved without the necessity of a surveyor visiting them and placing marks on their boundaries, it would require plain words to render the performance of such unnecessary acts a condition precedent to the validity of an expropriation, and I find no such words in the section. In construing a statutory provision of which the meaning is not plain assistance may be derived from the presumption expressed in the maxim *lex neminem cogit ad vana seu inutilia.*

In my opinion the requirements of s. 9(1) of the *Expropriation Act* have been fulfilled in the case at bar and it follows that the appeal succeeds.

For the above reasons I would allow the appeal, set aside the judgment below and direct judgment to be entered dismissing the petition of right with costs. In the particular circumstances I would make no order as to the costs of the appeal.

*Appeal allowed; no costs.*

*Solicitor for the appellant: W. R. Jackett, Ottawa.*

*Solicitors for the respondent: Green & Green, Ottawa.*

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CITY OF VANCOUVER .....APPELLANT;

AND

BRANDRAM-HENDERSON OF B.C. LIMITED .....RESPONDENT.

1960
*Jan. 28, 29
*Feb. 1, 2, 3
Apr. 11

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Arbitration—Motion to set aside award for misconduct or error of law on face—Evidence taken under oath—Whether any evidence to support finding—Whether award uncertain—The Arbitration Act, R.S.B.C. c. 16, s. 14.*

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Judson JJ.

1960

CITY OF VANCOUVER v. BRANDRAM-HENDERSON OF B.C. LTD.

The appellant City had agreed to indemnify the respondent against any damage or injury it might sustain or which might be occassioned to the premises it occupied, by the construction of a bridge to be built by the appellant over the said property. Failing to agree as to the amount to be paid, the parties proceeded to arbitration as provided for by the agreement. An award of $12,500 was made by the arbitrators for injurious affection to the leasehold interest and diminution of property values (that portion of the award was not in question in this appeal). By a majority, the arbitrators awarded $40,000 for loss of business, loss of efficiency, loss through disruption and general inconvenience. As to the claim for special expenses, the arbitrators ruled that it would either be covered by the award of $40,000 or by the taxed costs. The trial judge set aside the award of $40,000 on the grounds that there was no evidence to support it and that it was invalid as being uncertain. This judgment was reversed by the Court of Appeal. The City appealed to this Court.

*Held:* The appeal should be dismissed.

*Per* Kerwin C.J. and Abbott and Judson JJ.: The evidence having been taken in shorthand by consent, this Court was entitled to look at it to determine whether or not there was evidence upon which the arbitrators could make their award. As the arbitrators had evidence before them to warrant the award, there was, therefore no error manifest on the face of it, including for that purpose all the evidence.

All that the arbitrators decided with respect to the special expenses was that they should not be granted in addition to the $40,000 and costs.

*Per* Locke, Cartwright, Abbott and Judson JJ.: Where there has been a submission to arbitrators to determine compensation and the evidence on which the award is based is taken under oath, as permitted by the *Arbitration Act*, this Court is entitled to examine the record of the proceedings to determine whether, as a matter of law, there was evidence of loss or damage falling within the terms of the submission. In the absence of such evidence, the award may be set aside at common law or under s. 14 of the Act as misconduct; in that case, there would be an error of law appearing on the face of the award. There was, in the present case, evidence upon which the arbitrators could base their award of damages for loss of profit, and, in the absence of a contention that any of the evidence relied upon by the arbitrators was improperly admitted, this Court could not concern itself further with this aspect of the matter. This Court could not in proceedings such as these weigh the evidence or interfere with the award on the ground that it was against the weight of the evidence. *Cedar Rapids v. Lacoste*, [1914] A.C. 569, distinguished.

The contention that the award was rendered uncertain by the manner in which the special expenses had been dealt with, could not be entertained.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Clyne J. Appeal dismissed.

*Hon. J. W. de B. Farris, Q.C.*, and *R. Elliott*, for the appellant.

[1] (1959), 18 D.L.R. (2d) 700.

*D. McK. Brown and R. H. Guile,* for the respondent.

The judgment of Kerwin C.J. and of Abbott and Judson JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by the City of Vancouver against the judgment of the Court of Appeal for British Columbia[1] reversing the order of Clyne J. and restoring the award of certain arbitrators in its entirety. The arbitrators, of whom there were three, had unanimously allowed the company-respondent the sum of $12,500 for injurious affection to its leasehold interest and diminution of property values and the costs of the arbitration. The majority had awarded the company the sum of $40,000 for compensation for loss of business, loss of efficiency, disruption and general inconvenience. An application to Clyne J. to set aside that part of the award as to the $40,000 succeeded and it was ordered that the City pay the company the costs with respect to the claim of $12,500 but that the company pay the City the costs in connection with the claim of $40,000. The company was ordered to pay the costs of the application before Clyne J. The Court of Appeal restored that part of the award as to the $40,000 and ordered the City to pay the costs of the arbitration, of the motion before Clyne J. and of the appeal. The reasons of the majority were delivered by Davey J.A. with whom O'Halloran J.A. agreed. Sidney Smith J.A. dissenting, would have affirmed the decision of Clyne J.

About 1949-50 the City decided to erect a new Granville Street bridge. In the Granville Island area the company and others were tenants of the National Harbours Board. Because the area, including the lots upon which the offices and paint factory of the company were located, was the property of the Crown in right of Canada, doubts arose as to the power of the City to expropriate the company's leasehold interests and in order to avoid litigation, an agreement, dated November 10, 1952, was entered into between the company and the City. It recited that any sub-leasing or alienation of any property leased by the company from the Board or any user of the said property contrary to the terms of its lease, dated June 20, 1939, required the approval of

[1] (1959), 18 D.L.R. (2d) 700.

1960

CITY OF VANCOUVER v. BRANDRAM-HENDERSON OF B.C. LTD.

Kerwin C.J.

the Board and that the Board had agreed provisionally to give such approval. The agreement also contained the two following recitals:

AND WHEREAS the City now requires; firstly for construction of a Pier known as M. 1 for the said Bridge, a licence to use a portion of the said property, and secondly, for the footings of the said Pier M. 1, a sub-lease of part of the land covered with water demised by the hereinbefore recited lease, and thirdly, for the said bridge a licence irrevocable during the terms of the said lease to construct and maintain the span suspended over and above the said property.

* * *

AND WHEREAS the use of the portion of the property as above recited will cause certain loss to the Company.

The document then proceeded to set forth that the City agreed:

(*a*) That the position of the said Pier M. 1 on a portion of the land covered with water leased to the Company shall be as shown outlined in red on the attached plan which said plan is marked Schedule "A" hereto and shall form an integral part of this Agreement;

(*b*) That the area to be used by the City and its Contractor during the construction of the said Pier M. 1 shall be and shall not exceed the area shown outlined in green on the said plan marked Schedule "A" to this Agreement;

(*c*) That the estimated duration of occupancy of the area referred to in sub-paragraph (*b*) above will be 120 days from the 6th day of October A.D. 1952;

(*d*) That if at any time after the City or its Contractors shall enter upon the said property pursuant to the terms hereof any damage or injury is sustained by the Company or to the premises of the Company which said damage whether in whole or in part and whether directly or indirectly is occasioned by or attributable to the construction or presence of the said Bridge or to the fact that the said Bridge crosses the property of the Company whether or not a claim arises against the Company under or by virtue of clause 11 of the said lease dated 20th June, 1939, then the City will indemnify the Company in respect of such proportion of such damage or injury as is attributable to such construction or presence of such Bridge;

Clause (*d*) is relied upon by the company but the City takes the position that it is not applicable as the parties are engaged in a particular arbitration and not litigation about the subject matter of the clause. It is reproduced merely as part of the narrative because in my view it has no relevancy to the matters to be decided.

The City further agreed to pay the company the cost of re-locating the latter's office during the period of occupancy referred to in sub-para. (*c*) set out above which estimated cost was itemized and was to be payable by the City to the

company from time to time upon production by the company of receipted vouchers. The proper amount was paid by the City and there is no dispute about these items. Clauses (*i*) and (*j*) provide:

(*i*) That if during the time, or part of the time, while the said span is under construction over and above the said property of the Company, the office of the Company cannot be used owing to reasonable apprehension of danger to employees of the Company, then the City will also pay to the Company the costs of relocating the office of the Company for such period as may be considered necessary provided always that the need for such relocating as well also as the cost of the same shall, in the absence of agreement between the parties hereto be the subject of arbitration in the manner hereinafter provided in clause 1(*j*) hereof;

(*j*) That the City will pay, in addition to the above, compensation for loss of business, if any, loss of efficiency, disruption, diminution of property values, general inconveniences, injurious affection, or any other loss whatsoever, whether caused by or arising as a result of the relocation of the office whether during the time mentioned in clause (*h*) or clause (*i*) hereof, the construction of the said Pier M. 1, or the construction and existence after construction of the said Bridge or any part thereof, a sum of money to be determined by the parties hereto within three months of the end of the period of construction of that portion of the said Bridge suspended over the said property of the Company, failing which a sum of money to be determined by arbitration of three (3) arbitrators, one to be appointed by each party and the third by such two arbitrators and otherwise pursuant to the Arbitration Act of the Province of British Columbia.

It is agreed that the word "as" should be inserted in the second line of (*j*) before the word "compensation".

The City paid the costs of re-locating the company's office but it is important to bear in mind that the re-location continued for a period of about eleven months at a distance of three hundred yards from the company's factory. Bearing that in mind the real dispute hinges upon clause (*j*) and the terms of the award of the arbitrators with reference to a claim by the company for out-of-pocket expenses.

The Board was duly constituted, particulars of claim were delivered on behalf of the City and the Board sat for a total of twenty-four days of which seventeen were occupied with the presentment of the City's claim and the evidence on behalf of both parties. The Board was of opinion that the claim should be divided as follows:

Item 1. Compensation for loss of business, if any, loss of efficiency, loss through disruption, and general inconvenience.

Item 2. Diminution of property values, and injurious affection to the leasehold interest.

1960

CITY OF VANCOUVER v. BRANDRAM-HENDERSON OF B.C. LTD.

Kerwin C.J.

The arbitrators pointed out that the company relied upon the evidence of two chartered accountants but the Board unanimously rejected the method adopted by the auditors of computing the compensation to be paid to the company under Item 1.

The award continues:

> A majority of the Arbitrators, consisting of the Chairman and Mr. Smelts, are of the opinion that ample evidence is given to prove loss of business, loss of efficiency, loss through disruption and general inconvenience due to the construction of the bridge. They are also of the opinion that there was ample evidence given for them to compute what sum of money should be paid to the Company as compensation under those headings. After examining all the evidence and weighing it to the best of their ability, they are of the opinion that the sum of $40,000 is a fair amount to award to the Company under these headings. Mr. Wasson, on the other hand, is of the opinion that the Company did not prove any damage and accordingly would award nothing under the abovementioned headings. Attached hereto as Schedule 1 are his Reasons for so finding.

I do not reproduce Mr. Wasson's reasons because all the matters referred to by him were mentioned in the argument before us on behalf of the City. After awarding the sum of $12,500 for injurious affection and damage to the leasehold interest and diminution of property values, the award states:

> With regard to the claim for out-of-pocket expenses advanced by the Company, the Board is unanimously of the opinion that such sum as the Company is justly entitled to will either be covered by the amount of $40,000 already awarded or by the award of costs to the Company as hereinafter appears.

The costs are disposed of in the following paragraph of the award:

> (c) The Board unanimously awards to the Company the costs of this arbitration, such costs to be based upon the tariff of the Supreme Court of British Columbia and to be taxed under the said tariff.

I agree that the City was not a wrong-doer as it proceeded in accordance with its agreement with the company. There is also no doubt that the award may be remitted in a proper case, which could not apply here because one of the arbitrators has died, or that it may be set aside, if an error of law appears on the face of the award *Absalom Ltd. v. Great Western Garden Village Society Ltd.*[1]. Here the evidence was taken in shorthand by consent and we are entitled to look

[1] [1933] A.C. 592.

at the evidence to determine if the next point taken by counsel on behalf of the City is valid, i.e., that there was no evidence upon which the majority of the arbitrators could award the sum of $40,000; *Lacoste v. Cedar Rapids Manufacturing and Power Co.*[1], the second time the matter there in dispute was before the Judicial Committee, wherein Lord Warrington of Clyffe, speaking for their Lordships, states:

> The law and practice of the Province of Quebec governing the procedure of the Court in such matters appear to be in all essentials the same as in this country. Although the appeal is a rehearing, a verdict of a jury or an award of an arbitrator acting within his jurisdiction is not in general set aside unless it is shown that the jury or the arbitrator proceeded on an erroneous view of the law, or that there was no evidence on which the verdict or the award could properly be arrived at, or that there was some manifest error leading to the result. There might also, of course, be some other matter in the conduct of the proceedings such as the wrongful admission or rejection of evidence which might vitiate the result. But as a general rule the Court does not set aside a verdict or an award merely on the ground that it is against the weight of evidence. Of course, a verdict or an award may also be set aside on the ground of misconduct, in the popular sense of the word, on the part of the jury or the arbitrator, but nothing of this kind is alleged in the present case.

The argument that in the present case there was no such evidence found favour with Mr. Justice Clyne and Mr. Justice Sidney Smith. However, while I agree with counsel for the City that the decision in *Palgrave Gold Mining Co. v. McMillan*[2], referred to by Mr. Justice Davey is distinguishable as there the award had to be made before entry without knowing the scope of the intended operations or the effect upon the owner's use of the land or upon its value, I do agree with that learned judge that there is nothing in the agreement under consideration in this appeal which requires loss of business or profits to be proved by loss of specific sales or customers. An attack was made upon certain suggested methods of computing the loss suffered by the company put forward on its behalf but there is nothing in the award to indicate that the majority of the arbitrators adopted any one of these methods in coming to their conclusion. Moreover, as Mr. Justice Davey points out the photographs and the evidence of the officers of the company show that interference, disturbance and inconvenience impaired its sales organization and reduced the company's sales generally, in

[1] (1929), 47 Que. K.B. 271 at 283, [1928] 2 D.L.R. 1, 34 C.R.C. 399.
[2] [1892] A.C. 460.

1960

CITY OF VANCOUVER v. BRANDRAM-HENDERSON OF B.C. LTD.

Kerwin C.J.

addition to which extra administrative employees had to be employed. Mr. Brown, for the company, referred to many parts of the record and in my view these are sufficient in order to establish that the majority of the arbitrators had evidence before them to warrant the award.

Section 14 of the *Arbitration Act* of British Columbia, R.S.B.C. 1948, c. 16, is the only one requiring mention:

> 14. (1) Where an arbitrator or umpire has misconducted himself the Court may remove him.
>
> (2) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

There is no suggestion that any one of the arbitrators misconducted himself and the words "or an arbitration or award has been improperly procured" do not apply to a case where there is evidence to justify the award even if the amount allowed might be considered by some to be too large. The parties have agreed to arbitration and the question is not whether a Court would have allowed the same sum but whether there was any evidence upon which the majority of the arbitrators could award the sum of $40,000. There is, therefore, no error manifest on the face of the award including for that purpose all the evidence.

As noted above the Board unanimously considered that the out-of-pocket expenses would "either be covered by the amount of $40,000 already awarded or by the award of costs to the Company as hereinafter appears". All that part of this statement means is that the Board unanimously awarded the company the costs of the arbitration, such costs to be based upon the tariff of the Supreme Court of British Columbia and to be taxed under the said tariff. I can find in these references no evidence that the Board decided that the out-of-pocket expenses were included in the sum of $40,000 but merely that they should not be granted in addition to the $40,000 and costs.

The appeal should be dismissed with costs.

The judgment of Locke, Cartwright, Abbott and Judson JJ. was delivered by

LOCKE J.:—By the agreement made between the parties to this appeal dated November 10, 1952, it was provided that the appellant would indemnify the respondent against any

damage or injury it might sustain or which might be occasioned to the premises occupied by it, either directly or indirectly, by the construction or the presence of the bridge to be built by the appellant over the said property. The clause containing the submission to arbitration described in somewhat more detail the matters in respect of which compensation might be awarded and provided that the appellant would pay in respect of any such loss, failing agreement between the parties as to the amount to be paid:

> a sum of money to be determined by arbitration of three arbitrators, one to be appointed by each party and the third by such two arbitrators and otherwise pursuant to the *Arbitration Act* of the Province of British Columbia.

The award of a majority of the arbitrators, which was signed by Mr. A. J. Cowan, Q.C. and Mr. F. W. Smelts, after referring to certain evidence which had been given on behalf of the company based upon figures obtained from the Dominion Bureau of Statistics which was declared to be inadmissible, read in part:

> A majority of the Arbitrators, consisting of the Chairman and Mr. Smelts, are of the opinion that ample evidence is given to prove loss of business, loss of efficiency, loss through disruption and general inconvenience due to the construction of the bridge. They are also of the opinion that there was ample evidence given for them to compute what sum of money should be paid to the Company as compensation under those headings.

The sum of $40,000 was fixed as the compensation in respect of the matters last mentioned, and a further sum of $12,500 for injurious affection to the leasehold interest and diminution of property values. As to the last mentioned sum the Board was unanimous and that portion of the award is not in question.

In addition to the claims advanced by the respondent in respect of the matters aforesaid, a sum of $8,275.09, of which particulars were given, was claimed as expenses incurred by the company as a result of the construction and existence of the bridge. As to these claims the award stated that the Board was unanimously of the opinion that "such sum as the company is justly entitled to will either be covered by the amount of $40,000 already awarded or by the award of costs to the company as hereinafter appears." Costs were

1960

CITY OF VANCOUVER v. BRANDRAM-HENDERSON OF B.C. LTD.

Locke J.

unanimously awarded to the respondent, based upon the tariff of the Supreme Court of British Columbia and to be taxed under the said tariff.

Mr. Evans Wasson, the third arbitrator, dissented as to the award of $40,000 being of the opinion that there was no evidence that the company had suffered any damage from loss of business, loss of efficiency, disruption or from general inconvenience.

The City moved to set aside the award on the asserted ground that the arbitrators were guilty of misconduct in finding that the respondent had sustained loss of business, loss of efficiency, loss through disruption and general inconvenience, due to the construction of the bridge, when there was no evidence to substantiate such a finding; in awarding the sum of $40,000 as compensation when there was no evidence of any loss, and in failing to base their award on the evidence and preponderance of evidence. This application was heard by Clyne J. and that learned judge, being of the opinion that there was no evidence to support the award of $40,000 and that on the further ground it was invalid as being uncertain, set it aside.

The appeal[1] from that order was allowed by a judgment delivered by Davey J.A., with whom O'Halloran J.A. agreed. Sidney Smith J.A. dissented and would have dismissed the appeal.

The *Arbitration Act* of British Columbia, R.S.B.C. 1948, c. 16, provides by s. 4 that a submision, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the schedule to the Act, so far as they are applicable to the reference under the submission. The schedule referred to provides by para. (*h*) that the award to be made by the arbitrator or umpire shall be final and binding on the parties.

Section 14 provides that where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured the court may set the award aside. This section is in the same terms as s. 11 of the *Arbitration Act* of 1889, 52-53 Vict., c. 49 (Imp.). The section appeared in its present form in the first *Arbitration Act*

[1] (1959), 18 D.L.R. (2d) 700.

passed in British Columbia (c. 1, Statutes of 1893), which statute was taken practically *verbatim* from the English statute.

The case for the appellant is that the evidence given before the arbitrators did not prove that the respondent had suffered any pecuniary loss by reason of any of the matters described in the submission and, alternatively, that the award was rendered uncertain by the failure of the Board to determine what part, if any, of the out of pocket expenses was included in the award of $40,000. The manner in which this portion of the award was worded, it is said, amounted to an attempted delegation to the taxing officer of the powers vested in the arbitrators alone.

Where, as in the present matter, there has been a submission to arbitrators to determine compensation to which the terms of the *Arbitration Act* apply, their award may be set aside if there is error appearing upon its face. It seems to have been assumed by both parties that the evidence taken before the arbitrators might be referred to, at least to determine whether there was evidence of pecuniary damage of a nature falling within the terms of the submission.

An error in law appearing on the face of an award means that you can find in the award or a document actually incorporated in it as—for instance—by a note appended by an arbitrator stating the reason for his judgment, some legal proposition which is the basis of the award and which is erroneous: *Champsey Bhara & Co. v. Jivraj*[1]; *Attorney General for Manitoba v. Kelly*[2].

As their subsequent actions showed, it was the intention of the parties to the submission in this case that, failing agreement, the matter should be determined by arbitrators upon evidence to be adduced before them and that the witnesses, as permitted by the schedule to the *Arbitration Act*, should be sworn.

The evidence referred to in the majority award is that taken on oath before the arbitrators and is stated by them to be that upon which that portion of the award is based. This, in my opinion, permitted the court to examine the

[1] [1923] A.C. 480, 487. [2] [1922] 1 A.C. 268, 281, 62 D.L.R. 370.

1960

CITY OF VANCOUVER v. BRANDRAM-HENDERSON OF B.C. LTD.

Locke J.

record of the proceedings for the purpose of determining whether, as a matter of law, there was evidence of loss or damage falling within the terms of the submission.

The motion to set aside the award on the ground that the arbitrators were guilty of misconduct appears to have been made in reliance upon s. 14 of the *Arbitration Act*. The jurisdiction to set aside the award of an arbitrator for error of law appearing on the face of it is one that exists also at common law independently of the statute: 2 Hals., 3rd ed., p. 60; *Race Course Betting Control Board v. Secretary for Air*[1], *per* Greene M.R.

The word "misconduct" in s. 11 of the Act of 1889 in England has been given a wide meaning. Illustrations are to be found in 2 Hals., 3rd ed., at p. 257 *et seq.* In *Walford v. McFie*[2], Lush J., with whom Atkin J. agreed, said that it was legal misconduct on the part of the arbitrator to consider a document which had not been admitted in evidence and which was wholly inadmissible and went to the root of the question submitted to him for decision.

In *Kelantan Government v. Duff Development Co.*[3], Viscount Cave L.C. at p. 411 said that such an award might be set aside if it appeared on the face of it that the arbitrator had proceeded on evidence which was inadmissible or on wrong principles of construction, or had otherwise been guilty of some error in law.

If, as contended for the appellant, there was in the present matter no evidence to support an award of compensation for loss of profits from the business during the period of construction, that portion of the award may properly be set aside, in my opinion, whether the matter be dealt with under s. 14 of the statute or at common law.

In view of the contention that the arbitrators have acted without any evidence to support their finding, it is necessary to examine the evidence adduced at the hearing and I have done this.

The argument for the appellant is that the loss or damage sustained by the respondent company must be proven with some such certainty as claims in the nature of special damages in actions either for tort or breach of contract.

[1] [1944] 1 All E.R. 60 at 61. [2] (1915), 84 L.J.K.B. 2221.
[3] [1923] A.C. 395.

While the case for the respondent is that their claim for compensation under the agreement is for loss of profits for the period during which the bridge was under construction, no evidence was given by any former customer of the respondent that he had refrained from dealing with the respondent in consequence of the conditions brought about on Granville Island by the construction of the bridge. The appellant says that the obligation of the respondent was to adduce the best available evidence of its loss and that this was not done. It may be that some better evidence might have been adduced in support of the claim, but this objection really goes to the weight and not to the admissibility of the evidence which was given.

The respondent was at the times in question the lessee of a parcel of land on Granville Island and a water lot adjoining it in False Creek under a lease from the National Harbours Board dated June 20, 1939. On this property it had for many years carried on the business of manufacturing and selling paint. Paint was delivered to wholesale and retail dealers and other customers in Vancouver and shipments made to other points in British Columbia from these premises, and it was shown that there was prior to the disruption caused by the construction of the bridge a substantial business in what were called pick-up sales. These were to contractors and others who called at the premises and took delivery of paint in their own vehicles, at times in considerable quantities.

The construction of the bridge, as shown in a recital to the agreement of November 10, 1952, called for the construction of a pier and footings for such pier on part of the leased land and part of the land covered by water. Photographs of the premises during the period of construction show that large quantities of building material and equipment were brought upon the respondent's property for the purpose of carrying on the necessary work. The bridge under construction passed over part of the respondent's buildings and, of necessity, the construction work and the material and equipment necessary for it created difficulties of access to the respondent's factory and the premises where sales were made. In the result it was found necessary to move the respondent's office

1960

CITY OF VANCOUVER v. BRANDRAM-HENDERSON OF B.C. LTD.

Locke J.

to another location on Granville Island and temporary premises were rented for a considerable period while the work was in progress.

In support of the respondent's contention that it had suffered pecuniary loss in consequence of the construction of the bridge, N. M. Crute, a member of the firm of the company's auditors, gave evidence as to the annual profits of the respondent from its operations during the years 1947 to 1954, inclusive. For the year 1952 the profit was less than for any of the five preceding years except the year 1949. For the years 1953 and 1954 the profits were very much less than for any of the years 1947 to 1951, inclusive. While a computation had been made by the company's auditors of the profits which they considered the company would have realized but for the construction of the bridge, which was based upon the figures of the Dominion Bureau of Statistics for similar industries in British Columbia for these three years, this was rejected by the arbitrators as inadmissible.

J. D. F. Ekins, who had been the manager of the company from 1950 to March of 1953, described the difficulties caused to the operations by the noise of pile drivers and other equipment engaged in the construction of the pier and the footings, and of the congested conditions on the respondent's property created by the material and equipment of the contractors. This, he said, brought about difficulties for customers wishing to purchase material at the plant and resulted in the falling off of this business. The noise at times rendered it impossible to carry on conversations in the company's office. For the year commencing October 1, 1952, he said there was a drop in sales of over $100,000 from the preceding year, which he attributed to a general loss of efficiency and the interference with and disruption of the company's operations brought about by the construction of the bridge. Ekins had been employed by the company for many years and said that in his capacity as manager he usually spent from 70 to 75 per cent of his time in supervising and directing sales and the promotion of sales and that the time he had available for this purpose was cut in half by reason of his energies being diverted to other matters arising by reason of the work of construction.

He said that normally there were from two to three dozen pick-up sales a day but that these fell off completely.

Evidence was given by Mrs. Margaret Hutchings, the assistant purchasing agent, and Miss Helen Burton, a secretary employed by the company, as to the disruption of the office work caused by the noise and the disturbance and that it was necessary to engage taxis to bring some of the female members of the staff to work.

George Thompson, the shipper for the company, described the difficult conditions created by the contractor's operations and the moving of the office and said that the shipping room had been blockaded for a day on one occasion and the stock room flooded with water, and that they could not give proper service to their customers in Vancouver.

James Randall, a salesman for the company for some fifteen years, said that there was a decrease in the sales made by him in the years 1952 to 1954, which he attributed to his inability to give good service to the customers and which, he said, resulted in the loss of business. There were, he said, constant complaints about poor delivery and service.

Harold J. McMullin, the office manager of the company, said that the noise of the operations at times caused an entire disruption of the work of the staff and that the efficiency of the staff was materially impaired.

D. A. McLean, who succeeded Ekins as manager in March of 1953, said that, nearly every day during the period of the construction, traffic on the island was tied up for varying periods, and that, in his opinion, the decrease in the company's sales during the years 1953 and 1954 was attributable to the disruption and disturbance caused by the construction operations. He said that it was of particular importance in the paint business that the manager should devote a large part of his time to the promotion of sales and working with the salesmen and that he normally spent two-thirds of his time on these activities and that he was only able to spend about one-half of this time on such work during the years 1953 and 1954. He also said there was a big increase in the company's sales and resulting profits in the year 1955 when the bridge had been completed.

1960

CITY OF VANCOUVER v. BRANDRAM-HENDERSON OF B.C. LTD.

Locke J.

A number of witnesses were called for the City, for the purpose of showing that the falling off of the company's business had been due to other matters unconnected in any way with the bridge. It was also shown that during part of the period there had been a carpenter strike in Vancouver which brought great numbers of operations to a standstill, which would obviously affect the company's business.

In my opinion, the evidence of these witnesses and the documents produced by the company's auditor show that the profits of the respondent were diminished during the period of construction and there was evidence from which, if believed, the arbitrators could conclude that the diminution was due to the carrying on of the construction work and the interference with the company's operations.

The obligation of the City under the agreement of November 10, 1952, was to indemnify the respondent against any loss or damage attributable to the construction of the bridge. It was apparently common ground that the work would, of necessity, cause damage to the respondent since one of the recitals in the agreement read:

> And whereas the use of the portion of the property as above recited will cause certain loss to the company.

There is nothing in the agreement to indicate that the parties contemplated that the existence of such damage or its extent should be determined by the arbitrators upon evidence differing in its nature from that which has always been accepted, by way of illustration, in claims for injurious affection resulting from the expropriation of part of an owner's claim. A claim of this nature is considered in the judgment of this Court delivered by Duff J. (as he then was) in *St. Michael's College v. City of Toronto*[1], where the matters to be considered in determining the *quantum* of the compensation are indicated. It would obviously be impossible that such a claim could be proven by evidence of the nature required to prove what are commonly designated as special damages in an action for tort. The fact that the appellant was permitted by the agreement to enter upon and carry on its operations upon the respondent's leasehold property and was, accordingly, not a wrong doer cannot

[1] [1926] S.C.R. 318, 2 D.L.R. 244.

affect the nature of the proof required of the damage or loss suffered and for which compensation was to be made. It is commonly the case where lands upon which the owner is actively carrying on business are expropriated that it is necessary to estimate the damage sustained by the dislocation of the business, due to the necessity of moving it to other quarters. While the *quantum* of the damage cannot be determined with mathematical accuracy, it has never been suggested that this prevents an award based upon evidence that loss actually has resulted from the enforced taking of the nature of that given in the present matter.

Here there is evidence, in my opinion, upon which the arbitrators might base their award of damages for loss of profit and, in the absence of a contention that any of the evidence upon which the arbitrators relied was improperly admitted, we cannot concern ourselves further with this aspect of the matter. This is not an appeal from the award and the proceedings upon a motion such as this are not in the nature of a rehearing, as was the case in *Cedar Rapids v. Lacoste*[1]. In that case the expropriation was made under the provisions of the *Railway Act*, R.S.C. 1906, c. 37, which by s. 209 provided that where the award exceeded a stated amount any party might appeal upon any question of law or fact to a superior court: *Lacoste v. Cedar Rapids*[2]. This fact is noted in that portion of the judgment of the Judicial Committee in the second appeal in that matter[3], to which we were referred on the argument. We cannot in the present proceedings weigh the evidence or interfere with the award on any such ground as that it is against the weight of the evidence.

As to the contention that the award is rendered uncertain by reason of the manner in which the amounts claimed as special damages were dealt with by the arbitrators, I agree with Davey J.A. In my view, that portion of the award which I have quoted above is properly construed as meaning that such portion of the $8,275.09 claimed as is not properly taxable as costs in the manner directed, is included in the sum of $40,000 awarded. The matter left to the taxing officer is not to decide what portion of the amount claimed

[1] [1914] A.C. 569, 16 D.L.R. 168. [2] (1913), 43 Que. S.C. 410, 412.
[3] (1929), 47 Que. K.B. 271 at 283, [1928] 2 D.L.R. 1, 34 C.R.C. 399.

1960

CITY OF VANCOUVER v. BRANDRAM-HENDERSON OF B.C. LTD.

Locke J.

is to be allowed as compensation but simply which of the items are properly allowable as costs of the proceedings: the items excluded are by virtue of the award included in the lump sum awarded.

I would dismiss this appeal with costs.

*Appeal dismissed with costs.*

*Solicitor for the plaintiff, appellant: E. N. Rhodes Elliot, Vancouver.*

*Solicitors for the defendant, respondent: Russell & DuMoulin, Vancouver.*

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1960

*Mar. 17, 18
Apr. 26

WINGOLD CONSTRUCTION COMPANY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

W. A. KRAMP (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Contracts—Sale of goods—Breach of warranty of quality—Acceptance of goods—Damages confined to diminution of price contract—Whether buyer entitled to consequential or special damages—The Sale of Goods Act, R.S.O. 1950, c 345, ss. 34, 51(3).*

A buyer who accepts goods inferior in the quality contracted for is entitled, pursuant to s. 51(3) of the *Sale of Goods Act*, to damages for breach of warranty, these damages being the difference between the value of goods at the time of delivery and the value they would have had if they had answered to the warranty. However, such buyer is not entitled to consequential or special damages for loss over and above that difference, when such loss was not one directly and naturally resulting, in the ordinary course of events, from the breach of warranty, but one resulting from the use made by the buyer of the goods with full knowledge of their quality.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Spence J. Appeal dismissed.

*B. Grossberg, Q.C.*, for the plaintiff, appellant.

*A. E. Maloney, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

[1] (1959), 19 D.L.R. (2d) 358.

JUDSON J.:—The appellant sued the respondent for damages for breach of warranty arising from a contract for the sale of sand fill. The appellant accepted 831 loads of this fill and spread it in the basement of a building which it had under construction. It then refused to accept further deliveries and sued for damages. The respondent counterclaimed for $4,155, being the contract price for the 831 loads at $5 per load. The judgment at trial awarded the appellant damages of $5,466.99. On the counterclaim, judgment was given for $1,925, being the contract price for 385 loads out of 831, which, according to the learned trial judge, were in substantial compliance with the contract. The breach of warranty was therefore successfully set up in extinction of the price for 446 loads. The Court of Appeal[1] allowed the appeal and dismissed the action. The respondent abandoned his appeal against the amount awarded on the counterclaim. The appellant now appeals to this Court from the dismissal of its action.

The question in issue is whether the appellant in the circumstances of this case is entitled to recover consequential damages for breach of warranty over and above the ordinary measure of the difference in values between the goods contracted for and those delivered and accepted. In my opinion there can be no such recovery here and the appeal fails for the reasons given in the majority judgment of the Court of Appeal.

Laidlaw J.A. accepted the finding of the learned trial judge that the parties entered into a contract for the supply of a good grade of sand fill but not the finding that the contract was for such fill to the extent necessary to fill up the foundation of the building. On the contrary, his conclusion, with which I agree, was that the contract was not an entire one but was a sale by the respondent and a purchase by the appellant of each separate load. The superintendent of the appellant accepted the loads as they were brought on the premises and dumped into the building. The nature of the fill was plain to be seen as it was delivered load by load and the case was not one for consequential damages. Damages in diminution of the price had already been awarded by the reduction of the counterclaim from $4,155 to $1,925.

[1] (1959), 19 D.L.R. (2d) 358.

1960

WINGOLD CONSTRUCTION CO. LTD. v. KRAMP

Judson J.

The appellant was engaged in the construction of an addition to an existing industrial building in the Township of Scarborough. It had excavated a basement with an area of approximately 40,000 square feet and had poured the concrete walls to a height of four feet above ground level. It proposed to put in the fill and then to erect the steel frame, walls and roof, install the services and, finally, pour the concrete floor. The respondent, having purchased 10 acres of vacant land in the Township of Scarborough, proposed to remove a hill from this property for the purpose of making it saleable and it was from this hill that the sand fill was to come to supply the contract. The respondent and the president of the appellant met at the site of the sand hill for the purpose of inspection and they there agreed upon a price of $5 per load. There is no doubt that the appellant knew that the sand was to come from this hill. There was no other possible source. Although there is much to be said for the inference that what the appellant bought was sand fill as it might be encountered by the shovel during the course of the removal of the hill, for the purpose of these reasons I take the finding of the learned trial judge, also adopted by Laidlaw J.A. in the Court of Appeal, that the contract was for the supply of a good grade of sand fill.

The respondent began delivering loads of the fill on September 16, 1955, and continued until October 21, 1955, when the appellant refused to accept further deliveries. From September 16 to September 30, 483 loads were delivered, and from October 1 to October 21, 348 loads. As each load was delivered it was dumped in the excavation and spread by a bulldozer and then rolled and watered to provide a firm foundation for the concrete floor. The appellant's superintendent of construction, or someone acting for him, signed for all the loads as they arrived at the site. The condition of each load was plain to be seen, both in the truck and after it had been dumped in the excavation. Everything that was delivered was spread and used. The superintendent of the appellant said that the first 150 loads were of good quality but that subsequent loads began to contain a mixture of sand and clay. He made some complaints to the truck drivers and when about half of the quantity had been delivered, he made a complaint to the respondent. He said that the

respondent promised that the quality would improve. The appellant rejected no deliveries until October 21, when three loads were rejected. No further loads were delivered by the respondent. The appellant purchased the rest of the fill that it needed from another source.

The month of October was a wet month. The excavation was still uncovered and the rain turned the fill into a quagmire, which later froze in the month of November. In February, 1956, the appellant began to remove this frozen mass after being put to considerable expense to make it workable. Some of the fill was removed and it was replaced by about 100 loads of sand fill purchased from another source.

The appellant's first contention is that it did not accept these goods and that, at most, there was a mere receipt. In spite of continual grumbling about the deterioration in the quality of the loads, the appellant spread the material in the basement and subjected it to a certain amount of treatment in order to provide a firm foundation for the concrete floor. In these circumstances, it seems to me to be beyond argument, and it has been so found both by the trial judge and in the Court of Appeal, that there was an acceptance of these goods within the meaning of s. 34 of the *Sale of Goods Act* and that the appellant's claim must, in consequence, be confined to damages for breach of warranty.

Sections 51 and 52 of the Act read:

51. (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may,

(*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or

(*b*) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

1960

WINGOLD CONSTRUCTION CO. LTD. v. KRAMP

Judson J.

52. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

The Act deals only with general damages and merely saves the law relating to the right of the buyer to recover special damages. In the present case, the learned trial judge has found that the breach of warranty is one of quality. The Court of Appeal has accepted this finding. The loss is therefore governed by subs. (3) of s. 51 and this has been fully covered in the counterclaim. The ratio of the majority judgment of the Court of Appeal is that the appellant is not entitled to consequential or special damages because its loss was not one directly and naturally resulting, in the ordinary course of events, from the breach of warranty, but one resulting from the use made by the appellant of the goods with full knowledge of their quality. The goods might have been rejected load by load if they were not in accordance with the contract. Instead of doing this the appellant accepted almost 700 loads after beginning to complain about quality. Whatever loss the buyer suffered resulted from its failure to mitigate its damage. It chose to use the goods with knowledge of the risk to be run from adverse weather conditions before the roof was on the building. In these circumstances, a buyer is not entitled to consequential or special damages. I adopt the statement of law on this point from Benjamin on Sale, 8th ed., p. 1005:

> To enable a buyer, who has resold or otherwise dealt with the goods, to recover consequential damages for a breach of warranty over and above the ordinary measure of the difference in values, it is necessary that the buyer should not have been negligent in failing to detect the inferiority of the goods before he resells or deals with them, for otherwise the damages claimed do not "directly and naturally" result from the seller's breach of warranty, but are due to the buyer's own negligence. The circumstance that the defect in the goods is not readily discoverable is of course very material.

Statements to the same effect are to be found in 29 Halsbury, 2nd ed., p. 203; Williston on Sales, Revised ed., vol. 3, s. 490; and in *Merrill v. Waddell*[1].

[1] (1920), 47 O.L.R. 572, 54 D.L.R. 18.

1960

WINGOLD CONSTRUCTION CO. LTD. v. KRAMP

Judson J.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Levinter, Grossberg, Shapiro, Mayzel & Dryden, Toronto.*

*Solicitors for the defendant, respondent: Maloney & Hess, Toronto.*

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1960

THE MINISTER OF HIGHWAYS FOR THE PROVINCE OF BRITISH COLUMBIA (*Defendant*) .... APPELLANT;

*Feb. 3
Apr. 11

AND

BRITISH PACIFIC PROPERTIES LTD., VANCOUVER MORTGAGE CORPORATION LTD., AND WESTMOUNT ESTATES LTD. (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Expropriation—Whether injurious affection by severance to be included in compensation for land taken—Interest on total award—The Highway Act, R.S.B.C. 1948, c. 144, s. 16—The Lands Clauses Act, R.S.B.C. 1948, c. 177, ss. 4, 64.*

Under the provisions of the *Highway Act*, R.S.B.C. 1948, c. 144, the appellant took compulsory possession of the lands owned by the respondents. The compensation tendered was refused, and a subsequent arbitration made awards for the lands taken only, but refused compensation for damage sustained by reason of the severance of the respondents' lands from other lands owned by them. The trial judge held that compensation for the severance was properly payable, and this judgment was affirmed by a majority decision of the Court of Appeal. The Minister appealed to this Court.

*Held*: The appeal should be dismissed.

*Per* Kerwin C.J. and Cartwright and Martland JJ.: The principle applied in the precedents was that where a statute requires compensation to be paid for lands compulsorily taken, one element to be included in determining the compensation is the damage sustained by the owner by reason of injurious affection to his adjoining lands, because of

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*PRESENT: Kerwin, C.J. and Locke, Cartwright, Martland and Judson JJ.

1960

MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA v. BRITISH PACIFIC PROPERTIES LTD. et al.

the severance of the lands taken. *Blundell v. The King*, [1905] 1 K.B. 516 and *The Master and Fellows of University College, Oxford v. The Secretary of State for Air*, [1938] 1 K.B. 648, applied. Such compensation was not excluded by s. 16 of the *Highway Act*. The right to claim such compensation was reinforced by s. 64 of the *Lands Clauses Act*, the application of which was not excluded by s. 16 of the *Highway Act* by necessary intendment.

All the interest awarded to the respondents, including that given in respect of amounts awarded for injurious affection, was in place of their right to retain possession of their lands and could properly be given as against the Crown. *Inglewood Pulp and Paper Company Ltd. v. New Brunswick Power Commission*, [1928] A.C. 492 at 498; *The King v. Mackay*, [1930] S.C.R. 130 at 132, followed.

*Per* Locke and Judson JJ.: The amount of compensation to be paid was that provided for by s. 16 of the *Highway Act*. It was the value of the land to the owner with all the advantages which it possessed, present or future, in his hands which was to be determined. If the ownership of the lands taken enhanced the value of the lands from which they were to be severed, the extent of such enhancement was part of the value to the owner of the lands taken. The extent to which the value of the respondents' remaining land was depreciated by the taking of the lands in question was a matter to be taken into consideration in fixing the amount of compensation. *Cedar Rapids Manufacturing and Power Co. v. Lacoste*, [1914] *A.C. 569 at 576; Woods Manufacturing Co. Ltd. v. The King*, [*1951*] *S.C.R. 504 and Pastoral Finance Association v. The Minister*, [1914] A.C. 1083, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming (Davey, J.A. dissenting) a judgment of Collins J. Appeal dismissed.

*J. S. Maguire* and *D. H. Paterson*, for the appellant.

*J. J. Robinette, Q.C.*, and *J. S. Alley*, for the respondent.

The judgment of Kerwin C.J. and of Cartwright and Martland JJ. was delivered by

MARTLAND J.:—The main issue in this appeal is as to whether or not the respondents are entitled, in respect of lands owned by them, possession of which had been compulsorily taken by the appellant under the provisions of the *Highway Act*, R.S.B.C. 1948, c. 144, to compensation for the damage sustained and to be sustained by them by reason of the severing of the lands taken from other lands owned by them.

[1] (1960), 20 D.L.R. (2d) 187, (1959), 29 W.W.R. 193.

The lands in question are situated in the Municipality of West Vancouver and were taken for the purpose of establishing a public road through the municipality, known as the "Upper Levels Highway", from West Vancouver to Horse Shoe Bay.

Compensation for these lands was tendered by the appellant to the respondents, which was refused by them as being inadequate. The parties then proceeded to arbitration, pursuant to the provisions of s. 16 of the *Highway Act* and the provisions of the *Department of Highways Act,* 1955 (B.C.), c. 33. Awards were made to each of the respondents by the arbitrators, together with interest from March 10, 1954, the date upon which possession of the lands had been taken by the appellant.

The arbitrators stated that the amounts awarded were compensation for the lands taken only. They found that the provisions of the *Lands Clauses Act,* R.S.B.C. 1948, c. 177, and in particular s. 64 thereof, did not apply to the *Highway Act,* as in their opinion the provisions of the former act were excluded therefrom by necessary intendment. However, in the event that a court of competent jurisdiction should decide that they were in error in that opinion, the arbitrators made an appraisal of the damage sustained by the respondents, by reason of the severance of their lands, in the following amounts, namely:

1. British Pacific Properties Ltd. ..... $12,522.35
2. Vancouver Mortgage Corporation Ltd. .. $17,480.00
3. Westmount Estates Limited ..... $18,885.00

The respondents filed an originating summons for determination of this question of law and the learned trial judge awarded to the respondents the additional amounts of compensation above mentioned. This judgment was sustained by the Court of Appeal of British Columbia by a majority decision, from which the appellant has now appealed.

The relevant statutory provisions which require to be considered are s. 16 of the *Highway Act* and ss. 4 and 64 of the *Lands Clauses Act.*

1960

MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA v. BRITISH PACIFIC PROPERTIES LTD. et al.

Martland J.

Subsections (1), (2) and (3) of s. 16 of the *Highway Act* are as follows:

16. (1) Compensation shall be paid in respect of lands entered upon and taken possession of under this Part for the following matters only:—

(*a*) Improvements on the lands so taken, that is to say, everything constructed on or annexed to the soil by the hand of man, such as roads, buildings, structures, and fences, and improvements made by clearing, planting, grading, or cultivating the soil:

(*b*) Lands which were originally granted to some person by the Crown, either in the right of the Province or the Dominion, and by the taking of which the total area taken for the purpose of highways from the lands comprised in the original Crown grant is found to exceed one-twentieth of the total area of the lands comprised in the Crown grant, and then only for the area in excess of one-twentieth of that total area; but, where the lands comprised in the Crown grant have been subdivided into parcels by any registered conveyance or plan of subdivision, the area of land which may be so taken from any parcel without the payment of compensation shall not exceed one-twentieth of the area of that parcel, and where lands are being taken from two or more of the parcels at the same time the total area to be so taken without the payment of compensation shall be apportioned among those parcels on the basis of their respective areas.

(2) If the amount of compensation payable in any case under subsection (1) is not agreed upon, the amount may be appraised and awarded by arbitration, and for that purpose the provisions of the "Department of Highways Act" relating to arbitration shall mutatis mutandis apply.

(3) In determining the compensation payable to any owner in respect of any land entered upon and taken possession of under this Part, there shall be taken into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to the remaining lands of the owner through which the highway will pass, by reason of the passage of the highway through the same or by reason of the construction of the highway or of works incidental thereto, and the increased value that will be so given shall be set off against the compensation otherwise payable to that owner under this section.

The relevant portions of the *Lands Clauses Act* provide:

4. This Act shall apply:—

* * *

(*b*) To every undertaking authorized by any Act which authorizes the purchase or taking of lands situate in any part of the Province for such undertaking;

and this Act shall be incorporated with every such Act to which this Act shall as aforesaid apply, and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed, together therewith, as forming one Act.

* * *

64. In estimating the purchase-money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had by the Justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith.

It is not contested by the appellant that, if the provisions of the *Lands Clauses Act* are applicable at all, the taking of the lands in question by the appellant was for an "undertaking" within the meaning of s. 4 of that Act. The appellant contends, however, that the provisions of that statute, and in particular s. 64, are not applicable in the circumstances of this case because they have been excluded by the terms of s. 16 of the *Highway Act*. The respondents claim that the provisions of the *Lands Clauses Act* are not thus excluded and that, by virtue of s. 64 of that Act, they are entitled to receive the additional compensation as appraised by the arbitrators. There would appear to be no doubt that if s. 64 is applicable, the respondents would be entitled to such compensation and the question is, therefore, as to whether or not that section does apply.

By virtue of s. 4 of the *Lands Clauses Act*, s. 64 of this Act would apply save so far as its provisions are expressly varied or excepted by the *Highway Act*. There is no express reference to the *Lands Clauses Act* in the *Highway Act* and, consequently, it is necessary to determine whether they can be regarded as having been excluded, by necessary intendment, because of the provisions of s. 16 of the latter statute.

The test to be applied was stated by Westbury, L.C., in *ex parte The Vicar and Church Wardens of St. Sepulchre in re The Westminster Bridge Act, 1859*[1], where the Lord Chancellor had to determine whether the provisions of the English *Lands Clauses Act*, 1845 (which contained a provision similar to s. 4 of the British Columbia Act) were excluded by the provisions of the statute there under consideration. It is as follows:

> If the particular act gives in itself a complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject-matter of the rule out of the Lands Clauses Act.

[1] (1864), 33 L.J. Ch. 372 at 376, 4 De G. J. & Sm. 232, 46 E.R. 907.

1960

MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA v. BRITISH PACIFIC PROPERTIES LTD. et al.

Martland J.

This statement was approved in the case of *The London, Chatham and Dover Railway Company v. The Board of Works for the Wandsworth District*[1].

The contention of the appellant is that s. 16 of the *Highway Act* does, in itself, give a complete rule on the subject and that by virtue of that section compensation is to be paid only for improvements on the lands entered and of which possession is taken, and for lands, which were originally granted by the Crown in the right of the Province or of the Dominion, to the extent that the area of the lands entered and of which possession is taken exceeds one-twentieth of the total area comprised in the grant from the Crown. Those, it is said, are the only matters in respect of which compensation is payable and payment of damage, in respect of any other land, is excluded by the necessary intendment of the section.

The respondents' answer to this is that when land is compulsorily taken and damage is thereby sustained by the owner, by reason of the severance of such land from other lands of that owner, that damage is a part of the value of the lands which are actually taken and for which compensation must be paid. It is contended that when s. 16 of the *Highway Act* directs that "compensation shall be paid in respect of lands entered upon and taken possession of under this Part" such compensation is included.

Two cases cited on behalf of the respondents support this contention. They are *Blundell v. The King*[2] and *The Master and Fellows of University College, Oxford v. The Secretary of State for Air*[3]. In the former case, lands were compulsorily taken under the *Defence Acts* for the erection of a fort. Section 19 of the *Defence Act,* 1842, required the person determining the compensation "to find the compensation to be paid either for the purchase of such lands, buildings, and other hereditaments, or for the possession or use thereof . . ." There was no provision in this statute similar to that contained in s. 63 of the English *Lands Clauses Act* (the equivalent of s. 64 of the British Columbia *Lands Clauses Act*). Nevertheless, Ridley J. held that the owner was entitled

[1] (1873), L.R. 8 C.P. 185 at 189, 42 L.J.M.C. 70.
[2] [1905] 1 K.B. 516, 74 L.J.K.B. 91.
[3] [1938] 1 K.B. 648, 1 All E.R. 69.

to compensation for the injurious affection of his adjoining lands arising from the natural and ordinary uses of the lands taken for the purposes of the fort.

At p. 522, he says:

> On the other side it was argued that "compensation" means an indemnity—a full satisfaction for the land taken, and that, if in the taking of that land other land is injuriously affected, that injurious affection must be included in the term. If such a claim were decided by agreement, I think there is no doubt that no person would agree on the compensation due for his land to be taken without also adding to the actual purchase-money a claim in respect of the damages done by injurious affection of other land belonging to him; and it is fairly argued that the same elements must be included when a jury or an arbitrator has to assess the compensation. It is also to be remarked that s. 63 of the Lands Clauses Act does, in fact, treat such injurious affection as a part of the compensation to be given, for it enacts that "in assessing such compensation 'regard is to be had' not only to the value of the land but also to the damage," &c. And in the same section, "compensation" is apparently used as equivalent to "purchase-money"—so that the damages to be given for injurious affection are treated as a matter to be included in the purchase-money. I am inclined myself to prefer this reasoning, although I am somewhat pressed with the consequence which seems to follow, that even without s. 63 compensation under the Lands Clauses Act, 1845, would have included damages for injurious affection.

The decision of Ridley J. was stated to be right by Lord Hewart C.J., who delivered the unanimous judgment of the Court in the *University College* case.

The principle applied in these cases is that where a statute requires compensation to be paid for lands compulsorily taken, one element to be included, in determining the compensation for the lands taken, is in respect of damage sustained by the owner, by reason of injurious affection to his adjoining lands, because of the severance.

That element must, I think, be taken into account when applying the broad general principle governing the assessment of compensation to owners of property expropriated by the Crown which was enunciated by Rand J. in *Diggon-Hibben Ltd. v. The King*[1], and expressly adopted in the judgment of this Court in *Woods Manufacturing Co. Ltd. v. The King*[2]:

> . . . the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.

[1] [1949] S.C.R. 712 at 715, 4 D.L.R. 785.

[2] [1951] S.C.R. 504 at 508, 2 D.L.R. 465, 67 C.R.T.C. 87.

1960

MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA v. BRITISH PACIFIC PROPERTIES LTD. et al.

Martland J.

Section 16(1) of the *Highway Act* requires compensation to be paid for lands entered upon and taken "for the following matters only", those matters being, under paragraph (*a*), for improvements and, under paragraph (*b*), for lands, but limiting the compensation for the latter item to the area in excess of one-twentieth of the total area comprised in the Crown grant. I do not think that these paragraphs restrict the elements which are to be considered in determining the compensation for lands taken. They restrict the area of land in respect of which compensation is to be paid. The word "only" refers to "matters" and not to the word "paid".

In my opinion, therefore, in computing the compensation to be paid for lands taken by the appellant pursuant to the provisions of the *Highway Act,* damage sustained by the land owner by reason of the severance of the lands taken from other lands owned by him is a part of the compensation to be given for such lands. Such compensation is not excluded by s. 16. The right to claim such compensation is reinforced by s. 64 of the *Lands Clauses Act,* the application of which is not, on my interpretation of s. 16, excluded by that section by necessary intendment.

The second issue is with respect to the award, by the learned trial judge, of interest from March 10, 1954, upon the amounts of compensation appraised by the arbitrators in respect of the severance of the respondents' lands. On this point, the appellant argued that an award of interest as against the Crown could not be made. Interest was awarded by the arbitrators on the amounts of compensation which they had determined, and there is no issue with respect to that interest award. In my view, the interest in question here upon the amounts awarded in respect of injurious affection is in the same position as the interest which they awarded. All the interest awarded to the respondents is in place of their right to retain possession of their lands and could properly be given as against the Crown. *Inglewood Pulp and Paper Company, Limited v. New Brunswick Electric Power Commission*[1]; *The King v. MacKay*[2].

[1] [1928] A.C. 492 at 498.
[2] [1930] S.C.R. 130 at 132, 1 D.L.R. 1005.

Certain preliminary objections raised on behalf of the appellant before Collins J. and referred to by him were abandoned in this Court. The point that costs could not be awarded against the appellant was decided adversely to the appellant by all the judges in the Courts below, and it also was abandoned before us.

In my opinion, therefore, the appeal should be dismissed with costs.

The judgment of Locke and Judson JJ. was delivered by

LOCKE J.:—The question as to whether, in determining the amounts of the compensation to be paid to the respondents for the lands taken, there should be included an allowance for injurious affection to the balance of their land at the place in question, does not, in my opinion, depend upon the provisions of s. 64 of the *Lands Clauses Act*, R.S.B.C. 1948, c. 177.

The amount to be paid is that provided for by s. 16 of the *Highway Act*, R.S.B.C. 1948, c. 144. The compensation referred to in that section is for the lands taken, subject to any deduction that is to be made under the provisions of s-s. (*b*), and for improvements of the nature described in s-s. (*a*) of that section.

In my opinion, the principles which have been applied in proceedings under the *Railway Act*, R.S.C. 1906, c. 37, which were considered in the judgment of the Judicial Committee in *Cedar Rapids Manufacturing and Power Co. v. Lacoste*[1], and in proceedings under the *Expropriation Act*, R.S.C. 1927, c. 64, considered in *Woods Manufacturing Co. Ltd. v. The King*[2], are applicable.

It is the value of the land to the owner with all the advantages which it possessed, present or future, in his hands which is to be determined. The authorities are reviewed in the judgment of the former Chief Justice of this Court in the *Woods Manufacturing Company* case. What was said by Lord Moulton in delivering the judgment of the Judicial Committee in *Pastoral Finance Association v. The Minister*[3] has been adopted and followed in this Court.

[1] [1914] A.C. 569 at 576.
[2] [1951] S.C.R. 504, 2 D.L.R. 465, 67 C.R.T.C. 87.
[3] [1914] A.C. 1083.

1960

MINISTER OF HIGHWAYS FOR BRITISH COLUMBIA v. BRITISH PACIFIC PROPERTIES LTD. et al.

Locke J.

The owner is entitled to receive as compensation for the land taken that amount which a prudent man in his position would have been willing to give for the land sooner than fail to obtain it.

If the ownership of the lands taken enhances the value of the lands from which they are to be severed, the extent of such enhancement is part of the value to the owner of the lands taken.

The extent to which the value of the present respondents' remaining land was depreciated by the taking of the lands in question was a matter to be taken into consideration in fixing the amount of the compensation allowable under s. 16 of the *Highway Act*.

As I consider this to be decisive of the matter I express no opinion as to whether s. 64 of the *Lands Clauses Act* affects in any way the quantum of the compensation to be allowed under s. 16 of the *Highway Act*.

It was part of the award made that the appellant should pay to the respondents interest at the rate of 5% from the date upon which the lands were taken, and Collins J. directed that interest at this rate be paid upon the compensation, including in the amounts an allowance for injurious affection. The appellant contended before the Court of Appeal and in this Court that no interest should be payable upon that portion of the compensation which was allowed for injurious affection, while not questioning that it should properly be paid upon the amounts found payable by the arbitrators. Since, however, in my opinion, the portion of the compensation awarded in each case for injurious affection to the remaining lands of the respondents forms part of the value to the owners of the lands taken, the basis for the objection disappears.

I would dismiss this appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Clark, Wilson, White, Clark & Maguire, Vancouver.*

*Solicitors for the respondent: Davis & Company, Vancouver.*

# VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

1960

*Feb. 3, 4
May 16

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Constitutional law—Validity of The Orderly Payment of Debts Act, 1959 (Alta.), c. 61—Whether bankruptcy and insolvency legislation—The B.N.A. Act, 1867, s. 91(21)—The Bankruptcy Act, R.S.C. 1952, c. 14.*

*The Orderly Payment of Debts Act,* 1959 (Alta.), c. 61, applies, with certain exceptions, to contract and judgment debts not in excess of $1,000 and, with the consent of the creditors, to judgment debts in excess of $1,000. Proceedings are instituted by the debtor applying to the clerk of the Court for a consolidation order. This application of the debtor must be supported by an affidavit setting forth, *inter alia,* particulars of his debts, of the nature and extent of his property, his and his wife's income and his dependants. The clerk settles the amount proposed to be paid by the debtor periodically or otherwise. The consolidation order, when made, becomes a judgment of the Court in favour of each creditor. After the making of the order, no process can be issued against the debtor, except as permitted by the Act or by leave of the Court.

On a reference as to the validity of the Act, the Appellate Division of the Supreme Court of Alberta held that it was *ultra vires* the Legislature of the Province. The appeal of the Attorney-General for Alberta to this Court was supported by the Attorneys-General for Ontario and Saskatchewan.

*Held*: The Act was *ultra vires.*

*Per* Kerwin C.J. and Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.: The Act was *ultra vires* as it was in pith and substance bankruptcy and insolvency legislation. The provisions of the Act could be read in no other way than showing that they referred to a debtor who was unable to pay his debts as they matured. A debtor under the Act was one who ceased to meet his liabilities as they became due and, therefore, fell within s. 21(1)(*j*) of the *Bankruptcy Act.* The impugned legislation was not legislation for the recovery of debts.

*Per* Locke, Cartwright and Martland JJ.: While the Act does not declare in terms that the debtor must be insolvent in the sense that he is unable to pay his debts as they become due, it must be so construed. It is, therefore, a clear invasion of the legislative field of insolvency and is, accordingly, beyond the powers of the Legislature. Compositions and schemes of arrangement have for more than 100 years past been treated as subject-matters falling within the scope of statutes relating to bankruptcy and insolvency. The provisions of the impugned Act are in conflict with those in the legislation passed by Parliament dealing with the same matters in the *Bankruptcy Act* and the *Farmers' Creditors Arrangement Act.* The language of s. 91 of the *B.N.A. Act,* 1867, is that the exclusive legislative power of the Parliament extends to all matters in relation to, *inter alia,* bankruptcy and insolvency, and the provinces are excluded from that field. *A.G. for Ontario v. A.G. of Canada,* [1894] A.C. 189, distinguished.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

1960

VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

*Per:* Cartwright and Martland JJ.: In all the decisions of the Judicial Committee or of this Court, upholding provincial legislation impugned as affecting the rights and obligations of an insolvent entity and its creditors, two conditions have been found to exist: (1) that the legislation was not in truth and substance primarily in relation to bankruptcy and insolvency but rather in relation to one or more of the matters found in s. 92; and (2) that it was not in conflict with existing valid legislation of Parliament enacted in exercise of the power contained in s. 91(21), in so far as it affected the rights and obligations of an insolvent and its creditors. Neither of these conditions exists in this case.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], on a reference by the Lieutenant-Governor in Council. Appeal dismissed.

*H. J. Wilson, Q.C.* and *J. W. Anderson,* for the appellant, the Attorney-General for Alberta.

*L. Ingle,* for the intervenant, the Attorney-General for Saskatchewan.

*W. McKimm,* for the intervenant, the Attorney-General for Ontario.

*G. H. Steer, Q.C.,* counsel appointed by the Court to represent the creditors or other persons opposed to the legislation.

The judgment of Kerwin C.J. and of Taschereau, Fauteux, Abbott, Judson and Ritchie JJ. was delivered by

THE CHIEF JUSTICE:—Under the provisions of *The Constitutional Questions Act,* R.S.A. 1955, c. 55, the Lieutenant-Governor in Council of the Province of Alberta referred to the Appellate Division of the Supreme Court of the Province[1] the following question for hearing and consideration:

> Is The Orderly Payment of Debts Act, being Chapter 61 of the Statutes of Alberta, 1959, *intra vires* the Legislature of Alberta, either in whole or in part, and if so, in what part or parts, and to what extent?

That Court directed that argument of the question be set down for hearing at its sittings to be held in Calgary commencing June 1, 1959, and that a copy of that direction and of the Order-in-Council and of the Act be served upon

(1) Canadian Bankers Association;

(2) Credit Granter's Association of Edmonton;

(3) Retail Merchants Association of Canada (Alberta) Inc.;

[1] (1959), 29 W.W.R. 435, 20 D.L.R. (2d) 503.

(4) Canadian Credit Men's Trust Association Ltd.;
(5) Canadian Consumer Loan Association (Canada);
(6) Attorney-General of Canada.

George H. Steer, Esq., Q.C., was appointed as counsel to argue the case on behalf of creditors or other persons who might be opposed to the provisions of the Act. At the hearing counsel for the Attorney General for the Province and one counsel for three credit associations appeared to uphold the Act while Mr. Steer presented argument against its validity. No one else appeared, although the others mentioned above were duly notified. Judgment was reserved and the Court consisting of the Chief Justice, H. J. Macdonald, M. M. Porter and H. G. Johnson, J.J.A., unanimously decided that the Act was wholly *ultra vires* the Legislature of the Province.

The Attorney General for Alberta appealed to this Court. In accordance with the Rules notice was duly served upon the Attorney General of Canada and by direction notice was also served upon the Attorney General for each of the other provinces. Before us counsel for the Attorney General for Ontario and for the Attorney General for Saskatchewan supported the appeal. No one else appeared except Mr. Steer. On behalf of the three provinces it was submitted, as apparently it was argued in the Appellate Division, that the Act was within the legislative competence of the Province of Alberta under Heads 13, 14 and 16 of s. 92 of the *British North America Act,* 1867:

13. Property and Civil Rights in thet Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction and including Procedure in Civil Matters in those Courts.
16. Generally all Matters of a merely local or private nature in the Province.

Mr. Steer contended that the subject matter of the Act dealt with bankruptcy and insolvency and was therefore within the sole competence of the legislative authority of the Parliament of Canada under Head 21 of s. 91 of the *British North America Act.* He also contended it was *ultra vires* because it encroached upon the following heads of s. 91 of that Act:

15. Banking, incorporation of Banks and the issue of Paper Money.

1960

VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

Kerwin C.J.

18. Bills of Exchange and Promissory Notes.
19. Interest.

and because it gives to the clerk of a District Court the powers of a judge contrary to the provisions of s. 96 of the *British North America Act*.

I agree with the Appellate Division that the Act is *ultra vires* on the ground that in pith and substance it is bankruptcy and insolvency legislation and that it is therefore unnecessary to consider the other grounds of attack.

Section 3 of *The Orderly Payment of Debts Act* provides:

3. (1) This Act applies only

(*a*) to a judgment for the payment of money where the amount of the judgment does not exceed one thousand dollars,

(*b*) to a judgment for the payment of money in excess of one thousand dollars if the creditor consents to come under this Act, and

(*c*) to a claim for money, demand for debt, account, covenant or otherwise, not in excess of one thousand dollars.

(2) This Act does not apply to a debt due, owing or payable to the Crown or a municipality or relating to the public revenue or one that may be levied and collected in the form of taxes or, unless the creditor consents to come under this Act,

(*a*) to a claim for wages that may be heard before, or a judgment therefor by, a magistrate under *The Masters and Servants Act*,

(*b*) to a claim for a lien or a judgment thereon under *The Mechanics Lien Act*, or

(*c*) to a claim for a lien under *The Garagemen's Lien Act*.

(3) This Act does not apply to debts incurred by a trader or merchant in the usual course of his business.

Provision is then made whereby a debtor may apply to the clerk of the District Court of the judicial district in which he resides for a consolidation order, showing by affidavit all his creditors together with the amount he owes to each one, his income from all sources and, if he is married, the amount of the income of his wife, the number of persons dependent upon him, the amount payable for board or lodging or rent or as payment on home property and whether any of his creditors' claims are secured, and if so, the nature and particulars of the security held by each. The clerk is to settle an amount proposed to be paid by the debtor into court periodically or otherwise on account of the claims of his creditors and provide for hearing objections by the latter.

After such a hearing, if necessary, a consolidation order is to be made, which order is a judgment of the Court in favour of each creditor, and provision is made for a review by the Court of any such order.

Sections 12, 13 and 14 are important and read as follows:

12. The court may, in deciding any matter brought before it, impose such terms on a debtor with respect to the custody of his property or any disposition thereof or of the proceeds thereof as it deems proper to protect the registered creditors and may give such directions for the purpose as the circumstances require.

13. Upon the making of a consolidation order no process shall be issued in any court against the debtor at the instance of a registered creditor or a creditor to whom this Act applies

(*a*) except as permitted by this Act or the regulations, or

(*b*) except by leave of the court.

14. (1) The clerk may at any time require of, and take from, the debtor an assignment to himself as clerk of the court of any moneys due, owing or payable or to become due, owing or payable to the debtor or earned or to be earned by the debtor.

(2) Unless otherwise agreed upon the clerk shall forthwith notify the person owing or about to owe the moneys of the assignment and all moneys collected thereon shall be applied to the credit of the claims against the debtor under the consolidation order.

(3) The clerk may issue a writ of execution in respect of a consolidation order and cause it to be filed with the sheriff of a judicial district and at any land titles office.

While the Act applies only to claims or judgments which do not exceed one thousand dollars, unless in the case of a judgment for the payment of money in excess of one thousand dollars the creditor consents to come under the Act, I can read these provisions in no other way than showing that they refer to a debtor who is unable to pay his debts as they mature. Why else is authority given the Court to impose terms with respect to the custody of his property or any disposition thereof or of the proceeds thereof as it deems proper to protect the registered creditors (s. 12)? And why else may no process be issued in any court against the debtor at the instance of a registered creditor or a creditor to whom the Act applies, except as stated (s. 13)? Section 14 authorizing the clerk to require an assignment to him by the debtor of any monies due, owing or payable or to become due, owing or payable to the debtor, or earned or to be earned by the debtor is surely consonant only with the position of an insolvent debtor. In fact a debtor under the Act

1960

VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

Kerwin C.J.

is ceasing to meet his liabilities generally as they become due and therefore falls within s. 20(1)(*j*) of the *Bankruptcy Act*, R.S.C. 1952, c. 14.

In *Attorney General for British Columbia v. Attorney General for Canada et al.*[1], Lord Thankerton speaking for the Judicial Committee states at p. 402:

> In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration. The justification for such proceeding by a creditor generally consists in an act of bankruptcy by the debtor, the conditions of which are defined and prescribed by the statute law.

This was said in an appeal affirming the decision of the majority of this Court in the *Reference as to the Validity of The Farmers' Creditors Arrangement Act of the Dominion*, as amended[2].

In *Canadian Bankers' Association v. Attorney General of Saskatchewan*[3], this Court held that *The Moratorium Act* of Saskatchewan was *ultra vires* as being in relation to insolvency. There the decision of the Judicial Committee in *Abitibi Power and Paper Company v. The Montreal Trust Company*[4] was relied upon, but, for the reasons given by Mr. Justice Locke, it was held that it had no application. As was pointed out, the Judicial Committee in the 1943 case held that the purpose of the impugned legislation was to stay proceedings in the action brought under the mortgage granted by the Abitibi Company until the interested parties should have an opportunity of considering such plan for the re-organization of the company as might be submitted by a Royal Commission appointed for that purpose. For the same reason that decision is inapplicable here. The older decision of the Privy Council in *Attorney General for Ontario v. The Attorney General of Canada*[5], dealing with *The Ontario Assignments and Preference Act*, is quite distinguishable, although in my view it is doubtful whether in view of later pronouncements of the Judicial Committee

[1] [1937] A.C. 391, 1 D.L.R. 695, 18 C.B.R. 217, 67 C.C.C. 337.
[2] [1936] S.C.R. 384, 3 D.L.R. 622, 17 C.B.R. 359, 66 C.C.C. 180.
[3] [1956] S.C.R. 31, [1955] 5 D.L.R. 736, 35 C.B.R. 135.
[4] [1943] A.C. 536, 4 D.L.R. 1, 3 W.W.R. 33.
[5] [1894] A.C. 189.

it would at this date be decided in the same sense, even in the absence of Dominion legislation upon the subject of bankruptcy and insolvency.

The Act in question is not legislation for the recovery of debts. It has no analogy to provincial bulk sales legislation because there the object is to make sure that when a person sells his stock of goods, wares, merchandise and chattels, ordinarily the subject of trade and commerce, the creditors will not be placed in any difficulty because of the disappearance of the proceeds of the sale. It is unnecessary to express any opinion as to the validity of s. 156 of *The Division Courts Act* of Ontario, R.S.O. 1950, apparently introduced for the first time in 1950 by c. 16 of the statutes of that year, which provides for a consolidation order.

The debtor under *The Orderly Payment of Debts Act* is not in the same position as the appellant in *L'Union St. Jacques de Montréal v. Bélisle*[1], and the appellant can gain no comfort from *Ladore v. Bennett*[2], because there it was held that the *City of Windsor (Amalgamation) Act,* 1935 and Amendment were in pith and substance Acts passed in relation to "municipal institutions in the Province" and did not encroach upon the exclusive legislative power of the Dominion Parliament in relation to bankruptcy and insolvency, interest, or private rights outside the Province. This was a decision of the Judicial Committee affirming that of the Court of Appeal for Ontario[3], which latter, in the meantime, had been applied by the Court of Appeal for British Columbia in *Day v. Corporation of the City of Vancouver, McGavin and McMullen*[4]. The legislation in question in each of these cases was quite different from the effort by Alberta in *Board of Trustees of the Lethbridge Northern Irrigation District v. I.O.F.*[5].

The appeal should be dismissed.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J.:—The *Orderly Payment of Debts Act* was passed by the Legislature of Alberta and appears as c. 61 of the Statutes of 1959. By s. 22 it is declared that the Act is

[1] (1874) L.R. 6 P.C. 31.
[2] [1939] A.C. 468, 3 D.L.R. 1, 2 W.W.R. 566.
[3] [1938] O.R. 324, 3 D.L.R. 212.
[4] (1938), 53 B.C.R. 140, 4 D.L.R. 345, 3 W.W.R. 161.
[5] [1940] A.C. 513, 2 D.L.R. 273.

1960

VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

Locke J.

to come into force on a date to be fixed by proclamation. We are informed that, pending the determination of this reference, it has not been proclaimed.

In my opinion of the various grounds upon which it is contended that the Act is *ultra vires* the legislature it is necessary to consider only that as to whether it infringes upon the exclusive jurisdiction of Parliament to make laws in relation to bankruptcy and insolvency under head 21 of s. 91.

While "bankruptcy" and "insolvent person" are defined in s. 2 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, it is rather the meaning that these words commonly bear that is to be given to them in construing the words in s. 91. In *Parker v. Gossage*[1], Parke B. said that an insolvent in the ordinary acceptation of the word is a person who cannot pay his debts. In *Reg. v. Saddlers Company*[2], Willes J. adopted what had been said by Baron Parke as to the meaning assigned to the term "insolvent" and said that the words "in insolvent circumstances" had always been held to mean not merely being behind the world, if an account were taken, but insolvency to the extent of being unable to pay just debts in the ordinary course of trade and business.

In *Attorney General of British Columbia v. Attorney General of Canada*[3], referring to the words in head 21, Lord Thankerton said that, in a general sense, insolvency means inability to meet one's debts or obligations.

When the *Bankruptcy Act* was first enacted in 1919 (c. 36) "insolvent person" and "insolvent" were declared to include a person who is for any reason unable to meet his obligations as they respectively become due, or who has ceased paying his current obligations in the ordinary course of business, thus substantially adopting what had been said by Parke B. and Willes J. The meaning commonly borne by the terms employed in head 21 of s. 91 did not differ in 1867 from their present day meaning.

[1] (1835) 5 L.J. Ex. 4.
[2] (1863), 10 H.L.C. 404 at 425.
[3] [1937] A.C. 391 at 402, 1 D.L.R. 695, 18 C.B.R. 217, 67 C.C.C. 337.

The statute to be considered does not refer in terms either to bankruptcy or insolvency and this, while not decisive, is a matter to be considered in determining the question as to what is its true nature.

The Act is declared by s. 3 to apply to a judgment not in excess of one thousand dollars, to a judgment in excess of that amount if the creditor consents to come under the Act and to a claim for money, demand for debt, account, covenant or otherwise, not in excess of one thousand dollars. Debts due to the Crown or to a municipality or relating to the public revenue, claims for wages that might be heard before a magistrate under the *Masters and Servants Act,* claims for a lien or a judgment thereon under the *Mechanics Lien Act,* claims for a lien under the *Garagemen's Lien Act* and debts incurred by a trader or merchant in the usual course of business are exempted from the operation of the Act.

As is the case of a proposal made by a debtor under the provisions of s. 27 of the *Bankruptcy Act* or s. 7 of the *Farmers' Creditors Arrangement Act,* R.S.C. 1952, c. 111, proceedings under this statute are initiated by the debtor who may apply to the clerk of the district court of the judicial district in which he resides for what is called a consolidation order. With the application the debtor is required to file an affidavit in the prescribed form setting forth, *inter alia,* particulars of the debts owing by him, of the nature and extent of his property, the amount of the income of himself and his wife and the number of persons dependent upon him.

Section 5 requires the clerk to file the affidavit and the particulars in a register and:

> upon reading the affidavit and hearing the debtor settle an amount proposed to be paid by the debtor into court, periodically or otherwise, on account of the claims of his creditors and enter particulars thereof in the register or, if so proposed, enter in the register a statement that the present circumstances of the debtor do not warrant the fixing of any amount.

The clerk is then required to give notice of the application to each of the creditors and fix a date on which he will hear objections. If no objections are received within twenty days after the notices are mailed, the clerk is required to note the fact in the register and issue a consolidation order.

1960

VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

Locke J.

By s. 7 it is provided that any creditor may within the time limited file an objection with the clerk either to the amount entered in the register as the amount owing to him or to any other creditor or to the amount "fixed to be paid into court by the debtor or the times of payment thereof or to the statement fixing no amount." Upon such objection being filed the clerk is required to notify the debtor and any other creditor whose claim is objected to.

By s. 8 the clerk is empowered to bring in and add to the register the name of any creditor of the debtor of whom he has notice and who is not disclosed in the affidavit of the debtor.

Section 9 reads:

(1) At the time appointed for the hearing the clerk shall consider all objections filed with him in accordance with this Act and

(*a*) if an objection is to the claim of a creditor and the parties are brought to agreement or if the creditor's claim is a judgment of a court and the only objection is to the amount paid thereon, he may dispose of the objection in a summary manner and determine the amount owing to the creditor.

(*b*) if an objection is to the proposed terms or method of payment of the claims by the debtor or that terms of payment are not but should be fixed, he may dispose of the objection summarily and determine as the circumstances require the terms and method of payment of the claims, or that no terms be presently fixed, or

(*c*) in any case he may on notice of motion refer any objection to be disposed of by the court or as the court otherwise directs.

(2) The clerk shall enter in the register his decision or the decision of the court, as the case may be, and shall issue a consolidation order.

Section 10 provides that the consolidation order shall state the amount owing to each creditor, the amount to be paid into court by the debtor and the times of payment, and declares that a consolidation order is a judgment of the court in favour of each creditor for the amount stated and is an order of the court for the payment by the debtor of the amounts specified.

Section 11 provides that on notice of motion a judge of the district court may review a consolidation order made by the clerk and vary it or set it aside. Under the provisions of s. 12 the judge may impose such terms on a debtor with respect to the custody of his property or any disposition thereof as he deems proper to protect the registered creditors and give such directions for that purpose as the circumstances require.

Section 13 declares that upon the making of a consolidation order no process shall be issued in any court against the debtor at the instance of a registered creditor or a creditor to whom the Act applies, except as permitted by the Act or the regulations, or by leave of the court.

Section 14 enables the clerk at any time to require the debtor to assign to him any moneys owing to or to become owing or to be earned by the debtor and authorizes him to issue a writ of execution "in respect of a consolidation order" and to file it with the sheriff or at any land titles office.

Section 15 permits an application to be made by a creditor whose claim is not entered in the consolidation order to have it entered in the register and provides the manner of settlement of any dispute as to its amount.

Section 16 declares that a registered creditor holding security for his claim may, at any time, elect to rely upon his security and if the security is realized any excess above the amount of the creditor's claim is to be paid to the clerk and applied in payment of other judgments against the debtor.

By s. 17 provision is made, *inter alia,* for an application by any registered creditor where a debtor defaults in complying with an order for payment or any other order or direction of the court, or where any other proceeding for the recovery of money has been brought against the debtor, or where a judgment is recovered against him for an amount in excess of one thousand dollars and the judgment creditor refuses to permit his name to be added to the register for leave to take proceedings on behalf of all of the registered creditors to enforce the consolidation order. The section further provides for an *ex parte* application to the court where a debtor is about to abscond or has absconded or, with intent to defraud his creditors, is about to remove his property from Alberta.

Section 18 provides that the debtor or any registered creditor may at any time apply *ex parte* to the clerk for a further examination of the debtor as to his financial circumstances and, after notice has been given to all parties to the consolidation order, vary the order as to the time, amount and method of payment.

1960

VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

Locke J.

Section 19 requires the clerk to distribute the moneys paid into court on account of the debts of a debtor at least once every three months *pro rata* among the registered creditors.

While, according to s. 3, the Act applies only to judgments or claims which do not exceed one thousand dollars, the total of such claims is not mentioned so that the Act can be applied irrespective of the aggregate amount of the debts. While the debtor may be required by the clerk under the provisions of s. 14 to assign any moneys due, owing, payable, or to become due or earned by the debtor, there is no express provision for the conveyance of the debtor's other assets to the clerk, though the powers of the district court judge under s. 12 would permit such an order to be made.

Persons engaged in farming in Alberta, as that expression is defined in the *Farmers' Creditors Arrangement Act,* who are entitled to make a proposal to their creditors under the terms of s. 7 of that Act are among those to whom the *Orderly Payment of Debts Act* will be applicable.

The language of s. 5 is that the clerk, upon an application being filed, after reading the affidavit required by s. 4 and hearing the debtor (apparently *ex parte*) shall "settle an amount proposed to be paid by the debtor into court periodically or otherwise on account of the claims of his creditors" or, "if so proposed" (presumably by the debtor) enter in the register a statement that the present circumstances of the debtor do not warrant the fixing of any amount. This language, while lacking in clarity, appears to indicate that, at least in the first instance, the clerk is to accept the debtor's estimate as to what, if anything, he can pay to his creditors and record this in the court records. Providing no objections are received within twenty days, this estimate appears to be conclusive by virtue of s. 6 and a consolidation order will issue.

Where objections are filed, they are to be dealt with under s. 9 which gives to the clerk power to settle the amount payable under any judgment if the amount is in dispute and, where the proposed scheme of payment is objected to, he may dispose of the objection summarily and decide upon the terms of the consolidation order.

This procedure may be compared with that provided for dealing with proposals which may be made to a trustee in bankruptcy by an insolvent person under the provisions of Part 111 of the *Bankruptcy Act* where the proposal is submitted to a meeting of the creditors and, if accepted by them and approved by the court having jurisdiction in bankruptcy under the terms of s. 34, becomes binding upon the parties concerned. Under the Act in question, where the proposal is objected to by a creditor whose claim does not exceed one thousand dollars, the wishes of the creditors may be disregarded by the clerk. The provisions of s. 13 which prohibit the taking of any proceedings by a registered creditor or a creditor to whom the Act applies are, after a consolidation order has been made as to these creditors, similar in their effect to the provisions of s. 40 of the *Bankruptcy Act* and s. 11 of the *Farmers' Creditors Arrangement Act* relating to bankruptcy and to proposals. While s. 4 details certain information that is to be contained in the debtor's affidavit, the form of the affidavit which may be prescribed by the Lieutenant-Governor in Council by regulation is not before us. Whether that affidavit is to contain a statement that the debtor is unable to meet his debts as they become due, or whether the clerk who is required to act by s. 5 is to do so upon the unsworn statement of the debtor that he is in insolvent circumstances, does not appear.

While the Act does not require that the debtor who applies must be insolvent in the sense that he is unable to pay his debts as they become due, it must, in my opinion, be so construed since it is quite impossible to believe that it was intended that the provisions of the Act might be resorted to by persons who were able to pay their way but do not feel inclined to do so. In my opinion, this is a clear invasion of the legislative field of insolvency and is, accordingly, beyond the powers of the legislature.

There have been bankruptcy laws in England since 1542 dealing with the estates of insolvent persons, and the terms of statutes in force in England prior to 1867 may be looked at as an aid in deciding what subject matters were generally regarded as included in these terms.

1960

VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

Locke J.

The *Bankruptcy Consolidation Act* of 1849, 12-13 Vict., c. 106, which consolidated the law relating to bankrupts, contained in ss. 201 to 223 provisions by which a trader unable to meet his engagements with his creditors might petition the court to approve a composition or scheme of arrangement for the payment of his debts and declared the manner in which such a proposal might be submitted to the creditors and, if approved, to the court for its approval.

The manner in which disputes between the official assignee and the creditors as to the carrying out of a deed of composition or arrangement were to be settled was further dealt with in 1861 in s. 136 of an *Act to amend the law relating to bankruptcy and insolvency in England*, 24-25 Vict., c. 134.

Compositions and schemes of arrangement have thus for more than 100 years past been treated as subject matters falling within the scope of the statutes relating to bankruptcy and insolvency. The provisions dealing with this subject at the present day in England are to be found in the *Bankruptcy Act* of 1914 as amended (see Williams on Bankruptcy, 17th ed., p. 92). When the *Bankruptcy Act* was enacted in Canada in 1919 it contained in s. 13 provisions whereby an insolvent debtor who wished to make a proposal to his creditors for a composition in satisfaction of his debts or an extension of time for payment thereof or a scheme of arrangement of his affairs might, either before or after the making of a receiving order against him or the making of an authorized assignment by him, require in writing an authorized trustee to convene a meeting of his creditors for the consideration of such proposal and provisions whereby the scheme, if approved, might become binding upon the parties concerned. Similar provisions for dealing with such a proposal, a term which is defined to include a proposal for a composition, an extension of time, or for a scheme of arrangement, are contained in the *Bankruptcy Act* as it is today.

These provisions are made applicable to proposals by farmers in Alberta, Manitoba and Saskatchewan by the *Farmers' Creditors Arrangement Act* above mentioned. The Act under consideration appears to be an attempt to substitute for the provisions of the *Bankruptcy Act* and

the *Farmers' Creditors Arrangement Act* relating to proposals for an extension of time or a scheme of arrangement which are submitted to the interested creditors for their approval and, if approved, thereafter to the judge in bankruptcy, a scheme whereby the propriety of accepting such a proposal is to be determined by the clerk of the district court and with regard, apparently, only to the claims of those creditors the debts owing to whom are less than one thousand dollars in amount and those to whom greater amounts are owing who consent to come under the Act, leaving other creditors whose claims are greater to resort to such remedies as they may be advised to take for the enforcement of their claims. The provisions of the provincial Act thus conflict with those in the legislation passed by Parliament dealing with the same matters.

In *Attorney General of British Columbia v. Attorney General of Canada*[1], where the *Farmers' Creditors Arrangement Act 1934* of the Parliament of Canada, as amended by the *Farmers' Creditors Arrangement Act Amendment Act 1935* was considered, Lord Thankerton said in part:

> it cannot be maintained that legislative provision as to compositions, by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation.

and referred to the judgment of this Court in the matter of the *Companies' Creditors Arrangement Act*[2], where Sir Lyman Duff, delivering the judgment of the majority, said that the history of the law seems to show clearly that legislation in respect of compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law.

Some support for the validity of this legislation is sought in the judgment of the Judicial Committee in *Attorney General of Ontario v. Attorney General of Canada*[3]. The question in that appeal was as to whether s. 9 of c. 124, R.S.O. 1887, was within the powers of the legislature. The Act was entitled *"An Act respecting assignments and preferences by insolvent persons."* A majority of the members of the Court of Appeal who considered the question

[1] [1937] A.C. 391, 1 D.L.R. 695, 18 C.B.R. 217, 67 C.C.C. 337.
[2] [1934] S.C.R. 659, 4 D.L.R. 75, 16 C.B.R. 1.
[3] [1894] A.C. 189.

1960

VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

Locke J.

had found the section to be *ultra vires*. In an earlier case, *Clarkson v. Ontario Bank*[1], Haggarty C.J.O. and Osler J.A. had held the Act as a whole to be *ultra vires* as legislation relating to bankruptcy and insolvency, while Burton and Patterson JJ.A. considered it to be *intra vires* as being in relation to property and civil rights in the province.

Prior to the passing of that statute the *Insolvency Act of 1875* (c. 16) had been repealed by Parliament by c. 1 of the Statutes of 1880 and there was no Bankruptcy or Insolvency Act of the Dominion.

The judgment allowing the appeal was delivered by Herschell L.C. The Act, the first two sections of which dealt with fraudulent preferences by insolvents or those knowing themselves to be on the eve of insolvency, permitted a debtor-solvent or otherwise—to make an assignment of his exigible assets to a sheriff for the purpose of realization and distribution *pro rata* among his creditors. Section 9 provided that such an assignment should take precedence of all judgments and all executions not completely executed by payment. There were no provisions permitting proposals for a composition or extension of time for payment of debts. It was said that the effect to be given to judgments and executions and the manner and the extent to which they might be enforced was *prima facie* within the legislative powers of the legislature and that the validity of the assignment and the application of s. 9 did not depend on whether the assignor was or was not insolvent. Such an assignment, their Lordships said, did not infringe on the exclusive legislative power of Parliament under head 21. The concluding portion of the judgment reads (pp. 200-201):

> Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

[1] (1890), 15 O.A.R. 166.

As Parliament has dealt with the matter, the concluding portion of this judgment would be fatal to the appellant's contention, even if the subject of bankruptcy and insolvency were one in relation to which the province might legislate in the absence of legislation by the Dominion. But the language of s. 91 is that the exclusive legislative power of the Parliament of Canada extends to all matters in relation to, *inter alia,* bankruptcy and insolvency, and the provinces are excluded from that field. As Lord Watson said in *Union Colliery v. Bryden*[1]:

> The abstinence of the Dominion Parliament from legislating to the full limit of its power could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

Neither *Ladore v. Bennett*[2] nor *Abitibi Power and Paper Co. v. Montreal Trust Co.*[3], affect the question, in my opinion. In the former case the legislation, while it affected the rights of persons who had claims against insolvent municipalities, was found to be in pith and substance in relation to municipal institutions in the province and, as such, was *intra vires* the legislature under s. 92(8). In the latter case the purpose of the impugned legislation was to stay proceedings in an action brought under a mortgage until the interested parties should have an opportunity of considering a plan for the reorganization of the company, and the true nature of the legislation was held to be to regulate property and civil rights within the province.

I would dismiss this appeal.

The judgment of Cartwright and Martland JJ. was delivered by

CARTWRIGHT J.:—I agree with the conclusion of my brother Locke, that in its true nature and character *The Orderly Payment of Debts Act* is legislation in relation to matters coming within the class of subjects specified in head 21 of s. 91 of the *British North America Act,* and is wholly *ultra vires* of the Legislature of the Province of Alberta, and I am in substantial agreement with his reasons.

[1] [1899] A.C. 580 at 588, 68 L.J.P.C. 118.
[2] [1939] A.C. 468, 3 D.L.R. 1, 2 W.W.R. 566.
[3] [1943] A.C. 536, 4 D.L.R. 1, 3 W.W.R. 33.

1960

VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

Cartwright J.

I wish, however, to add some observations as to some of the decisions relied upon by counsel who supported the appeal.

The first of these is the judgment of the Judicial Committee in *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*[1]. The decision of the Court of Appeal for Ontario in that case is reported in[2]. The question referred to the Court was:

> Had the Legislature of Ontario jurisdiction to enact the 9th section of the Revised Statutes of Ontario, ch. 124, and entitled 'An Act respecting Assignments and Preferences by Insolvent Persons?'

The Court consisted of four judges. Hagarty C.J.O. and Burton J.A. answered in the negative; Maclennan J.A. answered in the affirmative; Osler J.A. made no answer. In the result the decision was that the section was *ultra vires* of the Legislature. On appeal to the Judicial Committee this decision was reversed and the question was answered in the affirmative.

In the earlier case of *Clarkson v. Ontario Bank*[3], Hagarty C.J.O. had reached the conclusion that the whole Act was *ultra vires* of the Provincial Legislature; in the later case, the learned Chief Justice adhered to the opinion he had expressed in *Clarkson's* case and speaking of s. 9, to which alone the question put to the Court had reference, he said at p. 493:

> I find it impossible to separate it from the rest of the Act, or to give any opinion as to its effect, standing by itself, unless I arrived at a judgment the opposite to that expressed in 1888 to which I still fully adhere.

In the Judicial Committee, the Lord Chancellor, Lord Herschell, who gave the judgment of their Lordships, referred to certain other sections of the Act in order to explain the meaning of section 9 but did not deal with the question of the validity of those other sections or of the Act as a whole. At pp. 198 and 199, he said:

> Their Lordships proceed now to consider the nature of the enactment said to be ultra vires. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. Now there can be no doubt that the effect to be given to judgments and executions and the manner and extent to which they

[1] [1894] A.C. 189. [2] (1893), 20 O.A.R. 489.
[3] (1890), 15 O.A.R. 166.

may be made available for the recovery of debts are prima facie within the legislative powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise. The Act of 1887 which abolished priority as amongst execution creditors provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year, containing the section which is impeached, goes a step further, and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets of the debtor, including those which have been seized in execution.

But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency, and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the Province of Canada which prevailed at the time when the Dominion Act was passed, it was one of the grounds for an adjudication of insolvency.

* * *

Moreover, the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent.

Viewing the impugned section in this way their Lordships were able to hold that, at all events in one aspect, its true subject matter fell within heads 13 and 14 of s. 92 of the *B.N.A. Act* (although in another aspect that subject matter would fall within head 21 of s. 91) and so could stand while there was no bankruptcy or insolvency legislation of the Dominion Parliament in existence in relation to the same subject matter.

In *Ladore v. Bennett*[1], their Lordships held that the impugned legislation was in its true nature and character in relation to the subject matter comprised in head 8 of s. 92, Municipal Institutions in the Province, and that the fact that the municipal institutions dealt with in the legislation had become insolvent did not remove the subject matter from the ambit of provincial legislative power.

[1] [1939] A.C. 468, 3 D.L.R. 1, 2 W.W.R. 566.

1960

VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

Cartwright J.

In *Abitibi Power & Paper Co. v. Montreal Trust Co.*[1], their Lordships regarded the subject matter of the legislation there in question as falling within heads 13 and 14 of s. 92. The Montreal Trust Co., as trustee for the bond-holders, had commenced an action in the Supreme Court of Ontario on September 8, 1932, against the Abitibi Company for the enforcement of the security of a deed of trust and bond mortgage. On September 26, 1932, the Abitibi Company was adjudicated bankrupt. On December 7, 1932, leave to continue this action was granted pursuant to s. 21 of the *Dominion Winding Up Act*. The bond-holders made no claim in the winding-up, and in their Lordships' view, once leave had been granted "the action proceeded as a provincial action, subject to the provincial law regulating the rights in such an action and subject to the sovereign power of the legislature to alter those rights in respect of property within the province". The judgment of their Lordships continues as follows at pp. 547 and 548:

> It could not be denied that the action proceeded subject to the possibility of being stayed under the ordinary rules of procedure as, for instance, for security for costs, default in pleading or discovery, or any special circumstances which the court might think demanded a stay. Middleton J.A. appreciated this position, but he expressed the opinion that the action would proceed in accordance with the orders and rules of practice that were in existence at the date of the application. The limitation to existing rules is significant. Their Lordships can see no ground for such a restriction. If the rules of procedure were subsequently altered before the action came to an end, it must proceed thereafter subject to the rules as amended. The province, therefore, could enact rules in the course of the action imposing a further ground of stay, and, if it can thus impose what may be a general moratorium, there is no reason why its sovereign power should be so limited as not to enable it to impose, if it so desired, a moratorium limited to a special class of action or suitor, or to one particular action or suitor.

I do not propose to refer in detail to the other authorities relied upon in support of the appeal but, after examining all of them, I think I am right in saying that in every decision of the Judicial Committee or of this Court in which provincial legislation, impugned on the ground that it affected the rights and obligations of an insolvent entity and its creditors and thereby trenched on the subject matter comprised in head 21 of s. 91, has been upheld it appears that in the view of the court two conditions were

[1] [1943] A.C. 536, 4 D.L.R. 1, 3 W.W.R. 33.

found to exist; (i) that the impugned legislation was not in truth and substance primarily in relation to Bankruptcy and Insolvency but rather in relation to one or more of the matters enumerated in s. 92; and (ii) that in so far as it affected the rights and obligations of an insolvent and its creditors it did not conflict with existing valid legislation of Parliament enacted in exercise of the power contained in head 21 of s. 91.

1960

VALIDITY OF THE ORDERLY PAYMENT OF DEBTS ACT, 1959 (ALTA.)

Cartwright J.

In the case at bar, as is shown in the reasons of my brother Locke, neither of these conditions exists.

I would dismiss the appeal.

*Appeal dismissed.*

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LOCAL UNION NUMBER 1432 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (*Plaintiff*) — APPELLANT;

AND

THE TOWN OF SUMMERSIDE (*Defendant*) ..... — RESPONDENT;

AND

THE ATTORNEY-GENERAL FOR PRINCE EDWARD ISLAND ..... INTERVENANT.

1960

*Feb. 23

May 16

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND

*Labour—Collective bargaining—Refusal of town to bargain—Mandamus—Whether Trade Union Act superseded by powers of town council under its Act of incorporation—Legality and applicability of Trade Union Act, R.S.P.E.I. 1951, c. 164, ss. 2, 3(1)—The Town of Summerside Incorporation Act, 1903 (P.E.I.), c. 18.*

The plaintiff union applied for an order of mandamus to compel the defendant municipality to bargain collectively. The defence of the municipality was that the *Trade Union Act* was ineffective to legalize trade union activities in the province, and that in any event it did

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

1960

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. TOWN OF SUMMERSIDE et al.

not apply to the municipality's employees in view of the more specific powers it had under its Act of incorporation respecting hiring, dismissal and remuneration of employees. The action was dismissed by the trial judge on the ground that the *Trade Union Act* did not apply. The Court of Appeal held that the *Trade Union Act* was valid and effectual to authorize collective bargaining and was available for that purpose between the parties, but that it did not apply on the topics of wages and dismissals which were reserved to the municipality under its Act of incorporation. The union appealed to this Court and the municipality cross-appealed.

*Held:* The appeal should be allowed and the cross-appeal dismissed.

Sections 2 and 3(1) of the *Trade Union Act* effectively constitute valid legislative authority for trade unions to organize and bargain collectively in the province.

There was no repugnancy between the *Trade Union Act* and the municipality's Act of incorporation. By the terms of s. 62 of the Act of incorporation, that Act applied only to "officers" appointed by the Council, a subject which is outside the jurisdiction of the *Trade Union Act*. The power to make by-laws given by s. 70 of the Act of incorporation includes the power to make such by-laws as may be deemed proper to comply with the terms of an agreement regulating the conditions of employment of the employees, provided that such provisions are not contrary to the terms of the enabling statute. There were no reasons at law why the powers vested in the Council could not be used to enable it to conclude a binding collective agreement with the union representing its employees.

APPEAL and cross-appeal from a judgment of the Supreme Court of Prince Edward Island, *in banco*[1], modifying a judgment of Tweedy J. Appeal allowed and cross-appeal dismissed.

*W. E. Bentley, Q.C.*, and *J. P. Nicholson*, for the plaintiff, appellant.

*J. O. Campbell, Q.C.*, and *E. H. Strong, Q.C.*, for the defendant, respondent.

*G. R. Foster, Q.C.*, for the Attorney-General of Prince Edward Island.

The judgment of the Court was delivered by

RITCHIE J.:—This action was commenced by writ of summons dated January 31, 1955, claiming a mandamus to compel the town of Summerside to bargain collectively with the appellant union. The writ was endorsed in the terms following:

The plaintiff's claim is for a Mandamus commanding the defendant to comply with the provisions of Section 3 of the Trade Union Act and to recognize the bargain collectively with the members of the plaintiff

[1] (1959), 15 D.L.R. (2d) 26.

trade union representing the majority choice of the employees of the defendant in its electric light and power department eligible for membership in the plaintiff trade union, the Provincial Secretary having, under the provisions of the said Act, determined that a unit of employees of the defendant's electric light and power department is appropriate for collective bargaining under the said Act, and having also determined that a majority of the employees of the defendant in such unit are members in good standing of the plaintiff trade union, and that a majority of them have selected the plaintiff to be a bargaining agent on their behalf, and having certified the plaintiff as such bargaining agent, of all of which notice was duly given by the plaintiff to the defendant, the defendant having, after receiving such notice, and after having been duly requested by the duly chosen officers of the plaintiff so to bargain, neglected and refused to do so.

The statement of claim and reply amplify this endorsement, but the present appeal is only concerned with the points of law raised in the defence and rejoinder which are adequately summarized for the present purposes by Campbell C.J., speaking on behalf of the Supreme Court of Prince Edward Island *in banco*[1], in the course of rendering the decision from which this appeal is asserted. He there said at p. 27:

> The two groups of objection in point of law which occupied the attention of both Courts may be summarized as follows:
>
> (1) That the Trade Union Act of Prince Edward Island is ineffective to legalize trade union activities in the province;
>
> (2) That even if the Trade Union Act has made trade unions lawful, its provisions cannot be construed to derogate from the more special provisions of the respondent's Act of Incorporation (Town of Summerside Act, 1903, Prince Edward Island, c. 18) and By-laws respecting the terms of employment of its officers and employees.

It was agreed between the parties that these points of law should be heard and determined before any issues of fact raised by the pleadings and by Order of the Court they were set down for hearing before Tweedy J. on September 22, 1955.

In his decision rendered on November 25, 1955, Tweedy J. stated that although he was not satisfied that the *Trade Union Act,* R.S.P.E.I. 1951, c. 164, as amended, by 1953 (P.E.I.), c. 3, was invalid, he was nonetheless of opinion that "it does not and cannot apply to the employees

[1] (1959), 15 D.L.R. (2d) 26.

1960

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. TOWN OF SUMMERSIDE et al.

Ritchie J.

of the Town of Summerside in the electric light and power department" and an Order thereupon issued which read in part as follows:

> . . . the Court being of opinion that the decision of such points of law substantially disposes of the whole action, HEREBY DISMISSES this action.

This opinion was obviously based on the proposition that the terms of employment of the employees of the town of Summerside were exclusively controlled by the *Town of Summerside Incorporation Act,* 1903 (P.E.I.), c. 18, and the by-laws passed thereunder and that the *Trade Union Act,* being a general statute, did not apply to a relationship which was governed by the terms of a special Act.

On December 8, 1955, the appellant gave notice of appeal from this decision insofar as the same declared that the *Trade Union Act* did not apply in the circumstances, and in that notice stated that the Court of Appeal would be moved on a date to be fixed by it for an Order setting aside and reversing that part of the decision.

For some reason which does not appear in the record, the date which the Court of Appeal fixed for the hearing of this motion (i.e., November 1, 1956) was almost eleven months after the date of the notice of appeal and when that day came the Chief Justice was unable to be present and the Court adjourned until the 19th of December when argument was heard and the case "taken under advisement and decision reserved to a day to be fixed". The next entry concerning this case according to the record before this Court is that after a lapse of approximately nine months the Chief Justice addressed a letter to the solicitors for both parties under date of September 12, 1957, which read as follows:

> The members of the Court in banco have reached the following opinion as to the point already argued on this appeal:
>
> We feel, that though we agree with the general principle enunciated by Mr. Justice Tweedy to the effect that the particular provisions of the Summerside Incorporation Act and By-laws should prevail over the more general provisions of the Trade Union Act, nevertheless there is a certain portion of the field in which the two courses of legislation may have concurrent effect. In other words, we are of the opinion that the provisions of the Summerside Incorporation Act and By-laws preclude the operation of the Trade Union Act in matters relating to the employment,

remuneration and dismissal; but that at the same time there remains a limited field for collective bargaining in such matters as hours of work, safety precautions, holidays, social security, etc.

We are, however, in doubt as to the propriety of pronouncing judgment on the foregoing point while the other, and broader, questions remains undecided. It would, for instance, be mere dictum for the Court of Appeal to say that a certain portion of the field is open for collective bargaining, while it is still open for argument that the Trade Union Act is entirely invalid.

Counsel are therefore invited to attend before the Court on Friday, September 20th inst., at the close of the hearing scheduled for that date, to discuss the following questions: (a) whether, in view of the Court's opinion on the effect of the Summerside Incorporation Act, the parties still wish to have the broader question of the validity of the Trade Union Act argued and decided; (b) if the answer to question (a) is in the affirmative, what is the most appropriate method of arriving at a determination of the broader questions?

Counsel duly appeared on September 20 and addressed the Court after which the appeal was adjourned until November 12, but on that day the Court merely met for the purpose of adjourning until December 13, at which time a representative of the Department of the Attorney-General appeared, and after argument the hearing was further adjourned until January 9, 1958, when the argument was concluded.

On April 3, 1958, a memorandum was issued, signed by the Chief Justice and MacGuigan J., and reading as follows:

The Court is of the opinion that the Trade Union Act, now R.S., P.E.I., Chapter 164, is valid and effectual to authorize collective bargaining, and is available for that purpose as between the Town of Summerside and its employees except on the topics of wages, salaries, and dismissals, which are reserved to the Town Council by virtue of the Act of Incorporation of the Town of Summerside and by-laws passed thereunder.

Reasons and consequent directions to be given later.

The reasons of Campbell C.J., having been filed on July 25, the formal Order of the Court was granted on October 24, 1958, which read in part as follows:

This Court doth order and adjudge that the above recited judgment pronounced before Mr. Justice Tweedy be modified to the following extent, namely: that the Respondent's objections in point of law do not preclude the Appellant from obtaining, in proper circumstances, an order of mandamus requiring the Respondent to recognize and bargain collectively with the Appellant with respect to the terms and conditions of employment by the Respondent of its electric light and power employees who are members of the Appellant or with respect to other relevant matters; except on the

1960

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
*v.*
TOWN OF SUMMERSIDE
*et al.*

Ritchie J.

topics of appointments or hirings, remunerations, and dismissals, which are reserved to the Town Council of the Respondent by virtue of its Act of Incorporation and by-laws passed thereunder.

The Court doth further order and adjudge that the action be referred back to the Court from which the appeal was taken for appropriate proceedings in the context of this judgment.

From this judgment the appellant has appealed to this Court, limiting his appeal however

> . . . to the part of the said Judgment appealed from which purported to refer the said Action back to Mr. Justice Tweedy, and to the failure and omission of this Court to grant to the Appellant the Order of Mandamus for which the Action was brought, and to the part of the said Judgment which purports to exclude and except from the subjects of collective bargaining the topics of appointments or hirings, remunerations and dismissals.

A cross-appeal was entered by the respondent from that part of the decision which held that the *Trade Union Act* of Prince Edward Island was effective to legalize trade union activities in the province and also from that part which held that the legal objections raised by the respondent did not preclude the appellant from obtaining an Order of mandamus.

At the opening of the appeal before this Court it was suggested by the Chief Justice that in order to obviate any difficulty in the event that the judgment below should be considered not to be a final judgment, it might be advisable for the Court to make an order permitting the appellant to appeal and the respondent to cross-appeal. Counsel for all parties agreed to this suggestion and the order was thereupon made. The Attorney-General of Prince Edward Island was represented by counsel before the Court but took no part in the argument.

As to the cross-appeal, I am in complete agreement with the learned Chief Justice of Prince Edward Island in holding that "the Trade Union Act of Prince Edward Island is effective to legalize trade union activities in the province".

The argument presented on behalf of the town of Summerside in support of the cross-appeal was to the effect that the taint of illegality which attached to trade unions in England in the 18th century was imported to Prince Edward Island with the original colonists and that as it has

never been removed by sufficiently explicit legislative language it remains, although unwritten and unrecognized for upwards of 200 years, so much a part of the common law of Prince Edward Island as to make the *Trade Union Act, supra,* ineffective and to preclude trade unions from the legal right to organize and bargain collectively in that province.

The provisions of ss. 2 and 3(1) of the *Trade Union Act* read as follows:

> 2. Employees may form themselves into a trade union, and join the same when formed.
>
> 3. (1) Employees may bargain collectively with their employer or employers and members of a trade union may conduct such bargaining through the trade union and through the duly chosen officers of such trade union. Every employer shall recognize and bargain collectively with the members of a trade union representing the majority choice of the employees eligible for membership in said trade union, when requested so to bargain by the duly chosen officers of said trade union, and any employer refusing so to bargain shall be liable to a fine upon summary conviction of One Hundred Dollars for each such offence, and in default of payment to thirty days imprisonment.

In my opinion these provisions effectively constitute valid legislative authority for trade unions to organize and bargain collectively in the province of Prince Edward Island.

As to that part of the notice of appeal which objects to the case being referred back to Mr. Justice Tweedy and to the failure of the Court of Appeal to grant the Order of mandamus, I am of opinion that neither of these objections can be sustained. The questions before this Court are limited to the points of law which were set down for hearing and determination before Tweedy J. Under the procedure here adopted and for the limited purpose of determining these questions, it must be taken that the statements of fact alleged in the appellant's pleadings are true, but this does not mean that they can be accepted for the purpose of granting the Order for mandamus. Although this action was started more than five years ago, no evidence has yet been taken, and as the Court appealed from held that

> the respondent's objections in point of law do not preclude the appellant from obtaining, in proper circumstances, an Order for Mandamus . . .

it had no alternative but to refer the matter back to the learned judge of first instance.

1960

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. TOWN OF SUMMERSIDE et al.

Ritchie J.

The really substantial ground of appeal to this Court is from that part of the Order and decision

> which purports to exclude and except from the subjects of collective bargaining the topics of appointments or hirings, remunerations and dismissals.

The reasoning of the learned Chief Justice of Prince Edward Island was that the *Trade Union Act* was inconsistent with the *Town of Summerside Incorporation Act* in that the above subjects were specifically dealt with by By-law 326 which was validly passed under the latter statute. This by-law reads as follows:

> The salaries of Town Officials, Firemen and all other Employees of the Town shall be such as the Town Council may from time to time determine and fix by resolution, and they shall remain in office during the pleasure of the Council, and should any vacancies occur, the Council may appoint others to take their place at any meeting of the Council.

Campbell C.J. appears to have taken the view that by the provisions of this by-law "the topics of appointments or hirings, remunerations and dismissals" of employees were reserved to the Town Council and that the collective bargaining provisions of the *Trade Union Act* had the effect of trespassing in some manner on this reservation and were, therefore, to this extent inapplicable to the Town because they formed part of a general statute which must give way to the special provisions of the *Summerside Incorporation Act.*

Much was said at the argument before this Court about the principle which is embodied in the maxim *"generalia specialibus non derogant"* and the learned judge of first instance devoted a large part of his decision to the citation of textbook and other authority in this regard, but the matter appears to me to have been most clearly stated by Duff J. (as he then was) in *Toronto Railway Company v. Paget*[1], where he said:

> One possible view is that in such cases the provision in the general Act is to be wholly discarded from consideration; the other is that both provisions are to be read as applicable to the undertaking governed by the special Act so far as they can stand together, and only where there is repugnancy between the two provisions and then only to the extent of such repugnancy the general Act is to be inoperative.
>
> I think the latter is the correct view . . .

[1] (1909), 42 S.C.R. 488 at 491.

This view was re-affirmed by Rinfret J., speaking for the majority of this Court in *City of Ottawa v. Town of Eastview*[1], and in my opinion it correctly states the law which governs this branch of the case.

The learned judge of first instance approached the problem by saying:

> Now the question to decide is, does the Trade Union Act which is a general Act repeal the Town of Summerside Act which is a special Act?

and it was apparently by answering this question in the negative that he reached the opinion that the *Trade Union Act* did not and could not apply to the employees of the town of Summerside in the electric light and power department. With the greatest respect, I am of opinion that, having regard to what was said by Sir Lyman Duff in the case above noted, the learned judge addressed himself to the wrong question, and should rather have asked himself how far the two statutes could stand together in relation to their effect on the desire of the employees in question to bargain collectively with the town of Summerside through their union representatives.

Chief Justice Campbell adopted the approach which was approved in *Toronto Railway Company v. Paget, supra,* but, as has been indicated, he appears to have considered that the collective bargaining provisions of the *Trade Union Act* were repugnant to the *Summerside Incorporation Act* and particularly the aforesaid by-law insofar as the "topics of appointments or hiring, remunerations and dismissals" were concerned.

With all respect, I am of opinion that there is no repugnancy between these two statutes.

By s. 62 of the *Town of Summerside Incorporation Act* it is provided that "officers" may be appointed by the Town Council and "shall hold office during pleasure" and that their removal, replacement and remuneration shall be at the pleasure of the council, but the *Trade Union Act* does not apply to "officers, officials or other employees employed in any confidential capacity" and the *Town of Summerside Incorporation Act* contains no such restrictions with respect to employees generally. In fact, the only

[1] [1941] S.C.R. 448 at 462-5, 4 D.L.R. 65, 53 C.R.T.C. 193.

1960

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS *v.* TOWN OF SUMMERSIDE *et al.*

Ritchie J.

reference in that Act to the employment of employees deals specifically with those employed in the town electric plant and system and is in the following broad language:

> 163. (2) The Town is empowered to employ such engineers, experts, agents and workmen as may be deemed necessary in surveying, evaluating, constructing, improving, extending and maintaining any such plant or system, and operating the same, and to lease, purchase or otherwise acquire such lands, rights, easements or privileges as may be deemed necessary for the purposes hereof.

It is true that By-law 326 is a by-law which is capable of being construed as regulating conditions of employment of employees of the town and as dealing with "topics of appointments or hirings, remunerations and dismissals", and it is also true that all such by-laws "shall be as legal and binding as if incorporated in and forming part of the Act" (s. 70) so long as they remain in force. It must be remembered, however, that the Council is clothed by s. 70 of the Act with full authority "to make, ordain, enact, revise, alter and amend such by-laws as they may deem proper . . .", and this power, in my view, includes the power to make such by-laws as may be deemed proper to comply with the terms of an agreement regulating the conditions of employment of its employees, provided that such provisions do not run contrary to the terms of the enabling statute. If the Town Council purported to pass a by-law changing the terms of the employment of "officers" who are by statute declared to hold office "during pleasure" other considerations might well apply, but in regulating the employment of the employees here in question there is no statutory restriction on the powers of Council who may make such by-laws to that end "as they may deem proper".

The requirement of the *Trade Union Act* that an employer shall bargain collectively with a union representing its employees does not have the effect of compelling either party to conclude an agreement against his will, but collective bargaining would be a mere sham if it were conducted by an employer having no power or authority to conclude such an agreement. I can, however, see no reason at law why the powers vested in the Town Council cannot

be employed in such manner as to enable the town to conclude a binding collective agreement with the union acting on behalf of its employees.

It will accordingly be apparent that in my view there is nothing in the *Town of Summerside Incorporation Act* to exclude the respondent from being required to bargain collectively and without restriction with the appellant in accordance with the *Trade Union Act*, and I am of opinion that if it can be shown that all the requirements of the *Trade Union Act* have been complied with by the appellant, a mandamus should issue to compel the respondent so to bargain.

In view of all the above, I am of opinion that this appeal should be allowed, the cross-appeal dismissed, the judgment of the Supreme Court of Prince Edward Island *in banco* and of Tweedy J. set aside and the case remitted to Mr. Justice Tweedy for trial and determination of the issues of fact raised by the pleadings.

Counsel for the appellant entered a vigorous protest against the delays which took place between the hearing before Tweedy J. and the disposition of this case by the Supreme Court *in banco*, and it is for this reason that the course of events was traced in such detail at the outset of this decision. Having regard to all the circumstances, it is my view that the town of Summerside should immediately pay the appellant its costs of all the proceedings in this matter from the close of the pleadings to the issuance of the formal order on this appeal and cross-appeal, whatever the final result of the trial may be. There should be no costs for or against the Attorney-General of Prince Edward Island.

*Appeal allowed and cross-appeal dismissed with costs.*

*Solicitor for the plaintiff, appellant: W. E. Bentley, Charlottetown.*

*Solicitor for the defendant, respondent: J. O. C. Campbell, Charlottetown.*

*Solicitor for the Attorney General of Prince Edward Island: R. R. Bell, Charlottetown.*

1960
*June 8
June 24

JAMES HERD (*Defendant*) .....APPELLANT;

AND

ZVONE TERKUC (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Trial—Practice—Jury sent back to reconsider their answers to questions submitted to them—Whether course followed by trial judge a proper one.*

In the course of a trial in a motor negligence action certain questions were submitted to the jury. The trial judge was dissatisfied with the answers and, without referring to counsel, instructed the jury to reconsider their findings. On the second set of answers judgment was given dismissing the action with costs. The Court of Appeal, by a majority, who were of opinion that the course followed by the trial judge was not a proper one, allowed the plaintiff's appeal and directed a new trial. The defendant then appealed to this Court.

*Held:* The appeal should be allowed and the judgment at trial restored.

The first set of answers, read in the light of the evidence and of the charge, made it apparent that the jury had failed to grapple with the essential point which they were required to determine. In these circumstances, the trial judge had the power and it was his duty to instruct the jury to reconsider their answers. *Napier v. Daniel and Welsh,* (1837), 6 L.J.C.P. 62 at 63, and *Regina v. Meany,* (1862), 9 Cox C.C. 231 at 233, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Wells J. and directing a new trial. Appeal allowed.

*A. T. Hewitt, Q.C., and J. L. Nesbitt,* for the defendant, appellant.

*D. Boyle,* for the plaintiff, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of of the Court of Appeal for Ontario which, by a majority, allowed the plaintiff's appeal from a judgment of Wells J. dismissing the action and directed a new trial; Schroeder J.A. dissenting, would have dismissed the appeal.

*PRESENT: Locke, Cartwright, Martland, Judson and Ritchie JJ.

[1] [1958] O.R. 37, 11 D.L.R. (2d) 371.

The action was for damages for personal injuries suffered by the respondent in a collision between a motor car owned and driven by one Menard, in which the respondent was a passenger carried gratuitously, and a motor car owned and driven by the appellant.

The collision occurred in the City of Ottawa at the intersection of Laurier Avenue and Waller Street, on September 26, 1955, at about 6.30 a.m. Laurier Avenue runs east and west; Waller Street runs north and south. The movement of traffic at this intersection is controlled by signal lights, as provided by s. 41(2) of the *Highway Traffic Act*, R.S.O. 1950 c. 167. The car in which the respondent was carried was being driven south on Waller Street and the appellant was driving west on Laurier Avenue. Each driver claimed that he entered the intersection with the green signal light in his favour and the crucial question was as to which of them was right in this assertion. The evidence of the two drivers on this point was definite and in direct conflict. One of them must have been mistaken.

In the course of an admirable charge the learned trial judge repeatedly impressed upon the jury that their main task was to decide which driver had the traffic light in his favour. He said, for example:—

> You will have to decide which of these stories you believe, that is the key to this case, because whoever did not have the green light was negligent, I think it is as simple as that.
>
> * * *
>
> There is a concrete wall apparently 8 feet high obscuring vision until you are fairly close to the intersection, but if Menard had a green light, even if he saw Herd coming along, he was entitled to proceed through and entitled to assume Herd would stop. That applies equally to Herd who couldn't see up Waller because of that wall, and who had every right to assume, if the light was green, any traffic coming up or down Waller would stop on the red light. I think the whole key to the question is who had the light and the man who went through on the red light is negligent.

The learned trial judge did not withdraw the question of contributory negligence from the jury; he instructed them accurately and adequately as to the duty of a driver who has the signal light in his favour and went on to tell them, quite properly, that on the evidence there was little room for a finding of negligence on the part of whichever driver did in fact have the signal light in his favour.

1960

HERD v. TERKUC

Cartwright J.

The following questions were submitted to the jury:

1. Was there any negligence on the part of the defendant driver, James Herd, which caused or contributed to the injuries suffered by the plaintiff, Zvone Terkuc? Answer Yes or No.

2. If your answer to Question No. 1 is "Yes" then state fully, giving the facts on which you base your conclusions, the particulars of such negligence.

3. Was there any negligence on the part of the driver of the Plaintiff's car, Jacques Menard, which caused or contributed to the injuries suffered by the Plaintiff? Answer Yes or No.

4. If your answer to Question No. 3 is "Yes", then state fully, giving the facts on which you base your conclusions, the particulars of such negligence.

5. If your answer should disclose that there was negligence on the part of both drivers which caused or contributed to the injuries suffered by the plaintiff, then state in percentage the respective degrees of negligence of each:

James Herd %
Jacques Menard %

100%

6. At what amount and irrespective of any other consideration do you assess the total damages suffered by the Plaintiff, Zvone Terkuc?

After deliberating for some two hours the jury returned to the court room and stated that they had reached a verdict. The list of questions was handed to the learned trial judge and contained the following answers:

To Question 1: Yes.

To Question 2: Excess of speed shown by force of impact.

To Question 3: Yes.

To Question 4: Failure in looking for cross-bound traffic.

To Question 5: James Herd 60%
Jacques Menard 40%

100%

To Question 6: $16,940.00

The learned trial judge without referring to counsel or inviting any submission from them said to the jury:

You see your difficulty is you haven't answered the essential questions. You say "Yes" to Question 1 and say "excessive speed shown by force of impact". In so far as this driver is concerned, if he had the green light he was entitled to go through. If he had the traffic light he did not have to look for anything unless it was apparent to him that something was coming through against the light. Try to grapple with the essential points in this case. You have a duty to do; now try and do it.

The jury thereupon retired and after deliberating for a further two hours returned the following answers to the questions:

To Question 1: No.
To Question 2: No answer.
To Question 3: Yes.
To Question 4: Failure to stop at red light.
To Question 5: No answer.
To Question 6: $16,940.00

On these answers the learned trial judge, on motion of counsel for the defendant gave judgment dismissing the action with costs.

The majority in the Court of Appeal were of opinion that the course followed by the learned trial judge was not a proper one. With respect, I am unable to agree with this conclusion.

The answers of a jury must, of course, be read in the light of the evidence and of the charge; on so reading the answers first made by the jury it was apparent that they had failed to grapple with the question as to which driver had the signal light in his favour which had been clearly presented to them as the essential point which they were required to determine. In these circumstances the learned trial judge had the power and it was his duty to instruct the jury to deal with that question. Particularly in view of the full and accurate charge which he had given on this point, his redirection, which is quoted in full above, while brief was adequate.

That the learned judge had the power to send the jury back to reconsider their answers is made plain by the authorities collected in the reasons of Schroeder J.A. I would add a reference to two decisions relied upon by counsel for the appellant. In *Napier v. Daniel and Welsh*[1], Tindal C.J. said:

> I have always understood the rule to be, that the jury are at liberty to alter the verdict before it is recorded, but not after. This is laid down in Co. Litt. fol. 227, *b*, where it is said, "after the verdict recorded, the jury cannot vary from it, but before it be recorded they may vary from the first offer of their verdict, and that verdict which is recorded shall stand."

[1] (1837), 6 L.J.C.P. 62 at 63, 3 Bing. N.C. 77.

1960

HEED v. TERKUC

Cartwright J.

In *Regina v. Meany*[1], Pollock C.B. said:

> There is no doubt that a Judge, both in a civil and criminal court, has a perfect right, and sometimes it is his bounden duty, to tell the jury to reconsider their verdict. He may send them back any number of times to reconsider their finding. The Judge is not bound to record the first verdict unless the jury insist upon its being recorded. If they find another verdict that is the true verdict.

While no doubt this power is not one to be used lightly, the circumstances of the case at bar appear to me to have required its exercise and I conclude, as did Schroeder J.A., that the course followed by the learned trial judge was a proper one.

For the above reasons and for those given by Schroeder J.A. with which I am in substantial agreement I would allow the appeal and restore the judgment of the learned trial judge. The appellant is entitled to his costs in the Court of Appeal and in this Court.

*Appeal allowed with costs.*

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

*Solicitors for the respondent: Guertin, Guertin and Boyle, Ottawa.*

---

1960

*May 9
June 13

SETTLED ESTATES LIMITED .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Income tax—Exemption claimed as a personal corporation—Claim rejected—The Income Tax Act, R.S.C. 1952, c. 148, ss. 63(1)(e), 68(1)(a), 139(1)(u)(ac).*

Appellant incorporated as a private company under the *Companies Act* of British Columbia, was controlled for many years by one Fiddes, who died on April 25, 1954. Letters probate were granted to his

*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

[1] (1862), 9 Cox C.C. 231 at 233, 32 L.J.M.C. 24.

executors on June 15, 1954. Following Fiddes' death the shares of the appellant were held by the executors and the company was controlled by them during the 1955 and 1956 taxation years. The appellant claimed that the executors were individuals according to s. 139(1)(*u*)(*ac*) of the *Income Tax Act* and as they had the requisite control and had met all other requirements of s. 68(1), the company was in 1955 and 1956 a personal corporation, and therefore exempt from income tax. The Minister rejected the claim and reassessed for the years in question. These reassessments were confirmed on appeal to the Income Tax Appeal Board and to the Exchequer Court. The appellant then appealed to this Court.

*Held:* The appeal should be dismissed.

The executors controlled the appellant company during the period in question on behalf of numerous beneficiaries of the estate. This was not one of the three methods of control contemplated by s. 68(1)(*a*) of the Act, i.e. (i) by an individual resident in Canada, (ii) by such an individual and one or more members of his family who were resident in Canada, (iii) by any other person on his or their behalf. An executor could not be the individual referred to in that section, because a plain intention to the contrary was to be gathered from its context.

S. 63 had no relevancy in the determination whether a corporation is a personal corporation.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada[1], affirming reassessments made by the Minister of National Revenue. Appeal dismissed.

*K. E. Meredith,* for the appellant.

*E. S. MacLatchy and T. E. Jackson,* for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The issue in this appeal is whether the appellant was a personal corporation within the meaning of s. 68 of the *Income Tax Act* during its 1955 and 1956 taxation years. Both the Income Tax Appeal Board and the Exchequer Court[1] have found that it was not. The appellant contests this finding and appeals from the reassessments made for the 1955 and 1956 taxation years.

The appellant was incorporated as a private company under the *Companies Act of British Columbia* and for many years it was controlled by the late Robert William Fiddes, who owned 1699 shares out of its 1700 total issued ordinary shares. During the lifetime of the late Mr. Fiddes the appellant was admittedly a personal corporation within the

[1] [1959] Ex. C.R. 449, C.T.C. 284, D.T.C. 1138.

1960

SETTLED ESTATES LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

meaning of s. 68 of the *Income Tax Act*. Mr. Fiddes died on April 25, 1954. Under his Will the Montreal Trust Company and Elmore Meredith, both of the City of Vancouver, were appointed executors and Letters Probate were granted to them on June 15, 1954. Following the death of Mr. Fiddes, the shares of the appellant were held by these executors and the appellant was controlled by them during the 1955 and 1956 taxation years. For these years, in filing its income tax returns, the appellant claimed exemption from tax on the ground that it was a personal corporation. The Minister rejected this claim and reassessed for these years on the ground that the appellant was not a personal corporation. These are the reassessments which were confirmed on appeal to the Income Tax Appeal Board and to the Exchequer Court.

In my opinion, the appeal fails and should be dismissed with costs.

"Personal corporation" is defined by s. 68 of the *Income Tax Act* in the following terms:

> 68. (1) In this Act, a "personal corporation" means a corporation that, during the whole of the taxation year in respect of which the expression is being applied,
>
> (*a*) was controlled, whether through holding a majority of the shares of the corporation or in any other manner whatsoever, by an individual resident in Canada, by such an individual and one or more members of his family who were resident in Canada or by any other person on his or their behalf;
>
> (*b*) derived at least one-quarter of its income from
>
> (i) ownership of or trading or dealing in bonds, shares, debentures, mortgages, hypothecs, bills, notes or other similar property or an interest therein,
>
> (ii) lending money with or without securities,
>
> (iii) rents, hire of chattels, charterparty fees or remunerations, annuities, royalties, interest or dividends, or
>
> (iv) estates or trusts; and
>
> (*c*) did not carry on an active financial, commercial or industrial business.
>
> (2) For the purpose of paragraph (*a*) of subsection (1), the members of an individual's family are his spouse, sons and daughters whether or not they live together.

It is admitted that the income of the corporation qualifies under subs. (*b*) of s. 68(1). The question is whether the control of the corporation in 1955 and 1956 was such as to qualify it within subs. (*a*) of s. 68(1). A personal corpora-

tion does not pay income tax but its income is taxed in the hands of the shareholders under s. 67 of the Act, which reads:

> 67. (1) The income of a personal corporation whether actually distributed or not shall be deemed to have been distributed to, and received by, the shareholders as a dividend on the last day of each taxation year of the corporation.
>
> (2) No tax is payable under this Part on the taxable income of a corporation for a taxation year during which it was a personal corporation.

The appellant's submissions on this appeal were that the executors were individuals according to the definition of "individual" and "person" in s. 139(1)(*u*) and (*ac*), and that consequently, the requirements of s. 68(1)(*a*) were met.

Section 139(1)(*u*) and s. 139(1)(*ac*) read:

> 139(1)(*u*). "Individual" means a person other than a corporation;
>
> 139(1)(*ac*). "person" or any word or expression descriptive of a person, includes any body corporate and politic, and the heirs, executors, administrators or other legal representatives of such person, according to the law of that part of Canada to which the context extends; . . . .

The argument is that since an individual means a person (other than a corporation) and as the definition of "person" includes executors and legal representatives, it follows that the executors of the Fiddes estate are individuals and that having had the requisite control and all the other requirements of s. 68(1) having been met, the appellant company was in 1955 and 1956 a personal corporation.

I have no hesitation in rejecting this argument. The executors controlled this company during the taxation years in question on behalf of the beneficiaries of the estate. This, in my opinion, is not one of the three modes of control contemplated by s. 68(1)(*a*). The three modes of control are:

(i) by an individual resident in Canada;

(ii) by such an individual and one or more members of his family who were resident in Canada (family being defined by statute);

(iii) by any other person on his or their behalf.

In my opinion, the individual first referred to must be a natural living person exercising control on his own behalf.

1960

SETTLED ESTATES LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

The word does not include executors, whether corporate or otherwise. I say this because that individual first referred to is next referred to in connection with his family. There is no room for executors, whether corporate or otherwise, in this scheme of control. The last mode of control is by any other person on behalf of an individual or on behalf of the individual and members of his family. I can think of situations where executors could exercise control under this third mode of control, for example, if T dies leaving all his shares in a personal corporation to executors and trustees in trust for an individual or for that individual and members of his family. But this is not the present case. Under the terms of the will left by the late Mr. Fiddes, the executors control on behalf of numerous beneficiaries. They do not control on behalf of an individual or the individual and members of his family. My conclusion therefore is that an executor cannot be the individual referred to in s. 68(1)(*a*).

Nor do I think that the appellant can get any assistance from ss. 63(1) and (2) of the *Income Tax Act*, which define a trust and then go on to define a trust as an individual as follows:

> 63(1). In this Act, trust or estate means the trustee or the executor, administrator, heir or other legal representative having ownership or control of the trust or estate property.
>
> 63(2). A trust or estate shall, for the purposes of this Act, and without affecting the liability of the trustee or legal representative for his own income tax, be deemed to be in respect of the trust or estate property an individual. . . . .

Section 63 has no relevancy in the determination whether a corporation is a personal corporation. Although s. 63(2) may require executors to be demed an individual for the purpose of taxation of the trust or estate and although they may be an individual holding the shares of the appellant company, for the reasons I have given they cannot be the individual referred to in s. 68(1)(*a*), because a plain intention to the contrary is to be gathered from the context of the section itself.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellant: Meredith & Co., Vancouver.*
*Solicitor for the respondent: A. A. McGrory, Ottawa.*

1960

*May 20
June 13

ROBERT M. BELL, ADMINISTRATOR OF THE ESTATE OF GEORGE MACLAREN AND ELEGETHA CANDACE MACLAREN (*Plaintiffs*) ..... APPELLANTS;

AND

ARTHUR S. ROBINSON (*Defendant*) ....RESPONDENT.

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

*Motor vehicles—Negligence—Findings of fact by trial judge sitting without jury—Whether judgment at trial should be varied by appellate court—Survival of Actions Act, R.S.N.B. 1952, c. 223—Fatal Accidents Act, R.S.N.B. 1952, c. 82—Motor Vehicle Act, 1955 (N.B.), c. 13.*

A collision occurred between an oil tank truck owned by R and operated by his employee G, and an automobile owned and operated by M, who died as a result of injuries received in the accident. The trial judge, sitting without a jury, found that G's negligent driving was the sole cause of the collision. From this decision the defendant appealed to the Appeal Division of the Supreme Court of New Brunswick, where the parties were found to have been equally at fault, and judgment was given awarding 50 per cent of the total damages to the plaintiffs. The plaintiffs then appealed to this Court.

*Held:* The appeal should be allowed and the judgment at trial restored.

The burden lay upon the respondent to prove that after the deceased became or should have become aware of the truck driver's breach of the provisions of s. 131 of the *Motor Vehicle Act,* he failed to take advantage of an opportunity to avoid the accident of which a reasonably careful and skillful driver would have availed himself. *Walker v. Brownlee and Harmon,* [1952] 2 D.L.R. 450, referred to.

This was a question of fact and as there was evidence to support the conclusion of the learned trial judge with respect to it, his decision should not be varied. *S.S. Hontestroom v. S.S. Sagaporack,* [1927] A.C. 37, *Prudential Trust Company v. Forseth,* (1960), 21 D.L.R. (2d) 587 at 593, *Semanczuk v. Semanczuk,* [1955] S.C.R. 658 at 677, applied. The damages as found by the trial judge were not so excessive as to warrant any interference with the award made by him.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division, reversing a judgment of Robichaud J. Appeal allowed.

*D. M. Gillis, Q.C.,* and *H. W. Church for* the plaintiffs, appellants.

*PRESENT: Locke, Cartwright, Martland, Judson and Ritchie JJ.

1960

BELL AND MACLAREN v. ROBINSON

*P. Barry, Q.C.*, and *R. D. C. Stewart, Q.C.*, for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This action arises out of a collision between an oil tank truck bearing the name and carrying the products of Imperial Oil Company Limited which was owned by the respondent and operated by his employee, H. P. Giddens, and an automobile owned and operated by the late George MacLaren who died as a result of injuries sustained in the collision.

The collision occurred on an icy and steeply banked curve on the highway between St. Stephen and St. Andrews in the province of New Brunswick at about 10:00 a.m. on January 30, 1959, when the respondent's vehicle was proceeding in an easterly direction so that the banked curve sloped down towards his left-hand side of the highway, and as the driver himself admits the truck was skidding or sliding a bit in that direction.

This action is brought by the administrator of the estate of the late George MacLaren claiming under the provisions of the *Survival of Actions Act*, R.S.N.B. 1952, c. 223, and the *Fatal Accidents Act*, R.S.N.B. 1952, c. 82, and by the late Mr. MacLaren's widow who claims for damages resulting from personal injuries sustained by her in the collision.

The statement of claim alleges that the collision was caused by the negligent driving of the truck by Giddens for which the respondent and Imperial Oil Company Limited were responsible, and in the first instance the Imperial Oil Company Limited and Giddens were joined with the respondent as parties-defendant; no appeal has, however, been taken from the Order of the learned trial judge dismissing the action against the Imperial Oil Company Limited nor has any appeal been asserted by the driver.

By the original defence the defendants, Giddens and Robinson, simply "deny the allegations of negligence" and

> plead inevitable accident in that the Defendants were using all care and caution at the time the said accident happened and allege that the said accident was caused entirely by the conditions of the highway.

At the trial, however, the respondent Robinson added a counterclaim of $1,500.00 for damages to his truck, alleging that "the said George MacLaren was negligent in failing to keep to his own side of the highway and in not having his car under proper control."

The case was tried before Robichaud J., sitting without a jury, and the learned trial judge, after a careful review of the evidence, concluded that "Gliddens' negligent driving on that occasion was the sole cause of the collision and the damages resulting therefrom" and he specified that negligence as follows:

> The negligence of the defendant driver Giddens consisted, therefore, in the unreasonable speed at which he was driving the Robinson truck, coupled with his lack of control of the same resulting in the rear end of the truck overlapping in the right driving lane of the MacLaren car and colliding therewith.

Pursuant to this finding, the learned trial judge awarded the following damages:

| | | |
|---|---|---|
| (1) | Under the *Survival of Actions Act* for hospital bills and disbursements, pain and suffering of the late Mr. MacLaren and the loss of his automobile | $ 2,219.88 |
| (2) | Under the *Fatal Accidents Act* general damages for loss of maintenance, support and assistance to the dependants of the deceased | 43,500.00 |
| | together with the costs of funeral and burial expenses | 932.60 |
| (3) | For injuries, pain, suffering and inconvenience of Mrs. MacLaren | 500.00 |
| | together with special damages | 141.50 |

From this decision the respondent appealed to the Appeal Division of the Supreme Court of New Brunswick, and in accordance with the decision of that Court delivered by Ritchie J.A. whereby the parties were found to have been equally at fault, judgment was given reducing the assessment of the damage sustained for loss of pecuniary benefit under the *Fatal Accidents Act* from $43,500.00 to $40,000.00 and awarding only 50 per cent. of the total damages to the appellants so that $21,576.24 was awarded in respect of the claims under the *Fatal Accidents Act* and the *Survival of Actions Act,* Mrs. MacLaren was awarded $320.75 and the respondent Robinson was awarded one-half of his counterclaim, i.e. $750.00. It is from this judgment that the appellants now appeal.

1960

BELL AND MACLAREN v. ROBINSON

Ritchie J.

The significant feature of the decision rendered on behalf of the Appellate Division is that it recognizes the negligence of the respondent's driver and allows the appeal entirely on the ground of the appellants' contributory negligence. In reviewing the conduct of the respondent's driver, Ritchie J.A. has this to say:

> Giddens admits that immediately prior to the collision the truck was sliding towards the centre line but says it was "carrying off" to the right as it went down the hill. He also admits that, taking a chance nothing would happen and without slowing down, he had continued along the road and around the curve where the collision occurred. The pavement at the scene of the collision was practically glare ice.

The crux of the decision appealed from is to be found in the following paragraph:

> Accepting the finding of the learned judge that the rear of the tank wagon was about four feet north of the centre line there was, including the north shoulder, about eighteen feet for the deceased to manoeuver his car so as to avoid collision with the truck. Either he did not have, by reason of the glare ice covering on the pavement, sufficient control of his car to enable him to veer to his right or he was not maintaining a proper lookout and did not see the truck. In any event, with great respect, it is my opinion the evidence, apart from his own statements, points irresistibly to the conclusion there also was negligence on the part of the deceased and that such negligence contributed to the collision.

It will be observed that the Appellate Division has not identified the negligence which it attributes to Mr. MacLaren whereas the learned trial judge has made specific findings in the appellants' favour with respect to the allegations in the respondent's counterclaim. The following excerpts from the decision of the learned trial judge will serve to show that these findings relate to questions of fact and that they are based on his assessment of the witnesses who appeared before him.

As to the allegation that Mr. MacLaren failed to keep to his own side of the highway, the learned trial judge has this to say:

> According to her (Mrs. MacLaren's) evidence, when the Robinson truck "bumped into" them, as she said, her late husband was then driving his automobile on his own right-hand side of the highway. This is corroborated by Mrs. Edna Mowatt, an independent witness, who impressed me as a very truthful one. Mrs. Mowatt testified that at the time of the collision the late Mr. MacLaren was driving his automobile "on the right-hand side going to St. Stephen". In her cross-examination, by Mr. Barry,

Mrs. Mowatt stated that Mr. MacLaren, at that time, "wasn't far off from the edge of the ditch"—"from where it turns down over the ditch". . . . she said, again referring to Mr. MacLaren:—

> "Well I would say his two wheels was over on the edge of the gravel—over on the edge of the gravel at the side of the road."

After making reference to the evidence of the driver Giddens and his helper, the learned trial judge continued:

> Needless for me to elaborate any further on the issue of contributory negligence, raised by the inclusion of a counterclaim, by the amendment to Arthur S. Robinson's defence. The evidence to which I have just referred is sufficiently convincing to negative the particulars of negligence set out in the Counterclaim.

This seems to me to be a case to which the observations of Lord Sumner in *S.S. Hontestroom v. S.S. Sagaporack*[1], recently approved by this Court in *Prudential Trust Company v. Forseth*[2], and *Semanczuk v. Semanczuk*[3], have particular application. Lord Sumner there said at pp. 47-8:

> . . . Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial Judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

* * *

It is not suggested that the learned trial judge acted on any wrong principle in attributing the cause of the collision entirely to the negligence of Giddens, and I can see no indication of his having either failed to use or having misused the advantage afforded to him by seeing and hearing the witnesses, nor has the Appeal Division cast any reflection on the honesty of any of the witnesses upon whose testimony his findings are based.

On the other hand, by accepting the findings of the learned trial judge that the respondent's truck was about 4 feet north of the centre line of the highway, the Appeal Division has confirmed the fact that the truck was being

[1] [1927] A.C. 37.
[2] (1960), 21 D.L.R. (2d) 587 at 593.
[3] [1955] S.C.R. 658 at 677, [1955] 4 D.L.R. 6.

1960

BELL AND MACLAREN v. ROBINSON

Ritchie J.

operated contrary to the provisions of s. 131 of the *Motor Vehicle Act* of New Brunswick, 1955 (N.B.), c. 13, which reads as follows:

> Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one line of traffic in each direction each driver shall give to the other at least one-half of the main travelled portion of the roadway.

It accordingly appears to have been accepted by both courts below that, as a result of the truck driver taking a chance and rounding a steeply banked curve covered at least in part with practically glare ice without slowing down, the truck invaded that half of the highway which Mr. MacLaren was entitled to assume would be free for his own use. In these circumstances the burden lay upon the respondent to prove that after Mr. MacLaren became or should have become aware of the truck driver's breach of the law, he failed to take advantage of an opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself (see *Walker v. Brownlee and Harmon*[1]). This is a question of fact and as there is evidence to support the conclusion of the learned trial judge with respect to it, I do not think that his decision in this regard should be varied nor do I think that the damages as found by him were so excessive as to warrant any interference with the award which he made.

In the result, I am of opinion that the judgment at the trial in this case should not have been varied, and I would allow this appeal with costs throughout and restore the judgment of the learned trial judge.

*Appeal allowed with costs throughout.*

*Solicitors for the appellants: Logan, Bell & Church, St. John, N.B.*

*Solicitor for the respondent: J. Paul Barry, St. John, N.B.*

[1] [1952] 2 D.L.R. 450 at 461.

1960

*June 1
June 13

DUMONT EXPRESS LIMITEE AND RAPHAEL GUILLEMETTE (*Defendants*) ..... APPELLANTS;

AND

DAME BEATRICE REKOSH KLEINBERG (*Plaintiff*) ..... RESPONDENT.

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

*Jury trial—Ex parte case—Whether plaintiff entitled to jury trial—Whether inscription for hearing only sufficient—Code of Civil Procedure, arts. 421, 423.*

A trial by jury may be had in *ex parte* cases. The application to have a case placed on the special roll for trial by jury must be made within ten days following the inscription for proof and hearing, whether the issue has been joined or whether the case proceeds *ex parte*. The Code does not require the prior filing of the pleadings.

An inscription for trial using the word "audition" alone and omitting the word "enquête" is a sufficient inscription within the meaning of art. 423 of the *Code of Civil Procedure*.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Lacourcière J. Appeal dismissed.

*G. Emery* and *P. Forest*, for the defendants, appellants.

*L. Corriveau*, for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—La demanderesse-intimée Dame Beatrice Rekosh Kleinberg a réclamé personnellement de la demanderesse-appelante Dumont Express Limitée et de Raphaël Guillemette, la somme de $60,000, et une somme additionnelle de $69,212.15 en sa qualité de tutrice à ses enfants mineurs. Elle allègue que le ou vers le 7 mai 1958, alors que son époux Isaac Kleinberg était l'un des occupants dans une voiture automobile, celle-ci fut frappée par un camion, propriété de l'appelante Dumont Express Limitée et conduite par l'autre appelant Raphaël Guillemette qui,

*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Martland JJ.

[1] [1960] Que. Q.B. 146.

1960

DUMONT EXPRESS LTÉE v. KLEINBERG

Taschereau J.

à ce moment, était dans l'exercice de ses fonctions comme employé de Dumont Express Limitée. A la suite de cet accident, ledit Kleinberg est décédé.

Les appelants ont comparu par le ministère de leurs procureurs, mais défaut a été enregistré contre eux parce que le plaidoyer n'avait pas été produit dans les délais légaux. La cause a en conséquence été inscrite *ex parte* et, s'autorisant de l'art. 421 du *Code de procédure civile,* la demanderesse, vu qu'il s'agissait d'une action en recouvrement de dommages résultant d'un quasi-délit, a demandé un procès par jury. La demanderesse a également fait signifier dans les délais prévus à l'art. 423 une requête demandant que le cause soit placée sur le rôle spécial des procès par jury. Lors de l'audition de cette requête, les procureurs de l'appelante se sont opposés à ce que la cause soit entendue par un jury, et le savant juge a rejeté la requête parce que l'inscription, au lieu d'avoir été faite pour enquête et audition *ex parte,* ne l'avait été seulement que pour audition *ex parte.* La Cour du banc de la reine[1] a unanimement renversé ce jugement et a décidé que l'omission du mot "enquête" lors de l'inscription ne vicie pas celle-ci, et que le mot "audition" seul était suffisant.

Elle a de plus décidé une autre question qui avait été soulevée en Cour supérieure, mais sur laquelle il n'y avait pas eu d'adjudication, à l'effet qu'il peut y avoir lieu à un procès par jury, même lorsqu'il n'y a pas de contestation écrite et que la cause est inscrite *ex parte.*

Je crois que la Cour du banc de la reine a bien jugé en décidant que l'omission du mot "enquête" dans l'avis d'inscription ne constituait pas une erreur fatale. Comme elle je suis d'opinion qu'il faut préférer le libre exercice d'un droit à l'application d'un formalisme trop exagéré.

La demanderesse-intimée avait droit à un procès par jury. Ce droit lui est conféré par l'art. 421 C.P., mais rien dans le Code ne défend ce recours, même si la cause est inscrite *ex parte.* Il serait trop facile à un défendeur de ne pas produire son plaidoyer et de laisser procéder *ex parte,* pour priver le demandeur de son droit de faire déterminer par un jury le sort de sa réclamation. Ce n'est pas ce que veut la loi.

[1] [1960] Que. Q.B. 146.

Quand, en vertu de l'art. 421 C.P., le demandeur peut exiger un procès par jury, il doit dans les dix jours de l'inscription pour enquête et audition, que la contestation soit liée ou que l'on procède *ex parte,* demander par requête que la cause soit placée sur le rôle spécial des procès par jury (423 C.P.). Cette demande ne peut être faite qu'après l'inscription, et le Code ne dit pas qu'il faut que le plaidoyer écrit ait été produit.

Il est nécessaire de ne pas oublier qu'avant 1954, date où le Code de procédure a été amendé, la situation pouvait être différente, car l'ancien art. 293 C.P. stipulait que seules les causes qui ne devaient pas être instruites devant un jury pouvaient être inscrites pour preuve et audition, mais la loi est maintenant changée et l'ancienne jurisprudence ne trouve plus son application.

Pour les raisons ci-dessus, et pour celles données par MM. les Juges Casey, Rinfret et Choquette, je crois que le présent appel doit être rejeté avec dépens.

*Appeal dismissed with costs.*

*Attorneys for the defendants, appellants: Letourneau, Quinlan, Forest, Deschene & Emery, Montreal.*

*Attorney for the plaintiff, respondent: L. Corriveau, Quebec.*

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CAIRNS CONSTRUCTION LIMITED (*Plaintiff*) ..... APPELLANT;

AND

THE GOVERNMENT OF SASKATCHEWAN (*Defendant*) ..... RESPONDENT.

1960
*Feb. 10, 11, 12, 15, 16
June 13

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Constitutional law—Provincial sales tax on consumers and users of tangible personal property—Materials incorporated into houses and sold as complete units—Whether builder user or consumer—Validity of Act—Applicability to durable goods—The Education and Hospitalization Tax Act, R.S.S. 1953, c. 61, ss. 35—The B.N.A. Act, 1867, ss. 121, 122.*

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

1960

CAIRNS CONSTRUCTION LTD. v. GOVERNMENT OF SASKATCHEWAN

The *Education and Hospitalization Tax Act*, R.S.S. 1953, c. 61, as amended, imposes a tax on consumers and users of tangible personal property purchased at retail sale in the Province for consumption and use and not for resale. The Act requires licensed vendors to collect the tax at the time of the retail sale.

The plaintiff, a building contractor, purchased component or prefabricated parts for use or incorporation in the construction of houses built by it for sale on its own lands or on lands of others at a fixed-price contract or on a cost-plus basis. The plaintiff contended that the Act was *ultra vires* and, alternatively, that it was not obligated to pay this tax. The trial judge found that the Act was valid but that it did not apply to the plaintiff. The Court of Appeal unanimously held the Act to be valid and by a majority held that it applied to the plaintiff.

*Held:* The Act was *intra vires* and was applicable to the plaintiff in this case.

Considering the general tendency of the impost, the Act was valid in respect of both durable and non-durable goods as imposing a direct tax within the Province.

There was no attempt to tax in disregard of ss. 121 and 122 of the *B.N.A. Act*, in respect of goods brought into the Province or of which delivery was received therein.

The plaintiff, in this case, was the final user of the personal property incorporated in the houses, and the fact that he would attempt to recoup the tax in fixing the price could not change the nature of the tax and make it an indirect one.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], reversing in part a judgment of Davis J. Appeal dismissed.

*M. C. Shumiatcher, Q.C., E. J. Moss* and *B. O. Archibald*, for the plaintiff, appellant.

*E. D. Noonan, Q.C.*, and *R. S. Meldrum, Q.C.*, for the defendant, respondent.

*G. V. LaForest* and *L. D. D'Arcy*, for the Attorney-General of New Brunswick.

*E. R. Pepper*, for the Attorney-General of Ontario.

*M. M. McFarlane, Q.C.*, for the Attorney-General of British Columbia.

*L. Tremblay, Q.C.*, for the Attorney-General of Quebec.

The judgment of the Court was delivered by

MARTLAND J.:—These proceedings were commenced by the appellant under *The Proceedings Against the Crown*

[1] (1959), 16 D.L.R. 465.

*Act*, R.S.S. 1953, c. 79, for the return of the sum of $6,688.84 received by the respondent, which had been paid by the appellant under protest.

The appellant is a company incorporated under the laws of the Province of Saskatchewan and carries on, in that province, the business of constructing buildings. A considerable part of its business was the erection of dwelling houses. During the time material to these proceedings, 1953 to 1955 inclusive, most of the dwellings constructed by the appellant were built on the appellant's own lands for sale to the public; some were constructed on lands owned by others, under fixed-price contracts; and a few on lands owned by others, on a cost-plus contract basis.

The appellant purchased component or prefabricated parts for these houses from another company, Engineered Buildings (Regina) Limited, which manufactured and sold such parts. These parts would then be assembled and fitted together in the construction of houses by the appellant's employees. Certain portions of the other construction work were done by subcontractors under contract with the appellant.

In respect of the component parts sold by the manufacturer to the appellant, the respondent claimed that tax was payable by the appellant under the provisions of *The Education and Hospitalization Tax Act*, R.S.S. 1953, c. 61. Engineered Buildings (Regina) Limited was a licensed vendor under that statute, the terms of which required it, as an agent of the Crown, to collect the tax. The respondent called upon that company to collect such tax in respect of the sales made to the appellant. The manufacturer, in turn, demanded payment of the tax from the appellant under threat of discontinuing future deliveries in the event of non-payment by the appellant. The appellant thereupon paid the $6,688.84 to its supplier, under protest, which company in turn paid that amount to the respondent. The appellant then sued the respondent for the return of these moneys.

The appellant bases its claim upon two grounds: first, that the *Act* in question is *ultra vires* of the Saskatchewan Legislature and, second, that even if it is valid, the appellant is not, under the terms of the *Act*, obligated to pay this tax.

1960

CAIRNS CONSTRUCTION LTD. v. GOVERNMENT OF SASKATCHEWAN

Martland J.

Both the learned trial judge and all the members of the Court of Appeal of Saskatchewan[1] decided the first issue in favour of the respondent. A majority of the Court of Appeal also decided the second issue in its favour. The learned trial judge and Gordon J.A., who dissented on this point in the Court of Appeal, held in favour of the appellant in respect of the second issue.

The main contention of the appellant in respect of the first point is that the statute imposed taxation which is not direct taxation within the province and so is beyond the powers of the Legislature under s. 92(2) of the *British North America Act*. The following provisions of *The Education and Hospitalization Tax Act*, as amended prior to judgment, are relevant to the consideration of this issue:

3. In this Act:

1. "consumer" means any person who within the province purchases from a vendor tangible personal property at a retail sale in the province for his own consumption or for the consumption of other persons at his expense, or on behalf of, or as the agent for, a principal who desires to acquire such property for consumption by such principal or other persons at the expense of such principal;

* * *

4. "purchaser" means any person who within the province purchases a vendor tangible personal property at a retail sale in the province;

5. "retail sale" means a sale to a consumer or user for purposes of consumption or use, and not for resale as tangible personal property and includes such a sale by auction;

6. "sale" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration, and includes any agreement of sale whether absolute or conditional;

7. "tangible personal property" means personal property which can be seen or touched, and includes gas used for heating or illumination, and electricity;

8. "user" means any person who within the province purchases from a vendor tangible personal property at a retail sale in the province for his own use or for the use of other persons at his expense, or on behalf of, or as the agent for a principal who desires to acquire such property for use by such principal or other persons at the expense of such principals;

9. "vendor" means any person who, within the province, and in the course of his business, or of continuous or successive acts, sells tangible personal property to a consumer or user at a retail sale in the province for purposes of consumption or use, and not for resale.

* * *

4. (1) No vendor shall sell any tangible personal property in the province at a retail sale unless he holds a licence to do so issued to him by the minister and such licence is in force at the time of the sale.

[1] (1959), 16 D.L.R. 465, 27 W.W.R. 297.

(2) The licence shall be issued without fee and shall be signed by the minister, or such person as the minister appoints for the purpose, and, if required by the regulations, shall be kept posted up, in the manner prescribed thereby, in the place where the vendor carries on his business.

(3) The minister may cancel or suspend the licence of a vendor for his failure to comply with any of the provisions of this Act or the regulation, and thereupon any other licence of the vendor issued by any authority in the province authorizing him to carry on his business shall become and be cancelled and of no effect.

* * *

5. (1) Every consumer of tangible personal property purchased at a retail sale in the province shall pay to Her Majesty the Queen for the raising of a revenue for educational and hospitalization purposes, at the time of making his purchase, a tax in respect of the consumption of such property, and such tax shall be computed at the rate of three per cent of the value of the property to be consumed.

(2) Every user of tangible personal property purchased at a retail sale in the province shall pay to Her Majesty the Queen for the raising of a revenue for educational and hospitalization purposes, at the time of making his purchase, a tax in respect of the use of such property, and such tax shall be computed at the rate of three per cent of the value of the property to be used.

(2a) A person who consumes or uses tangible personal property acquired by him for resale or who consumes or uses tangible personal property manufactured, processed or produced by him shall be deemed to have purchased such property from a vendor at a retail sale in the province.

(3) If a vendor in the ordinary course of his business sells any tangible personal property to a person who alleges that he is not purchasing it for consumption or use, the vendor shall nevertheless require such person to deposit with him an amount equal to the tax which would be payable under this Act if the property were sold to a consumer or user as herein defined, but the minister shall refund the deposit on receipt of evidence satisfactory to him that the property was purchased for the purpose of resale by a licensed vendor.

(4) Every person residing or ordinarily resident or carrying on business in Saskatchewan who brings into the province or who receives delivery in the province of tangible personal property for his own consumption or use, or for the consumption or use of other persons at his expense, or on behalf of or as agent for a principal who desires to acquire such property for consumption or use by such principal or other persons at his expense, shall immediately report the matter to the minister or his appointee and forward or produce to him the invoice, if any in respect of such property and any other information required by him with respect to the property and shall pay the same tax in respect of the consumption or use of such property as would have been payable if the property had been purchased at retail in the province at the price which would have been paid in Saskatchewan if such tangible personal property had been purchased at retail in the province.

* * *

7. Every vendor at the time of a retail sale of tangible personal property to a consumer or user shall levy and collect the tax imposed by this Act upon the consumer or user.

1960

CAIRNS CONSTRUCTION LTD. v. GOVERNMENT OF SASKATCHEWAN

Martland J.

8. Every vendor and every person authorized to collect or receive taxes from a vendor shall be a revenue officer within the meaning of *The Treasury Department Act* and shall be subject to the duties and liabilities of a revenue officer under that Act.

9. The minister may make an allowance to the vendor for his services in collecting and forwarding the tax to the minister, which allowance shall be determined by the Lieutenant Governor in Council.

* * *

29. The consumer or user shall be and remain liable for the tax imposed by this Act until the same has been collected and, in the event of failure on the part of the vendor to collect the tax, the consumer or user may be sued therefor in any court of competent jurisdiction.

Reference was made, during argument, to the many decisions, both of the Privy Council and of this Court, which have had to determine whether the various taxing statutes, under consideration in those cases, imposed direct or indirect taxation and which have established the tests which are to be applied in determining that issue. However, the judgment of the Privy Council in *Atlantic Smoke Shops, Limited v. Conlon*[1] is so closely in point that, in my view, unless it can be distinguished successfully, it must determine the issue here in favour of the respondent.

The statute under consideration in that case was *The Tobacco Tax Act,* 1940, enacted by the Legislature of the Province of New Brunswick, which imposed a tax in respect of tobacco purchased at a retail sale in the province for consumption. The definitions of the words "consumer", "purchaser", "retail sale", and "retail vendor" in that *Act* are practically the same as the definitions of the words "consumer", "purchaser", "retail sale" and "vendor" in the *Saskatchewan Act*. The provisions for the licensing of vendors are similar. Section 4 of the *New Brunswick Act,* which imposed the tax, is, in terms, practically identical with s. 5(1) of the *Saskatchewan Act*. The same similarity exists between s. 5 of the *New Brunswick Act* and subs. (4) of s. 5 of the *Saskatchewan Act* regarding the imposition of tax where goods are brought into the province and not purchased by retail in the province.

In that case, as in the present one, counsel for the appellant urged that the tax was a sales tax, that a sales tax is an excise tax and, therefore, an indirect tax.

[1] [1943] A.C. 550, 4 D.L.R. 81, 3 W.W.R. 113.

Viscount Simon, who delivered the judgment of the Privy Council, said at p. 563:

. . . It has been long and firmly established that, in interpreting the phrase "direct taxation" in head 2 of s. 92 of the Act of 1867, the guide to be followed is that provided by the distinction between direct and indirect taxes which is to be found in the treatise of John Stuart Mill. The question, of course, as Lord Herschell said in *Brewers and Malsters' Association of Ontario v. Attorney-General for Ontario*, 1897 A.C. 231, 236, is not what is the distinction drawn by writers on political economy, but in what sense the words were employed in the British North America Act. Mill's Political Economy was first published in 1848, and appeared in a popular edition in 1865. Its author became a member of parliament in this latter year and commanded much attention in the British House of Commons. Having regard to his eminence as a political economist in the epoch when the Quebec Resolutions were being discussed and the Act of 1867 was being framed, the use of Mill's analysis and classification of taxes for the purpose of construing the expression now under review is fully justified. In addition to the definition from Mill's Political Economy already quoted, citation may be made of two other passages as follows: "Direct taxes are either on income or on expenditure. Most taxes on expenditure are indirect, but some are direct, being imposed not on the producer or seller of an article, but immediately on the consumer" (bk. V. Ch. 3). And again, in ch. 6, in discussing the comparative merits of the two types of tax, he takes as the essential feature of direct taxation that "under it everyone knows how much he really pays." Their Lordships, therefore, consider that this tobacco tax in the form they have called (*a*) would fall within the conception of a "direct" tax, and ought so to be treated in applying the British North America Act. It is a tax which is to be paid by the last purchaser of the article, and, since there is no question of further re-sale, the tax cannot be passed on to any other person by subsequent dealing. The money for the tax is found by the individual who finally bears the burden of it. It is unnecessary to consider the refinement which might arise if the taxpayer who has purchased the tobacco for his own consumption subsequently changes his mind and in fact resells it. If so, he would, for one thing, require a retail vendor's licence. But the instance is exceptional and farfetched, while for the purpose of classifying the tax, it is the general tendency of the impost which has to be considered. So regarded, it completely satisfies Mill's test for direct taxation. Indeed, the present instance is a clearer case of direct taxation than the tax on the consumer of fuel oil in *Attorney-General for British Columbia v. Kingcome Navigation Co.*, 1934 A.C. 45, for fuel oil may be consumed for the purpose of manufacture and transport, and the tax on the consumption of fuel oil might, as one would suppose, be sometimes passed on in the price of the article manufactured or transported. Yet the Privy Council held that the tax was direct. In the case of tobacco, on the other hand, the consumer produces nothing but smoke. Mr. Pritt argued that the tax is a sales tax, and that a sales tax is indirect because it can be passed on. The ordinary forms of sales taxes are, undoubtedly, of this character, but it would be more accurate to say that a sales tax is indirect when in the normal course it can be passed on. If a tax is so devised that (as Mill expresses it) the taxing authority is not indifferent as to which of the parties to the transaction ultimately bears the burden, but intends it as a "peculiar contribution" on the particular party selected to pay the tax, such a tax is not proved

1960

CAIRNS CONSTRUCTION LTD. v. GOVERNMENT OF SASKATCHEWAN

Martland J.

to be indirect by calling it a sales tax. Previous observations by this Board as to the general character of sales taxes, or of taxes on commercial dealings, ought not to be understood as denying the possibility of this exception.

The appellant seeks to distinguish the *Conlon* decision and that of the Privy Council in *Attorney-General for British Columbia v. Kingcome Navigation Company Limited*[1], on the grounds that the taxes in question in those cases related to goods purchased for the purpose of consumption by the buyer, tobacco in the *Conlon* case, fuel oil in the *Kingcome* case. The *Act* in question in the present case relates not only to personal property purchased for consumption, which were referred to in argument as non-durable goods, but also to personal property purchased for use, referred to in argument as durable goods. It was contended that the major incidence of the tax imposed by the *Act* would be upon durable goods. Such goods, it was argued, would, by their nature, continue, after their purchase, to be capable of being the subject-matter of subsequent trading. If they were subsequently traded, the purchaser of them, who had paid the tax, would seek to pass it on to a subsequent purchaser. Consequently it was submitted that a tax upon durable goods is an indirect tax. The trading in of second-hand automobiles was cited as an example.

As was pointed out in the judgment of Lord Herschell in *Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario*[2], referring to *Bank of Toronto v. Lambe*[3]:

> The question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act.

Lord Hobhouse, in *Bank of Toronto v. Lambe,* at p. 581, says:

> Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

[1] [1934] A.C. 45, 1 D.L.R. 31, [1933] 3 W.W.R. 353.
[2] [1897] A.C. 231 at 236.
[3] (1887), 12 App. Cas. 575.

In my opinion, the same reasoning which led the Privy Council to conclude, in the *Kingcome* and *Conlon* cases, that the respective statutes there under consideration imposed direct taxation is properly applicable to the *Act* now under consideration and is not rendered inapplicable because the present statute applies to durable as well as to consumable goods. It is true that the number of cases in which there might be a resale, as second-hand goods, by the taxpayer, of personal property which he has purchased for his own use and on which he has paid tax is greater in relation to durable goods than consumable goods. Our task, however, is to consider the general tendency of the impost for the purpose of classifying the tax. In my view, the sale by the taxpayer, as second-hand goods, after using it, of personal property which he has purchased for his own use, is exceptional when considering the general tendency of the tax as a whole. I cannot reach the conclusion that the Legislature, in imposing the tax, must have had the expectation and intention that it would be passed on.

It was also contended for the appellant that the *Act* is invalid as amounting to an attempt to tax in disregard of ss. 121 and 122 of the *British North America Act*, which provide:

> 121. All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.
>
> 122. The customs and excise laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada.

This argument relates to the provisions of subs. (4) of s. 5 of the *Act* which imposed the same taxation in relation to goods brought into Saskatchewan, or delivery of which is received there, as would have been payable if the goods had been purchased at a retail sale in Saskatchewan.

Exactly the same argument was raised in the *Conlon* case respecting s. 5 of the *New Brunswick Act*, which is almost identical in terms with s. 5(4) of the *Saskatchewan Act*. The argument was unsuccessful and the Privy Council held that the *New Brunswick Act* did not attempt to tax in disregard of these two sections of the *British North America Act*. No valid basis has been suggested whereby that decision can be distinguished on this point, and for that reason I think that this argument also fails.

1960

CAIRNS CONSTRUCTION LTD. v. GOVERNMENT OF SASKATCHEWAN

Martland J.

In my opinion, therefore, *The Education and Hospitalization Tax Act* is *intra vires* of the Legislature of the Province of Saskatchewan.

I turn now to the second point of the appellant's argument, namely, that even if the *Act* is valid legislation, it did not impose a legal obligation upon the appellant to pay the taxes which are in dispute.

It was contended that in order to be taxable it must be established that the appellant was a user of personal property purchased at a retail sale, within subs. (2) of s. 5 of the *Act*. It was then contended that the appellant did not purchase at a retail sale and was not a user of the goods within the meaning of the subsection.

A "retail sale" is defined in the *Act* as meaning a "sale to a consumer or user for purposes of consumption or use, and not for resale as tangible personal property". If the appellant was a user of the goods within the meaning of the *Act*, I am of the opinion that there was a retail sale to him within the meaning of the definition.

This brings me to the main submission, that the appellant was not a user of the goods in question within s. 5(2) of the *Act*. The contention on this point was that the appellant did not purchase the component parts for its own use but that they were acquired for incorporation into houses being built for the purpose of sale. If, it was argued, the use made of the goods by the appellant was to be construed as the "use" contemplated by the *Act*, it would result in the statute being clearly unconstitutional because the tax would certainly be passed on to the house purchaser. Consequently, it was suggested, the "use" which would involve the payment of tax under the *Act* must be restricted in its meaning so as to exclude use in the process of production or manufacture and be limited to ultimate or final use.

This contention was accepted by the learned trial judge and also by Gordon J.A., in the Court of Appeal, who summed up the argument of the appellant in this way:

> The legal advisers of the provincial legislature knew perfectly well that if the tax were to be valid it would have to fall on the "ultimate" consumer or user. That is why a "consumer" was defined as one who purchases property at a retail sale "for his own consumption". The word "user" was defined in a similar way. The phrase "retail sale" was also defined as a sale to a consumer or user and not for resale. It is true that by the amendment of 1957 the words "as tangible personal property" were added, but, with every

deference, I do not think this amendment helps the defendant. If the plaintiff used the personal property to build a house for resale and had to pay the tax it would be an indirect tax and ultra vires. Most definitely the personal property involved in these proceedings was bought for resale in houses. If this was just an isolated transaction in which the law had an indirect application it could still be valid but such is not the case. I can take judicial notice of the fact that companies like the plaintiff are carrying on extensive operations and the tax collected may run into a large sum.

The contrary view may be summed up in the words of Culliton J.A., who said:

> Here the respondent purchased certain building materials which were admittedly tangible personal property as defined in the Act. This material was purchased not for the purpose of resale as tangible personal property but for the purpose of constructing houses to be sold as real property. By the incorporation of these building materials in these houses such building materials lost their character as tangible personal property and became an integrated part of the real property. The respondent therefore was the ultimate user or consumer of such tangible personal property and thus liable for the tax imposed upon it by the legislation. That liability in my opinion arises under the provisions of the Act without recourse to either the regulations or rulings.

In my opinion, the appellant was a "user" of the goods in question here and was made liable for payment of tax under s. 5(2) of the Act. I would agree that the intention of the Act is to impose the tax upon the final consumer or user of the personal property purchased. It was upon that basis that the Privy Council upheld the New Brunswick legislation under consideration in the *Conlon* case. But it also appears to me that a person who purchases personal property and incorporates it into something else, in the process of which it loses its own identity as personal property, is the final user of that personal property so incorporated. The nails which were hammered into the structure, the paint placed on the walls, or the shingles on the roof were finally used for the purposes for which they were created when they became a part of the building. Equally, the prefabricated parts were finally used when they were incorporated into the houses which the appellant constructed. The purchaser of a house would not thereafter use them as component parts. He would make use of the completed house.

Is the general character of the tax altered because a house-builder, such as the appellant, would seek, as he undoubtedly would seek, in fixing the price of the house, to recoup the

1960

CAIRNS CONSTRUCTION LTD. v. GOVERNMENT OF SASKATCHEWAN

Martland J.

tax which he was required to pay in respect of the component parts? I do not think that it is. In my view, this attempt to recoup the tax in such cases is no different from the attempt which, in argument in the *Kingcome* case, it was suggested would be made by the manufacturer or the transporter to pass on the fuel oil tax there in question in the price of the article manufactured or transported. The appellant would undoubtedy seek, when selling the house which he constructed, to recoup himself for municipal land taxes which he had been required to pay on the land on which the house is situated, yet, clearly, a tax of this general character does not cease to be direct because cases may occur in which the taxpayer may be able to pass it on, as was established in *City of Halifax v. Fairbanks Estate*[1]. If the general tendency of the tax imposed is such that it may be classified as a direct tax, the authorities establish that its nature is not changed because, in some instances, it may be passed on. This point is stated by Lord Greene in *Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Company*[2]:

> It is argued, however, that the tax, whatever name be given to it, is an indirect tax because the natural tendency for the person who is to be assessed to it will be to pass it to others and thus indemnify himself against it. This operation of passing, it is said, would take one or other or both of two forms—a "passing back" to the railway company by means of a lowering of the purchase price, and a "passing on" to purchasers of the cut timber. It is probably true of many forms of tax which are indisputably direct that the assessee will desire, if he can, to pass the burden of the tax on to the shoulders of another. But this is only an economic tendency. The assessee's efforts may be conscious or unconscious, successful or unsuccessful; they may be defeated in whole or in part by other economic forces. This type of tendency appears to their Lordships to be something fundamentally different from the "passing on" which is regarded as the hallmark of an indirect tax.

My conclusion on this point is, therefore, that, as the general tendency of this tax is such as to make it a direct tax, and, as the appellant is a final user of the personal property here in question, the appellant is not relieved from liability for payment of the tax because he might be able, in his own case, to pass it on. Nor do I think that the words of the statute must be construed in each individual case in

[1] [1928] A.C. 117, [1927] 4 D.L.R. 945, 3 W.W.R. 493.

[2] [1950] A.C. 87 at 118, 1 D.L.R. 305, 64 C.R.T.C. 165, [1949] 2 W.W.R. 1233.

a manner which ensures that the tax shall never apply to a taxpayer who could establish the likelihood of his being able to pass it on.

The appellant further contended that the wording of the *Act* is incomprehensible and should not be construed as imposing any valid tax. The basis of this argument is that the taxing provisions, such as s. 5(1), when read in the light of the definitions contained in the interpretation section, have no meaning because in various instances a definition paragraph, in defining a word, has, in the definition, made use of other words, also having a defined meaning, the definitions of which, in turn, relate back to the word defined. For example, the definition of "consumer" commences with the words "any person who within the province purchases from a vendor", while the definition of "vendor" is "any person . . . who, within the province . . . sells . . . to a consumer . . . ." Applying these definitions, therefore, s. 5(1) would apply to "every person who purchases from any person who sells to any person who purchases from any person who sells to . . . etc. etc."

This argument may constitute a valid criticism of the draftsmanship of the interpretation section, but it pays attention only to the words of each definition which are themselves defined and overlooks the other limiting parts of the definition of each word; for example, that a consumer is one who purchases for his own consumption and that a vendor is one who sells in the course of his business. I think the intent and object of the taxing provisions can be determined satisfactorily with the assistance of the definition paragraphs. The Privy Council was apparently able to interpret the like clauses in the *New Brunswick Act* in the *Conlon* case with like definitions. Furthermore, to the extent that the strict definition of any of the words used would be inconsistent with the intent or object of the *Act* or give an interpretation inconsistent with the word's context, the situation is provided for by subss. (2) and (1) of s. 3 of the *Interpretation Act,* R.S.S. 1953, c. 1.

1960

CAIRNS CONSTRUCTION LTD. v. GOVERNMENT OF SASKATCHEWAN

Martland J.

In my opinion, therefore, the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Shumiatcher, Moss & Laverry, Regina.*

*Solicitor for the defendant, respondent: E. D. Noonan, Regina.*

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1960

*Feb. 8, 9
Jun. 13

WESTERN CANADA STEAMSHIP COMPANY LIMITED (*Plaintiff*) } APPELLANT;

AND

CANADIAN COMMERCIAL CORPORATION AND OTHERS (*Defendants*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Shipping—Claim for general average constribution by carrier against cargo owner—Weakness of tail shaft because of design—Cause of weakness not known at time of loss—Unseaworthiness—Burden of proof of due diligence—Whether discharged by carrier—The Water Carriage of Goods Act, R.S.C. 1952, c. 291.*

The plaintiff carrier claimed for general average contribution against the defendants as owners of the cargo carried on the plaintiff's ship "Lake Chilco", when that ship's tail shaft broke while at sea on a return voyage as a result of what was later discovered to be a defect in the main propulsion machinery. A new tail shaft was flown in a specially converted bomber from Wales to Singapore. The claim was for the difference between the cost of flying the new tail shaft and the cost of sending one by sea. The defendants denied liability on the ground that the ship was unseaworthy, and argued that the expense was not an "extra" expense incurred in place of another so as to be allowable as general expense within Rule F of the York-Antwerp Rules, 1924. Shortly before beginning its outward voyage, the ship propeller struck a fender log, but inspections showed that no damage had been done. The owner had been alerted to the high incidence of tail shaft failures on ships of that class (although the cause of this failure was still unknown at the time of the loss in this case), and had the tail shaft carefully examined before the outward voyage even though her classification did not require this to be done at the time.

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*PRESENT: Locke, Cartwright, Martland, Judson and Ritchie JJ.

The trial judge found that the ship was unseaworthy, but that the carrier had exercised due diligence to make her seaworthy. This judgment was reversed by a majority in the Court of Appeal. The carrier appealed to this Court.

*Held:* The appeal should be allowed.

When unseaworthiness has been shown to be the cause of the loss, the statutory burden imposed upon the carrier by Art. *IV*, Rule 1 of the schedule to the *Water Carriage of Goods Act,* is limited to that of proving the exercise of due diligence to make the ship seaworthy before and at the beginning of the voyage. This burden does not require the carrier to prove either the cause of the loss or the cause of the unseaworthiness and is not to be treated as going so far as to make him prove all the circumstances which explain an obscure situation.

In this case, the evidence disclosed that the carrier had met the burden of proving due diligence to make the ship seaworthy before and at the beginning of the voyage. The beginning of the voyage must be taken as the period from at the least the beginning of the loading of the cargo until the ship started on the contemplated voyage. The defect in the tail shaft was a latent one in this case, and due diligence did not require the carrier to install torsiograph equipment and make numerous tests before the cause of the weakness could be determined.

The evidence did not warrant the inference that it was usual to charter an aircraft for the purpose of bringing an 8-ton shaft from Wales to Singapore. This was an extra expense incurred in place of that which would have been involved in sending one by sea.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Whittaker J. Appeal allowed.

*J. I. Bird* and *W. C. D. Tuck,* for the plaintiff, appellant.

*C. C. I. Merritt* and *D. B. Smith,* for the defendants, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This action was brought by the appellant for General Average Contribution from the respondents as owners of cargo carried in the appellant's steamship *Lake Chilco* on September 20, 1947, when that ship's tail shaft broke while at sea in calm weather as a result of what was later discovered to be a defect in the design of the main propulsion machinery.

The 38 Bills of Lading covering the cargo in question were identical in form and variously related to the carriage of goods from Mombasa, Colombo and Singapore to Los Angeles and Vancouver. These contracts were all expressed

[1](1959), 20 D.L.R. (2d) 47.

1960

WESTERN CANADA STEAMSHIP CO. LTD. v. CANADIAN COMMERCIAL CORPORATION *et al.*

Ritchie J.

to be subject to the *Water Carriage of Goods Act*, 1936 (Can.), c. 49 (now R.S.C. 1952, c. 291), and to the York-Antwerp Rules, and each contained the following clause:

10. General Average shall be adjusted according to York Antwerp Rules, 1924, and, as to matters not therein provided for, according to the laws and usages of the Dominion of Canada, and the general average shall be prepared by average adjusters selected by the carrier, the said adjusters to attend to the settlement and collection of the average subject to the customary charges.

In the event of accident, danger, damage or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible by statute, contract, or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if such salving ship or ships belonged to strangers.

Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery.

The *Lake Chilco* was built in British Columbia in 1944 in accordance with plans and specifications approved by Lloyd's Register of Shipping. She was one of the Victory Class ships which are of substantially the same design as, though not identical with, ships of the American Liberty Class. This ship was purchased by the appellant in April 1946 at which time she was inspected and surveyed by the appellant's Superintendent Engineer and a Lloyd's Registered Surveyor, and although the tail shaft was not "drawn" at that time the propeller was backed off to permit a visual examination in the normal manner, everything was found to be in order and a Lloyd's Classification Certificate was duly issued. One of the Lloyd's requirements for this ship was that the tail shaft should be drawn and inspected every three years but the next such inspection was not due until August 1947.

In April 1947 the *Lake Chilco* was due to leave on the voyage during which the loss occurred, and it is apparent that at this time the appellant knew that it was a matter of general interest and comment in the shipping and marine insurance world on the west coast that a considerable number of Liberty and Victory Class ships had manifested a tendency to develop a weakness in the tail shaft from some

cause then unexplained. In fact the appellant operated 20 such ships, most of which were of the Victory Class, and in January of that same year one of these ships, the *Lake Sicamous*, had suffered a fractured tail shaft while at sea. These considerations no doubt account, at least in part, for the fact that the *Lake Chilco's* shaft was drawn and subjected to close examination by a Lloyd's Surveyor when she was in drydock at Vancouver on April 25, 1947, although the classification requirements did not make this necessary. The procedure followed in making this examination was to draw in the shaft, uncouple it and carefully examine the shaft, key, keyway, taper and the bronze liner under a magnifying glass. The rubber sealing ring and the fit of the propeller on the taper were all carefully examined, and all having been found in fit condition, the ship was prepared for sea on April 29. Lloyd's Register of Shipping issued a certificate pursuant to this examination, and although there is some suggestion that the use of substances called magnaflux and magnaglow might have disclosed concealed cracks in the shaft which could not be detected under the magnifying glass, these substances were not available at the time, and it appears to me that the usual standard and approved method of inspection was employed having regard to the then state of knowledge of all concerned, and that there was no neglect or default on the part of the surveyor.

On May 9, 1947, while the *Lake Chilco* was coming alongside the dock at Victoria for the purpose of loading part of her cargo for the outward voyage, her propeller struck a Douglas Fir fender log at the berth, leaving three gashes in the log about 18 inches apart, the deepest of which was about 6 inches. On the following day the master, together with the chief engineer and a marine surveyor, examined the blades and the surveyor reported that:

> In so far as could be seen blades had suffered no damage and vessel consequently in fit condition to take on part cargo of lumber here and then to proceed to Mainland ports, to complete for destination.
>
> It was recommended that close attention be given the action of propeller and shafting while proceeding to these ports, any excessive vibration to be reported at Vancouver, B.C.

On May 11 the ship proceeded to New Westminster and thence to Vancouver from which port she sailed bound for Balboa on May 16. During this voyage the shafting was observed in accordance with the recommendations of the

1960

WESTERN CANADA STEAMSHIP CO. LTD. v. CANADIAN COMMERCIAL CORPORATION et al.

Ritchie J.

surveyor and no unusual vibration which might have indicated propeller damage was noted. The propeller was again seen 3½-4 feet out of the water when the ship was virtually in ballast after unloading at Beira, Portuguese East Africa in August, and at this time no damage was seen.

The ship continued on the voyage and reached Mombasa on August 21, where loading of the first of the cargo in question commenced at 5.45 p.m. on August 25. After completing loading at Mombasa, she proceeded without incident via Zanzibar to Colombo where more of the cargo was loaded and thence to Singapore where loading was completed on September 16 and 17 and from whence she sailed bound for Los Angeles on the evening of the 18th.

On the early morning of September 20, in a smooth sea, heavy vibrations suddenly shook the entire ship, and upon investigation it was found that the tail shaft had fractured at the after end and the propeller had dropped off. The *Lake Chilco* was towed to Singapore where it was found that no appropriate tail shaft was available for replacement, and after making inquiries in Australia, the Orient, Canada, the United States and the United Kingdom it was found that the least costly available shaft from the viewpoint of transportation was one obtainable from Wales, and as a consequence a Halifax bomber aircraft was specially converted and chartered to carry the shaft to Singapore. The cost of transporting this shaft by air was $22,018; the steamer freight would have amounted to $246.75, and the appellant now claims the difference between these two figures, namely, $21,771.25 as a General Average item on the ground that the time saved by flying the shaft out resulted in avoiding Port of Refuge expenses estimated at $24,606, and that the cost of air freight was, therefore, an "extra expense incurred in place of another expense which would have been allowable as general average" within Rule F of the York-Antwerp Rules, 1924. The relevant provisions of the York-Antwerp Rules read as follows:

RULE D. Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the advanture; but this shall not prejudice any remedies which may be open against that party for such fault.

RULE F. Any extra expenses incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed, but only up to the amount of the general average expenses avoided.

In the event of it being determined that the respondents are liable to contribution, the only item disputed by them is the sum of $10,182 being the amount claimed as their portion of the excess of air over sea freight hereinbefore referred to which they contend to be a "normal" rather than an "extra" expense and, therefore, not one which is properly allowable as General Average expense.

The respondents, however, contend that they are not liable for any contribution at all under the circumstances of this case, alleging that the loss was occasioned by reason of the unseaworthiness of the *Lake Chilco*. This is expressed in the following language in para. 3 of the defence:

(*a*) The said *Lake Chilco* had, to the knowledge of the Plaintiff, while berthing at Victoria, British Columbia, on the 9th day of May, 1947, struck with her propeller a fender log with such violence as to damage the said tail shaft and to render it liable, or, alternatively, more liable to fracture and the Plaintiff failed to inspect and repair said tail shaft or failed adequately so to do and the Plaintiff permitted the said ship to proceed on the voyage in question in this action with its said tail shaft in said damaged condition and the loss of the said propeller was due directly to said damage; or alternatively to a combination of said damage and the defect in construction hereinafter referred to;

(*b*) The *Lake Chilco* was a vessel of such construction that her tail shaft was, to the knowledge of the Plaintiff, at and before the commencement of the voyage upon which she lost her propeller, liable to fracture and the said *Lake Chilco* lost her propeller by fracture of her said tail shaft;

(*c*) With knowledge of said defect in construction, or of such damage, or alternatively, of both defect and damage, the Plaintiff permitted the said vessel to proceed upon said voyage without carrying with her a spare tail shaft, and the alleged "substituted expenses" claimed in the average statement referred to in . . . the Statement of Claim were occasioned by such default and such unseaworthiness.

The allegation of negligence with respect to failure to carry a spare tail shaft was not sustained by the evidence and little reliance was placed upon this defence either at the trial or on the appeal.

1960

WESTERN CANADA STEAMSHIP CO. LTD. v. CANADIAN COMMERCIAL CORPORATION et al.

Ritchie J.

These defences must, of course, be viewed in the light of art. III, Rule I and art. IV, Rule I of the Schedule to the said the *Water Carriage of Goods Act* which read as follows:

ARTICLE III, RULE I.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to

(*a*) make the ship seaworthy;

(*b*) properly man, equip, and supply the ship;

(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

ARTICLE IV, RULE I.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

The learned trial judge and the members of the Court of Appeal[1] treated the allegations contained in para. 3(*a*) and (*b*) of the defence separately, and examined the evidence with a view to determining whether the ship owner exercised due diligence to make the ship seaworthy (a) having regard to the fender log incident, and (b) having regard to its knowledge of the potential tail shaft weakness.

There has been no appeal from the following finding of the learned trial judge that the ship was unseaworthy and it can be taken as agreed to by the appellant:

The evidence establishes that tail shafts in ships of the *Lake Chilco's* class were peculiarly susceptible to torsional stress and that this was due to some defect in design of the ship or propulsion machinery. I accept the evidence of the experts who stated that the weakness engendered in the *Lake Chilco's* shaft as a result of this stress was probably present before the ship left Vancouver on the voyage in question, and, of course, later on when she left Mombasa. I think therefore, that by direct evidence and by inference from all the circumstances this particular allegation of unseaworthiness has been established.

The learned trial judge went on to find that the appellant had discharged the onus of proving that it exercised due diligence to make the ship seaworthy within the meaning

[1] (1959), 20 D.L.R. 47.

of arts. III and IV of the Schedule in respect of this defect, and he found also that the respondents had fallen far short of proving unseaworthiness with respect to the fender log incident, but that, in any event, due diligence had been exercised in that regard also. From this decision the respondents appealed to the Court of Appeal for British Columbia, the members of which considered the fender log incident and the state of the appellant's knowledge as two separate issues as to which they were sharply divided in their opinion.

O'Halloran J.A. found that the learned trial judge did not err in holding that the ship owner had exercised due diligence in respect of the fender log incident and that there was not sufficient evidence to make it more likely than not that this incident was a causative factor in the loss of the propeller. He then went on to hold that the appellant had failed to exercise due diligence to make the ship seaworthy having regard to its knowledge of the frequency of tail shaft failures in Victory Class ships.

Davey J.A., on the other hand, concluded that due diligence had been exercised by the ship owner except that it had failed to discharge the burden of proving that the fender log incident, when considered together with the weakness of the shaft, did not cause or contribute to the loss, and he held that due diligence had not been exercised in this regard.

Sheppard J.A. agreed with the learned trial judge that, notwithstanding the appellant's knowledge of the tendency to weakness in these shafts, due diligence had been exercised before the commencement of the voyage, and also found that the fender log incident must be disregarded for the reason that it had not contributed to the accident, and, in any event, that the learned trial judge had found due diligence to have been exercised in respect thereof and that this finding should not be disturbed.

In the result, the Court of Appeal gave formal judgment setting aside the judgment of the trial judge and dismissing this action, and it is from this judgment that the appellant now appeals.

1960

WESTERN CANADA STEAMSHIP CO. LTD. v. CANADIAN COMMERCIAL CORPORATION et al.

Ritchie J.

The burden of proving that the loss was caused or contributed to by the fender log incident which was assumed by the respondents by their pleadings must, of course, be considered in light of the statutory rules and provisions hereinbefore recited and of the fact that it is now admitted that the vessel was unseaworthy "owing to a defect in the design of the main propulsion machinery of the ship".

The decision of Davey J.A. is based in large measure upon the conclusion which he reached as to the nature of this burden. In this regard he expressed himself as follows:

> In my opinion, appellant's counsel was right in his submission that once he proved, as he did, the ship was unseaworthy at the commencement of the voyage because of the weakened shaft, which caused the casualty, the statutory onus resting on the respondent to prove due diligence required it to show the actual cause of the unseaworthiness, i.e., the cause of the weakened shaft, and that it had exercised due diligence in respect of that cause, or failing proof of the actual cause, to enumerate all probable causes and show that it had been diligent in respect of each.

This opinion is based on that portion of the judgment delivered by Fry L.J. in the *Merchant Prince*[1], where that learned judge discussed the burden resting on a defendant who relies upon inevitable accident as an answer to a claim founded in negligence which reads:

> They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided.

The *Merchant Prince* was a case in which a ship, moving down a crowded channel on a stormy day, ran into a ship at anchor and could thus only avoid liability by showing inevitable accident. In fact, the accident was not found to have been inevitable at all because it was apparent that the probable cause of the collision was the stretching of a chain in the steering machinery which could and should have been foreseen. That case was not concerned at all with whether or not due diligence had been taken to make the ship seaworthy, the only question at issue being the cause of the collision, and it was held that the circumstances were such as to require the moving ship to prove that all causes of the mishap were beyond its control and could not have been avoided by it.

[1] [1892] P. 179 at 189.

It seems to me that the distinction between the statutory burden of proof imposed by art. IV, Rule I and the burden which falls on a party to a collision who is required to rely upon "inevitable accident" by way of defence is that in the latter case the issue to be determined is confined to "the cause" of the collision whereas in the former "unseaworthiness" must have already been determined to be a "cause" of the loss before any burden is cast upon the carrier at all.

When, as in the present case, unseaworthiness has been shown to be the cause, the burden then arising under art. IV is limited to that of "proving the exercise of due diligence to make the ship seaworthy before and at the beginning of the voyage". Notwithstanding the views expressed by Davey J.A., this language does not, in my view, serve to shift to the carrier the onus of proving either the cause of the loss or the cause of the unseaworthiness and should not be treated as going so far "as to make him prove all the circumstances which explain an obscure situation" such as the one here disclosed (see *Dominion Tankers Limited v. Shell Petroleum Company of Canada Limited*[1], per Maclean J.).

The evidence presented at the trial of this action attributing the loss of the propeller to the effect of torsional vibrations on the propulsion machinery of the ship is, in my opinion, so strong as to exclude the *probability* of the fender log incident as a contributing cause of the loss, but it is to be remembered that at the time of the striking the appellant had no way of being sure that the shaft would not be weakened by contact with the log, and, accordingly, I think it would have been incautious to ignore the possible effect of this incident on the propeller and the shaft. In this regard, however, I am satisfied that the investigation and inspection carried out in May and the subsequent care and attention given to the matter by the ship's engineer constituted the exercise of due diligence within the meaning of art. IV of the Schedule, and I am not satisfied that if any further steps had been taken any further evidence of damage would have been discovered.

It seems to me that much of the difficulty presented by this case has been created by treating the facts as if they gave rise to two separate issues of unseaworthiness casting two separate burdens of proof upon the appellant, one

[1] [1939] Ex. C.R. 192 at 203, 3 D.L.R 646, 50 C.R.T.C 191.

1960

WESTERN CANADA STEAMSHIP CO. LTD. v. CANADIAN COMMERCIAL CORPORATION et al.

Ritchie J.

relating to the fender log incident and the other to the state of the appellant's knowledge of the ship's tendency to shaft weakness. In fact there is only one issue which has been hereinbefore stated to be whether or not, having regard to all relevant circumstances, (which would have included the fender log incident if it had been shown to be relevant) the appellant exercised due diligence to make the ship seaworthy "before and at the beginning of the voyage".

As has been pointed out, the present action is brought pursuant to 38 separate contracts of carriage entered into at Mombasa, Colombo and Singapore and relating to cargoes loaded at those points in August and September 1947. The second paragraph of each of these Bills of Lading reads as follows:

> It is agreed that the custody and carriage of the goods are subject to the following terms which shall govern the relations, whatsoever they may be, between the shipper, consignee, and the carrier, master and ship in every contingency, wheresoever and whensoever occurring, and also in the event of deviation, or of unseaworthiness of the ship at the time of loading or inception of the voyage or subsequently, and none of the terms of this Bill of Lading shall be deemed to have been waived by the carrier unless by express waiver in writing signed by a duly authorized agent of the carrier.

In my view the "beginning of the voyage" contemplated by each of those contracts must be taken "as the period from at least the beginning of the loading" of the cargoes respectively referred to therein until the vessel started on the voyage contemplated thereby (see in this connection the observations of Lord Somervell in *Maxine Footwear Co. Ltd. et al. v. Canadian Government Merchant Marine Ltd.*[1]).

As the first of these cargoes was loaded at Mombasa on August 25 and as there is no suggestion of any change in the ship's condition or the appellant's state of knowledge between that time and September 20 when the shaft broke, it seems to me that the only question to be determined is whether or not, having regard to the state of its knowledge at that time and to all other relevant circumstances, the appellant exercised due diligence to make the *Lake Chilco* seaworthy before starting to load her cargo at Mombasa.

[1] [1959] A.C. 589 at 603, 21 D.L.R. (2d) 1, 79 C.R.T.C. 1.

In determining this question, it is to be remembered that as Lord Sumner said in *F. O. Bradley and Sons Lim. v. Federal Steam Navigation Co. Lim.*[1]:

> In the law of carriage by sea neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and the standard prevailing at the material time.

It was apparently made known to the appellant by a letter dated July 11 which is not in evidence that the torsional characteristics of the propulsion system of Liberty Class ships was under investigation by the American Bureau of Shipping in the Summer of 1947, but the results of this investigation, disclosing as they did the cause of the shaft weakness, were not made known until January 1948. In the meantime, the only specific recommendation made known to the appellant by the American Bureau of Shipping was contained in a letter of May 20 to which reference will hereafter be made and was to the effect that the shafts in these ships should be drawn every two years.

In view of the fact that the cause of this loss was only finally determined in January 1948 after prolonged investigation and experiment, it is perhaps helpful to recall what was said by Scrutton L.J. when the last-noted case was before the Court of Appeal in England. In speaking of the standard of seaworthiness, he made the following observations which are reported in 24 Lloyd's Law List at pp. 454-455:

> The vessel is to be reasonably fit. It certainly need not have fittings or instruments which had not at the time been invented, because by subsequent inquiry a danger has been discovered which these fittings and instruments when invented might avert. While the shipowner may be bound to add improvements in fittings where the improvement has become well known or the discovery of danger established, the position is quite different where at the time of the voyage the discovery had not been made or the danger discovered. It is not enough in my view to say, "we have now after the event discovered that there was a danger to which the cargo was exposed, the nature of which was unknown at the time; and, the danger being known, we have thought of a remedy, which was not common knowledge at the time, and which a prudent owner would not be imprudent in neglecting, having regard to the existing state of knowledge."

[1] (1927), 137 L.T. 266 at 268.

1960

WESTERN CANADA STEAMSHIP CO. LTD. v. CANADIAN COMMERCIAL CORPORATION et al.

Ritchie J.

In the present case O'Halloran J.A. has made the following finding:

> It was the frequency of tail shaft failures at sea that made clear the inherent unseaworthiness of the ship. With that knowledge the shipowner took a calculated risk that a tail shaft failure would not happen during the voyage; in these circumstances the shipowner cannot claim immunity because he did not know the exact cause of the failure.

It is true that there is evidence to the effect that in the month of April 1947 the appellant had been alerted to the high incidence of tail shaft failures in American Liberty Class ships and to a lesser extent in those of the Canadian Victory Class, and that this situation had been brought home to the appellant by the loss of the shaft of the *Lake Sicamous* in January 1947, but in my view this does not make clear "the inherent unseaworthiness" of the particular ship here in question.

The evidence with respect to tail shaft failures is that in 1949 it was reported in "Transactions of the Institution of Naval Architects" that 583 shafts were renewed and 100 of these ships had been disabled at sea by reason of tail shaft failure in the three years preceding December 1, 1948. There is no evidence as to how many of these ships were afloat during the period in question and the record is also silent as to the age of the ships encountering such failures and of the shafts that failed, and there is certainly no suggestion that any such failure occurred in a ship that was only three years old whose shaft had been drawn and passed as sound by a competent surveyor four months before breaking. On the other hand, it is shown that of the 20 of such ships operated by the appellant, only one had experienced such a failure and the cause of this failure was still unknown in August 1947.

The fact that special care was taken to examine the tail shaft at the time of purchase in 1946 and that this shaft was drawn and carefully examined in April 1947, although its classification did not require this to be done, indicates that the appellant was exercising more than ordinary caution because of the concern evinced in shipping circles about these failures, but it does not indicate to me that the appellant or anyone else appreciated that there was any risk of the shaft of the *Lake Chilco* breaking while she was at sea.

In assessing the knowledge attributable to the appellant in August 1947, the letter of May 21 from the American Bureau of Shipping seems to me to be most significant. I think it can be taken from the terms of that letter that it represented the considered opinion of a very influential body in the shipping world as to the best remedy that could at that time be suggested for tail shaft failures in Liberty Class vessels and I think also that the ship owner was entitled to treat this as an authoritative guide in assessing the best method of limiting or excluding the risk, if any, of tail shaft breakage in these ships. The terms of the letter were as follows:

> As you are aware, the record of failures at sea on tailshafts on the above mentioned vessels is quite abnormal and is a matter of considerable concern to all interested partners.
>
> The Bureau Rules require tailshafts, with continuous liners, to be drawn every three years and in view of the above circumstances it is strongly recommended that the period between tailshaft drawings should not exceed two years for the Liberty type vessels.
>
> It would be greatly appreciated if you would change your schedules for tailshaft drawing due dates to conform with the above recommendation and also advise your field representatives accordingly. On those vessels whose tailshaft drawings are due within a year, the shafts should be drawn for examination on the occasion of the next drydocking of the vessel.

The further letter of July 11, 1947, from the same source which has been hereinbefore referred to made no further recommendations and no further warnings were issued concerning these shafts before the time of loading at Mombasa.

The *Lake Chilco* was a comparatively new ship built in accordance with widely accepted standards; it is not suggested that she had had any previous trouble either with her shaft or otherwise and she had been subjected to a survey of her shaft and other machinery in April. I am accordingly of opinion that at the time when loading commenced at Mombasa on August 25 the owner was justified in regarding this as a seaworthy ship, subject only to a potential weakness of unknown origin in her propulsion system which made it necessary to have the tail shaft drawn and inspected every two years rather than every three years. In these circumstances and as the tail shaft had been drawn only four months earlier, I do not think that it was unreasonable for a carrier to load cargo nor do I think that in so doing the

1960

WESTERN CANADA STEAMSHIP CO. LTD. v. CANADIAN COMMERCIAL CORPORATION et al.

Ritchie J.

appellant was exposing the respondents to any risk of which it was or ought to have been aware other than the normal risks attendant upon any marine adventure.

The contention that something more should have been done before leaving Vancouver to discover the potential weakness seems to me to be met, at least in part, by a consideration of the length of time taken by experts working with special equipment before the cause of the weakness was determined. In saying this, I am not ignoring the fact that the investigation by the American Bureau of Shipping was delayed through a strike, but even when allowance is made for this delay it seems apparent that the defect was not one which could be discovered by any of the usual and accepted methods of inspection currently employed on the west coast of Canada in April 1947.

In any event, the appellant more than complied with the requirements of Lloyd's Register of Shipping in maintaining the *Lake Chilco* and it is to be remembered that one paragraph of the written "Admission of Facts" agreed to on behalf of the respondents reads as follows:

> Lloyds Register of Shipping was established for the purpose of obtaining for the use of Merchant Shipowners and Underwriters a faithful and accurate classification of mercantile shipping, and many shipowners *as a matter of sound commercial practice* maintain their vessels in accordance with the requirements of this Classification Society. (The italics are mine.)

While not express, it does seem to me that this constitutes a tacit recognition of the fact that the requirements of "sound commercial practice" are considered by many ship owners to be met by maintaining the Lloyd's classification requirements.

The decision of O'Halloran J.A. is based in large measure upon the case of *Smith Hogg & Co. Ltd. v. Black Sea and Baltic General Insurance Co.*[1], also reported in 60 Lloyd's Law List, p. 253, and his reasoning in this regard is disclosed in the following excerpt from his judgment:

> That case has basic similarities with the present case in that (a) the happening which actually brought about the loss crystallized a substantial time after the ship had commenced her voyage; and (b) the cause of the disaster was the ship's instability which made the ship unseaworthy when she sailed from Soroka. In the *Smith Hogg* case the unseaworthiness was due to its large negative metacentric height, and in our case was due to

[1] [1940] A.C. 997.

torsional vibration, both due to the design of the ship; (c) the ship owners in the *Smith Hogg* case were held not to have exercised due diligence; with due deference the same reasoning applies here, for the lack of due diligence here was sending an unseaworthy ship to sea; (d) in each case the true cause of the loss was not the lack of due diligence in the conventional sense but inherent unseaworthiness springing from the fault of the ship owners in knowingly sending an unseaworthy ship to sea; in the *Smith Hogg* case owing to its instability and in this case owing to its being subject to tail shaft failure at sea; and (e) in either case the disaster would not have occurred but for the unseaworthiness when the ship was sent to sea.

I do not find it necessary to analyze the facts of the *Smith Hogg* case because I accept the view of that case expressed by Lord Wright in the course of his judgment which appears to me to be at variance with the interpretation placed upon it by Mr. Justice O'Halloran. Lord Wright said of the ship involved in that case[1]:

> The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect, such an exception can only excuse against latent defects. The overloading was the result of overt acts.

As I understood it, Mr. Bird, on behalf of the appellant, rejected the suggestion that the potential weakness of the *Lake Chilco's* shaft was "a latent defect", and while it is no doubt true that, at least for certain marine insurance purposes, an error in design is not considered to be a latent defect, it nevertheless seems to me that the condition of the shaft of the *Lake Chilco,* when it was inspected in April, was such that its potential weakness was not discoverable by the exercise of due diligence, and that the defect was "latent" in the sense in which Lord Wright used that word in the passage above quoted.

The observations of Kennedy J. in *Jackson v. Mumford*[2], have been widely quoted as indicating one of the limitations of the words "latent defect in the machinery" for purposes of the marine insurance clause there under consideration. He there says:

> But for the purposes of today it is sufficient for me, without attempting to define its boundaries, to say that the phrase, at all events, does not, in my view, cover the erroneous judgment of the designer as to the effect of the strain which his machinery will have to resist, the machinery itself being faultless, the workmanship faultless, and the construction precisely that which the designer intended it to be.

[1] [1940] A.C. 997 at 1001.

[2] (1902), 8 Com. Cas. 61 at 69.

1960

WESTERN CANADA STEAMSHIP CO. LTD. v. CANADIAN COMMERCIAL CORPORATION et al.

Ritchie J.

Although the defect in the design of the main propulsion machinery of the *Lake Chilco* would, no doubt, not be a latent defect within the meaning of *Jackson v. Mumford, supra,* it nonetheless seems to me that it had much in common with the kind of defect to which Branson J. referred in *Corporacion Argentina de Productores de Carnes v. Royal Mail Lines, Ltd.*[1], when he said:

> Supposing that one had a tail-shaft which had a flaw in it which nobody could possibly discover by any examination short of destroying the thing, and that tail-shaft broke, it would be no answer to the shipowner's defence that there was a latent defect not discoverable by due diligence, to say that it might be he had not exercised any diligence to look at that tail-shaft at all. If the defect is such that it cannot be discoverable by due diligence it becomes immaterial to consider whether due diligence was exercised or not, because *ex hypothesi* if it had been exercised it would have been useless.

Although the defect in the present case was in the design rather than in the shaft itself and it would not have been necessary to destroy the thing in order to discover the weakness, it is nonetheless apparent from the American Bureau of Shipping letter of January 8 that it was necessary to install "torsiograph" equipment on a ship and to conduct numerous experiments before the cause of the weakness could be determined and in my view the exercise of due diligence to make the ship seaworthy under the circumstances did not require the ship owner to install such equipment even if it had been available or to make such tests.

Although I agree with Mr. Justice Branson when he says that "if the defect is such that it cannot be discoverable by due diligence, it becomes immaterial to discover whether due diligence was exercised . . . .". I do not base my decision on this premise because I consider that the evidence discloses that due diligence was in fact exercised by the appellant in this case in the manner and for the purposes required by arts. III and IV of the Schedule of the *Water Carriage of Goods Act,* and I am, therefore, of opinion that the respondents are liable for contribution in General Average in respect of the expenses consequent upon the loss of the ship's propeller in the manner and to the amount determined by the Average Adjustment statement which is an exhibit in this case.

[1] (1939), 64 Ll.L. Rep. 188 at 192.

As has been indicated, the respondents contend that they are not liable for the difference in cost between the amount of freight which would have had to be paid if the shaft had been shipped from England by sea and the amount which actually was paid in bringing it out by air. This contention is based on the ground that spare parts for ships are frequently flown into Singapore by air and that the cost of flying the shaft was a usual expense and not one of the "extra" expenses contemplated by Rule F of the York-Antwerp Rules. In my view the evidence does not warrant the inference that it is usual to charter an aircraft for the purpose of bringing an 8-ton shaft from Wales to Singapore, and I cannot treat this as anything other than an extra expense which was incurred in place of the expense which would have been involved if the ship had been required to remain at Singapore while a shaft was being sent out by sea.

In view of all the above, I would allow this appeal with costs and restore the judgment of the learned trial judge.

*Appeal allowed with costs.*

*Solicitors for the plaintiff, appellant: Campney, Owen & Murphy, Vancouver.*

*Solicitors for the defendants, respondents: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.*

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DURAND ET CIE. (*Plaintiff*) .....APPELLANT;

AND

LA PATRIE PUBLISHING COMPANY LTD. (*Defendant*) ..... } RESPONDENT.

1960
*Mar. 9, 10, 11
Jun. 24

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Copyright—Infringement—Broadcast of opera "Pelléas et Mélisande"—Whether copyright protected in Canada—Registration—Assignment—The Copyright Act, R.S.C. 1952, c. 55—History of Copyright legislation.*

The plaintiff brought this action against the defendant for infringement of the copyright resulting from the broadcast of "Pelléas et Mélisande", an opera of which the plaintiff claimed to be the proprietor of both the

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Judson JJ.

1960

DURAND ET CIE. v. LA PATRIE PUBLISHING CO. LTD.

copyright and the performing rights. The plaintiff had not registered the work, or otherwise complied with the Canadian copyright legislation in force in Canada prior to January 1, 1924. The Exchequer Court held that the authors had validly assigned their copyright and performing rights to the plaintiff's predecessors in title, but dismissed the action on the grounds that (1) the plaintiff had assigned its rights to sue directly to Sacem, a society of authors, etc., in France, and (2) that it had failed to comply with the requirements of s. 48 of the *Copyright Act*. The plaintiff appealed to this Court and the defendant cross-appealed against the finding that the plaintiff held the copyright and the performing rights.

*Held:* The appeal should be allowed and the cross-appeal dismissed.

The evidence made it clear that the plaintiff had not given Sacem the performing rights in this opera, and consequently the plaintiff was not precluded from suing for infringement. Furthermore, there was no evidence to support the finding that s. 48 of the Act applied to the plaintiff.

As to the cross-appeal. It was clear that s. 4 of the Act applied to rights acquired on or after January 1, 1924, and, therefore, the contention that the plaintiff had acquired rights under that section could not be supported. However, by virtue of the combined application of various Imperial statues, the Berne convention of 1885 and Canadian legislation in force in Canada prior to January 1, 1924, the plaintiff, as the successor in title to the authors, was entitled to the copyright and performing rights in the opera in the United Kingdom and throughout the British Dominions, including Canada. The plaintiff was also entitled to the substituted right provided for under s. 42 of the Act and such right was in force when the present action was taken.

APPEAL and Cross-Appeal from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], dismissing an action for infringement of copyright.

*R. Quain, Q.C., and R. Quain, Jr.*, for the plaintiff, appellant.

*G. F. Henderson, Q.C., and R. McKercher*, for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—The present action was brought by appellant alleging infringement of copyright by reason of the broadcasting on March 12, 1950, of a series of records over Radio Station CHLP then owned and operated by the respondent. The broadcast consisted of a major portion of the well-known opera "Pelléas et Mélisande", of which the appellant claims to be proprietor of both the copyright and the performing rights.

[1] (1959), 19 Fox Pat. C. 93, 32 C.P.R. 1.

The relevant facts can be shortly stated. The opera in question, the lyrics of which were written by Maurice Maeterlinck and the music composed by Claude Debussy was first publicly performed at the Opéra Comique in Paris on April 30, 1902. At that time, Maeterlinck was a citizen of and resident in Belgium and Debussy a citizen of and resident in France. The appellant firm has been engaged for many years in France in the business of acquiring copyright in and promoting the licensing of literary, dramatic and musical works and, depending upon the character of the work, grants licences itself or does so through agents delegated by it to grant licences and to collect royalties. It bases its title to copyright and performing rights in the said opera upon an assignment from the authors dated March 31, 1905. Debussy died in 1918 and Maeterlinck in 1949.

It is common ground that appellant did not register the work in question under, or otherwise comply with, the Canadian copyright legislation in force in Canada prior to January 1, 1924, and that it had therefore acquired no copyright or performing rights in Canada prior to that date, apart from any such rights to which statutes of the United Kingdom then in force in Canada might entitle it.

The learned trial judge[1] found that the authors Maeterlinck and Debussy had validly assigned their copyright and performing rights to appellant's predecessors in title. There is ample evidence to support that finding and it should not be disturbed. He held however that while appellant was vested with the copyright to the work in question the present action must be dismissed because (1) appellant had assigned its rights to sue directly, to a society of authors, composers and publishers of music in France—known colloquially as SACEM—and (2) because it came within the provisions of s. 48 of the *Copyright Act*, R.S.C. 1952, c. 55, and had failed to comply with the requirements of that section.

Appellant appealed from that judgment, limiting its appeal to two issues namely, the findings (1) that appellant's action failed because of the application of s. 48

[1] (1959), 19 Fox Pat. C. 93, 32 C.P.R. 1.

1960

DURAND ET CIE. v. LA PATRIE PUBLISHING CO. LTD.

Abbott J.

of the *Copyright Act* and (2) that it had vested a third party with the right of action. The respondent cross-appealed.

I shall deal first with the two issues raised in the main appeal. It was established in evidence that the authors Maeterlinck and Debussy were members of SACEM, that appellant had adhered to its statutes and by-laws, and that SACEM had authorized "Canadian Publishers and Authors Association of Canada Limited" a performing rights society doing business in Canada—known colloquially as CAPAC—to grant licences in Canada for works included in SACEM's repertoire. It was also established that in 1950 respondent had paid an annual fee to CAPAC which authorized respondent to broadcast all works included in the repertoire of that society. The Assistant General Representative of SACEM for the United States, Canada and Mexico, called as a witness, testified positively however, that "Pelléas et Mélisande" was not included in the repertoire of his society and that the society did not grant licences for the performing rights to that work. Aside from any other consideration, in the light of that evidence, I am unable with respect, to agree with the finding of the learned trial judge that, because of its arrangements with SACEM, appellant was precluded from suing respondent for infringement.

The learned trial judge also held that appellant came within the terms of s. 48 of the *Copyright Act*, R.S.C. 1952, c. 55, relating to performing rights societies. That section reads in part as follows:

> 48. (1) Each society, association or company that carries on in Canada the business or acquiring copyrights of dramatico-musical or musical works or of performing rights therein, and deals with or in the issue or grant of licences for the performance in Canada of dramatico-musical or musical works in which copyright subsists, shall, from time to time, file with the Minister at the Copyright Office lists of all dramatico-musical and musical works, in current use in respect of which such society, association or company has authority to issue or grant performing licences or to collect fees, charges or royalties for or in respect of the performance of its works in Canada.

There was no evidence that appellant "carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or of performing rights therein"

and, with respect, the learned trial judge was in error, in my opinion, in holding that the section applied to appellant.

This disposes of the main appeal but by its cross-appeal respondent has appealed against the finding of the learned trial judge that appellant holds the copyright and performing rights to the opera in question.

The existence of such rights depends upon the interpretation and effect to be given to the *Copyright Act,* 1921, c. 24 (now R.S.C. 1952, c. 55) and in particular to sections 4, 42, 45 and 47 of that Act. Appellant's contention that it was entitled to copyright in the work in question under s. 4 of the Act, in my opinion, cannot be supported. That section reads in part as follows:

> 4. (1) Subject to the provisions of this Act, copyright shall subsist in Canada for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work, if the author was at the date of the making of the work a British subject, a citizen or subject of a foreign country that has adhered to the Convention and the Additional Protocol thereto set out in the Second Schedule, or resident within Her Majesty's Dominions; and if, in the case of a published work, the work was first published within Her Majesty's Dominions or in such foreign country; but in no other works except so far as the protection conferred by this Act is extended as hereinafter provided to foreign countries to which this Act does not extend.

Reading the Act as a whole, it is clear, in my opinion, that s. 4 was intended to operate prospectively, and that it applies only to rights acquired on or after January 1, 1924, the date upon which the Act became effective. The scheme upon which the Act is drawn up is to deal with copyright law as it is to be under the Act when it comes into force, leaving for special treatment a subject which requires special treatment—namely, the grafting into the new and comprehensive code of law of all works in respect of which copyright, performing rights and common law rights existed under the old law; see *Coleridge-Taylor* v. *Novello & Co. Ltd.*[1] and Fox Canadian Law of Copyright, at p. 220. Such special treatment is provided by s. 42. That section and the First Schedule of the Act unconditionally preserved existing rights by providing

> Where any person is immediately before the 1st day of January, 1924, entitled to any such right in any work as is specified in the first column of the First Schedule, or to any interest in such a right, he is, as from that

[1] [1938] 3 All E.R. 506 at 509.

1960

DURAND ET CIE. v. LA PATRIE PUBLISHING CO. LTD.

Abbott J.

date, entitled to the substituted right set forth in the second column of that Schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made, and the work had been one entitled to copyright thereunder.

In order to be entitled to the substituted right under s. 42 and the First Schedule, a right must have subsisted immediately prior to January 1, 1924.

The Canadian *Copyright Act* in force prior to January 1, 1924 (the *Dominion Copyright Act*, 1875, 38 Vic. c. 88, carried forward with some amendments into the Revised Statutes of Canada 1906 as chapter 70) did not deal with performing rights—as distinct from copyright—in dramatic, musical, or dramatic-musical works, and under the Canadian legislation in force in 1902 (the 1875 Act with amendments) copyright in dramatic or musical works existed only if such works were registered under the Act and notice given on the printed work. As I have said, it is common ground that no such formalities were ever complied with in Canada. However, certain Imperial Statutes to which I shall refer presently, did deal specifically with performing rights, as distinct from copyright.

It follows that any performing right which appellant may have held in Canada prior to January 1, 1924, could only have existed by virtue of such Imperial Statutes. The Imperial Statutes having particular relevance are the *Dramatic Copyright Act*, 1833, 3-4 Will. IV, c. 15, the *Copyright Act*, 1842, 5-6 Vic. c. 45, the *International Copyright Act*, 1886, 49-50 Vic. c. 33, and an Order-in-Council passed in 1887, under the last mentioned Act, adopting the Berne Convention.

The *Dramatic Copyright Act*, 1833, was the first statute to grant the exclusive right to perform dramatic compositions. It conferred upon the author of any dramatic piece or his assignee the sole liberty of representing it, or causing it to be represented, at any place or places of dramatic entertainment in any part of the United Kingdom or the British Dominions but it did not touch musical compositions. The performing rights in musical compositions were protected for the first time by the *Copyright Act*, 1842, which enacted that the provisions of the *Dramatic Copyright Act*, 1833, and the *Copyright Act*, 1842, should apply

to musical compositions and that the sole liberty of representing or performing any dramatic or musical composition should endure and be the property of the author and his assigns for the term provided in the 1842 Act for the duration of copyright in books. That term was fixed as being the life of the author and seven years after his death or forty-two years, whichever should be the longer. Both the 1833 Act and the 1842 Act were made applicable to the British Dominions and called for registration at Stationers' Hall in London.

Prior to 1911 the right of foreigners to obtain copyright protection in the United Kingdom depended upon various Copyright Acts (including the Acts of 1833 and 1842 to which I have referred) and two International Copyright Acts, namely the *International Copyright Act,* 1844, 7-8 Vic. c. 12 and the *International Copyright Act,* 1886. Both these latter Acts provided for coyright protection to foreigners upon their complying with certain registration requirements, and were made applicable to all British Dominions. The *International Copyright Act,* 1886, was enacted following the International Conference held in Berne in 1885, and it empowered the Crown, by Order-in-Council, to adhere to the Convention agreed to at that Conference. Both France and Belgium were also adherents to the Convention. On November 28, 1887, an Order-in-Council was passed giving effect to the Berne Convention, which (translated into English) appears as a Schedule to the Order. As a consequence, under the *International Copyright Act,* 1886, and the Order-in-Council of November 28, 1887, the Berne Convention itself and the subsequent Act of Paris, were made effective in Great Britain, became part of the municipal law, and, as such, have been interpreted by the Courts; *Hanfstaengl v. Empire Palace*[1]. The same result followed in the British Dominions (including Canada) to which the Act of 1886 and the Order-in-Council were made applicable.

Counsel for respondent argued before us that notwithstanding the provisions of the *International Copyright Act,* 1886, and the Order-in-Council of 1887, registration was still required under the *Copyright Act,* 1842, and the *Dramatic Copyright Act,* 1833, and that such registration not

[1] [1894] 3 Ch. 109.

1960

DURAND ET CIE. v. LA PATRIE PUBLISHING CO. LTD.

Abbott J.

having been made, no copyright existed under the said Acts. He relied for that proposition upon the opinion expressed by Sterling J. in *Fishburn v. Hollingshead*[1], but that decision was overruled by the Court of Appeal in *Hanfstaengl v. American Tobacco Company*[2], which held that in the case of foreign works to which the *International Copyright Act,* 1886, and the Order-in-Council applied, registration was no longer required.

The *Copyright Act,* 1842, the *Dramatic Copyright Act,* 1833, and the *International Copyright Acts,* were repealed by the *Copyright Act,* 1911, 1-2 Geo. V, c. 46, a consolidating and amending Act covering the whole subject of copyright. The 1911 Act did not extend to a self-governing Dominion unless declared by the legislature of that Dominion to be in force therein, but it conferred authority upon a Dominion legislature, to repeal (subject to the preservation of all legal rights existing at the time of such repeal) any or all enactments passed by the Imperial Parliament (including the Act of 1911) so far as operative within such Dominion. Pursuant to that authority, the Canadian *Copyright Act,* 1921, 11-12 Geo. V, c. 24, which was in large part based on the Imperial Act of 1911, and which came into force on January 1, 1924, repealed (1) all the Imperial enactments relating to copyright so far as their application to Canada was concerned and (2) all prior Canadian legislation upon the subject, saving of course any legal rights existing at the time of such repeal.

In *Routledge v. Low*[3], the Judicial Committee held that the Imperial *Copyright Act,* 1842, extended the protection of British copyright to all the British Dominions. Following the enactment of the Canadian *Copyright Act* in 1875, notwithstanding the fact that the Canadian Parliament had exercised its power under s. 91 of the *British North America Act,* 1867, to pass a statute relating to copyright, the Ontario Court of Appeal decided in *Smiles v. Belford*[4], that the *Copyright Act,* 1842, was also in force in Canada, and that decision was followed in *Black v. Imperial Book Co.*[5]. Appeal was taken to the Supreme Court of Canada in the *Imperial Book Company* case[6], but this Court dismissed

[1] [1891] 2 Ch. 371.
[2] [1895] 1 Q.B. 347.
[3] (1868), L.R. 3 H.L. 100.
[4] (1877), 1 O.A.R. 436 at 447.
[5] (1904), 8 O.L.R. 9.
[6] (1905), 35 S.C.R. 488.

the appeal upon other grounds and expressly refrained from expressing an opinion one way or the other upon the question as to whether *Smiles v. Belford* was rightly decided. Since the enactment of the *Copyright Act*, 1921, this constitutional question has of course become one of diminishing importance. *Smiles v. Belford,* however, has been consistently followed in the Canadian courts, accepted by the text writers and, in my respectful opinion, it correctly stated the law.

It follows that in my opinion (*i*) the *Dramatic Copyright Act,* 1833, the *Copyright Act,* 1842, the *International Copyright Act,* 1886, the Order-in-Council passed under the latter Act in November 1887, and the terms of the Berne Convention itself, all applied in Canada prior to January 1, 1924, and (*ii*) that under their combined application, immediately before that date the appellant, as the successor in title to Maeterlinck and Debussy, was entitled to the copyright and performing rights in the opera "Pelléas et Mélisande" in the United Kingdom and throughout the British Dominions, including Canada.

There remains the question as to whether appellant became entitled to the substituted right provided for under s. 42 of the *Copyright Act,* 1921, now R.S.C. 1952, c. 55. On this point the decision of the Judicial Committee in *Mansell v. Star Printing & Publishing Co. of Toronto Ltd.*[1] is of little assistance. The artistic copyright in issue in that case, subsisted in the United Kingdom under the *Fine Arts Copyright Act,* 1862, 25-26 Vic. c. 68, which was never in force in Canada, and copyright in Canada could only have existed therefore by registration under the Canadian Act of 1906 which had not been done.

In *Francis Day & Hunter v. Twentieth Century Fox Corporation*[2], however, the literay work concerned came under the Imperial *Copyright Act,* 1842, which was in force in Canada. The Judicial Committee was able to dispose of the controversy in that case upon another ground without deciding whether appellant was entitled to the substituted right under s. 42. However, it is to be observed that before dealing with that other ground Lord Wright at p. 197 after stating the arguments of counsel on this point, used the

[1] [1937] A.C. 872, 4 D.L.R. 1. [2] [1939] 4 All E.R. 192.

1960

DURAND ET CIE. v. LA PATRIE PUBLISHING CO. LTD.

Abbott J.

expression "assuming, but not deciding, that the appellant company is entitled to the copyright in Canada which it claims". I might add here that the record in the present case shows that appellant had complied with the requirements of the *Copyright (Musical Compositions) Act*, 1882, 45-46 Vic. c. 40, which their Lordships held in the *Francis Day and Hunter* case extended to Canada by necessary implication and effect although not in terms extended to this country.

I am satisfied that the substituted right provided by s. 42 of the Act of 1921, does apply to copyright subsisting in Canada prior to January 1, 1924, by virtue of Imperial legislation in force in Canada prior to that date as well as to copyright subsisting by virtue of prior Canadian legislation, that in consequence appellant became entitled to that substituted right, and that such right was in force when the present action was taken.

In the result the appeal should be allowed and the cross-appeal dismissed. There would seem to be no necessity now to grant appellant the injunction asked for. No special damages were alleged or proved but appellant claimed the sum of $600 for what it describes as punitive damages. There appears to have been only one broadcast by respondent of the opera in question, and in the circumstances, I would award appellant damages in the sum of $600, the amount claimed in the action.

Appellant is entitled to its costs in the Exchequer Court and on the appeal and cross-appeal to this Court.

*Appeal allowed and cross-appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant; Quain & Quain, Ottawa.*

*Solicitors for the defendant, respondent; Gowling, Mactavish, Osborne & Henderson, Ottawa.*

MONTREAL TRUST COMPANY AND TILLIE V. LECHTZIER (*Defendants*) ..... APPELLANTS;

AND

CLARA KRISMAN, JESSIE GUREVICH AND G. SYDNEY HALTER (*Plaintiffs*) ..... RESPONDENTS.

1960

*Apr. 26, 27
Jun. 13

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Trusts and Trustees—Will containing insurance trust declaration—Whether to be regarded as separate documents—Widow preferred beneficiary—Direction to pay her annual sum out of insurance trust—Whether vested capital interest given to widow—Whether life interest only—The Insurance Act, R.S.B.C. 1948, c. 164, s. 110.*

By an insurance trust declaration, contained in his will, the testator designated his wife as preferred beneficiary of all his life and accident insurance policies, and therefore under s. 110(1) of the *Insurance Act*, a trust was created in her favour. The proceeds of the policies were to be held in a separate fund and a specified annual payment was to be made to the wife until the fund was exhausted. The wife received other benefits under the will which provided also for the drawing from the residue of the estate if there was not enough in the insurance fund to make the last annual specified payment. The will further provided for further annual payments to the wife for life out of the residue of the estate, once the insurance fund was exhausted.

*Held:* The wife acquired an immediate absolute interest in the insurance fund, and not merely a life interest.

*Per* Kerwin C.J. and Judson J.: There was no contingency or limitation within the meaning of s. 110(3) of the Act. Whether or not the wife was entitled to receive all of the insurance money immediately upon the death of her husband, the ordinary rules as to payment of vested interests were not applicable. The case was to be determined under the Insurance Act. The provisions of the will and of the declaration were to be read separately, but the same conclusion would prevail in this case if the other clauses of the will were considered.

*Per* Cartwright, Martland and Ritchie JJ.: Regard should be had to the wording of both documents. On the true construction of the will the testator did not attach any contingency or limitation to the designation of his wife. The direction to pay an annual specified sum did not deprive the wife of the right to demand the whole fund at once. The rule in *Saunders v. Vautier* (1841) Cr. Ph. 240, that when a vested interest has once been given restrictions postponing the enjoyment of the gift after the donnee has become *sui juris* are ineffective, was applicable.

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

1960

MONTREAL TRUST CO. *et al.* v. KRISMAN *et al.*

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Brown J. Appeal dismissed.

*J. R. Nicholson* and *J. Austin,* for the defendants appellants.

*D. McK. Brown,* for the plaintiffs, respondents.

The judgment of Kerwin C.J. and of Judson J. was delivered by

THE CHIEF JUSTICE:—The executors and trustees of the will of Isidor Jacob Klein, who, as will be explained, are also trustees under an insurance trust declaration contained in the will, appeal from a judgment of the Court of Appeal for British Columbia[1], DesBrisay C.J. and O'Halloran J.A. (Sidney Smith J.A. dissenting), which reversed in the main a judgment of Brown J. after the trial of an action in which the present respondents, the executors and trustees of the will of Bessie Klein (the widow of Isidor) were plaintiffs and the appellants were defendants.

The action was to recover the proceeds of certain insurance policies, including interest and accretions, effected by Isidor Jacob Klein on his life as follows:

| | |
|---|---|
| New York Life Insurance Company | |
| No. 7933984 | $ 25,000 |
| No. 7057586-D | 2,034 |
| No. 7057587-D | 3,078 |
| Canada Life Assurance Company | |
| No. 284683 | 15,000 |
| No. 294637 | 10,000 |
| Sun Life Assurance Company of Canada | |
| No. NW-10939 | 5,000 |
| Mutual Life Insurance Company of New York | |
| No. 2768854 | 5,000 |
| Crown Life Insurance Company | |
| No. 319659 | 5,000 |

The Mutual Life and Crown Life policies for $5,000 each were by their terms payable to the insured's wife, Bessie Klein; the other policies were payable to the insured's estate.

Mr. Klein died on June 14, 1955, having made his last will and testament dated March 1, 1955, whereby he appointed executors and trustees to whom he devised and

[1] (1960), 23 D.L.R. (2d) 259.

bequeathed all his real and personal estate in trust. The clause providing for payment of his debts, funeral and testamentary expenses, succession and probate duties payable in respect of all gifts, devises and bequests and legacies concluded:

> and to pay and satisfy any and all succession and probate duties with regard to or occasioned by the proceeds of any insurance policies, the subject of the Insurance Trust Declaration hereinafter contained.

There was then a direction to transfer all personalty to his wife, to permit her to occupy his residence for life and to pay her the sum of $10,000. There were also certain charitable donations and gifts to three employees. The will then continued:

> (*f*) to hold and dispose of all the rest and residue of my estate for the following purposes:—
>
> (i) If there be not sufficient left in my Insurance Trust Fund to make the last annual payment of Fifteen Thousand ($15,000.00) Dollars, as is specified in my Insurance Trust Declaration hereinafter contained, then in such case I DIRECT my trustees to draw from my residuary estate, either from income or capital if need be, a sum sufficient to augment the balance of Insurance Trust Fund monies up to the said sum of Fifteen Thousand ($15,000.00) Dollars to permit the said last annual payment.
>
> (ii) After the Insurance Trust Fund shall have been exhausted by the last of the annual payments of Fifteen Thousand ($15,000.00) Dollars as is hereinafter provided in my Insurance Trust Declaration, then upon such exhaustion my trustees shall pay to my wife during her life, by instalments or otherwise, all the income of the said residue of my estate up to but not exceeding an annual sum of Fifteen Thousand ($15,000.00) Dollars, but if such amount in any year payable to my wife shall fall below Ten Thousand ($10,000.00) Dollars my trustees shall pay out of capital a sum sufficient to pay her Ten Thousand ($10,000.00) Dollars in that year.

In clause (*f*) it was also stated that during the lifetime of the testator's wife his sister and two nieces were to receive annual sums for their respective lives.

The insurance trust declaration reads as follows:

*INSURANCE TRUST DECLARATION*

I HEREBY DECLARE AND DESIGNATE my wife, Bessie Klein, to be the preferred beneficiary within the meaning of the "Insurance Act" of British Columbia of the Life Insurance policies effected by me in the New York Life Insurance Company numbered 7933984 for $25,000.00; 7057586D for $2,034.00 and 7057587D for $3,078.00; in the Canada Life Assurance Company numbered 284683 for $15,000.00 and 294637 for

1960

MONTREAL TRUST CO. *et al.* *v.* KRISMAN *et al.*

Kerwin C.J.

$10,000.00; in the Mutual Life Insurance Company of New York numbered 2768854 for $5,000.00 and in the Sun Life Assurance Company of Canada numbered N.W. 10939 for $5,000.00 and in the Crown Life Insurance Company, Group G. 145 Certificate No. 4, for $5,000.00, and of all and any life and accident insurance policies taken out by me upon my life and payable to her in the event of my death; I HEREBY DIRECT that the proceeds of all the before mentioned policies are to be held in a separate trust fund to be called my Insurance Trust Fund, the Trustees thereof to be the Trustees hereinbefore named in this my Will who are hereby charged with the administration thereof; AND I DIRECT that my trustees pay to my wife, Bessie Klein, the sum of Fifteen Thousand ($15,000.00) Dollars per year out of the capital or accumulated revenue of the aforesaid Insurance Trust Fund; said year to commence upon the day of my death and the said payments of Fifteen Thousand ($15,000.00) Dollars per year to continue until the entire capital and income of the said fund is used up.

It will be noted that the trustees of the insurance trust fund are the same as the trustees of the will. By virtue of various renunciations probate of the will was issued to Montreal Trust Company and Tillie V. Lechtzier. It was not noticed that the renunciations did not apply to the insurance trust fund and therefore the proceeds of all insurance policies mentioned therein, including interest and accretions, were paid by the several companies to the appellants who, at the trial, by their counsel, agreed that all parties would be bound by the final judgment in these proceedings, and in fact the appellants are described not only as executors of the estate of Isidor Jacob Klein but also as "trustees of the insurance trust fund declared in the last Will of the said Isidor Jacob Klein, deceased".

In addition to referring to the trust declaration and the provisions of the will mentioned above, counsel for the appellants relied upon the fact that the testator appointed the same trustees for his will as for the fund and also to the fact that nothing was given by the will to the wife's relations. Bessie Klein, the wife of Isidor, died on January 9, 1956, having been paid by the appellants one payment of $15,000 on November 8, 1955.

The trial judge decided that the proceeds of what are known as the "wife policies", i.e., the two policies for $5,000 each, which, by their terms had been payable to the wife, should be paid by the defendants to the plaintiffs but that the action as to the proceeds of the other policies be dismissed. The plaintiffs' appeal to the Court of Appeal was allowed and the defendants' cross-appeal as to the two

"wife policies" dismissed. The defendants do not now attack the disposition by the two Courts of the proceeds of the "wife policies".

The appeal is to be decided in accordance with the true meaning of the relevant provisions of the British Columbia *Insurance Act*, R.S.B.C. 1948, c. 164. Under s. 104(2), Bessie Klein, as the wife of Isidor, was a preferred beneficiary. By s. 77:

> "Declaration" means an instrument in writing, signed by the insured, attached to or endorsed on a policy, or an instrument in writing, signed by the insured, in any way identifying the policy or describing the subject of the declaration as the insurance or insurance fund or a part thereof or as the policy or policies of the insured or using language of like import, by which the insured designates or appoints a beneficiary or beneficiaries, or alters or revokes the designation or appointment of a beneficiary or beneficiaries, or apportions or reapportions, or appropriates or reappropriates, insurance-money between or among beneficiaries;

By s. 107(1), "Subject.....to the provisions of this Part relating to preferred beneficiaries, the insured may designate the beneficiary by the contract or by a declaration", and by subs. (2) it is enacted that, subject to subs. (1), a beneficiary or a trustee appointed pursuant to s. 132 may at the maturity of the contract enforce for his own benefit or as such trustee the payment of insurance money appointed to him by the declaration and in accordance with the terms thereof. Subsections (1) and (3) of s. 110 are important and read as follows:

> 110. (1) Where the insured, in pursuance of the provisions of section 107, designates as beneficiary or beneficiaries a member or members of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary or beneficiaries, and the insurance-money, or such part thereof as is or has been apportioned to a preferred beneficiary, shall not, except as otherwise provided in this Part, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured.
>
> * * *
>
> (3) The provisions of this section are subject to any vested rights of beneficiaries for value and assignees for value, to the provisions hereinafter contained relating to preferred beneficiaries, and to any contingency or limitation stated in the instrument by which the insured designates a preferred beneficiary: Provided that no provision in any instrument reserving to the insured the right to revoke or abridge the interest of a preferred beneficiary shall be effective so as to enable the insured to revoke or abridge that interest in favour of a person not in the class of preferred beneficiaries.

1960

MONTREAL TRUST CO. *et al.* *v.* KRISMAN *et al.*

Kerwin C.J.

By the insurance trust declaration Isidor Jacob Klein declared and designated his wife Bessie as the preferred beneficiary within the meaning of the *Insurance Act* and therefore under subs. (1) of s. 110 a trust was created in her favour. Under the circumstances there is nothing "otherwise provided in this Part" within the meaning of these words as used in s. 110(1), because the words in subs. (3) relied upon by counsel for the appellants "the provisions of this section are subject.....to any contingency or limitation stated in the instrument" have no application. There is no contingency or limitation. It is true that in the declaration the trustees are directed to pay to the wife $15,000 per year out of the capital or accumulated revenue of the trust fund. I agree with the Chief Justice of British Columbia that this direction does not have the effect of limiting Mrs. Klein's interest in the insurance money to a life interest. Counsel for the respondents submitted that Bessie Klein was not entitled to receive all of the insurance money immediately upon the death of her husband, pointing to the words underlined above in s. 107(2) "and in accordance with the terms thereof". Whether this be so or not, I agree with his contention that the ordinary rules as to payment of vested interests are not applicable. They, including the decision in *Busch v. Eastern Trust Company*[1], as explained in *Browne v. Moody*[2], can have no application to the present case which must be determined under the provisions of the British Columbia *Insurance Act*.

Notwithstanding the argument of counsel for the appellants, in my view the provisions of the will and of the declaration must be read separately as if they appeared in different documents. However, even if one takes into consideration all the other clauses in the will, there is nothing in them to vary the proper construction of the declaration.

The appeal should be dismissed with costs.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

CARTWRIGHT J:—The facts and the terms of the will of the late Isidor Jacob Klein, hereinafter referred to as "the testator", including the "Insurance Trust Declaration"

[1] [1928] S.C.R. 479, 3 D.L.R. 834.
[2] [1936] A.C. 635, O.R. 422, 4 D.L.R. 1.

therein contained so far as they are relevant to the questions raised on this appeal are set out in the reasons of the Chief Justice.

The answer to the question which we have to decide appears to me to depend upon the true construction of the testator's will.

In my opinion, we should have regard not only to the words of the "Insurance Trust Declaration" but to those of the whole will, particularly clauses (i) and (ii) of paragraph (*f*) which are quoted in the reasons of the Chief Justice. In view of the differences of opinion on this point in the courts below and the arguments addressed to us upon it I think it proper to refer to a few authorities which appear to me to be applicable.

In *Barton v. Fitzgerald*[1], Lord Ellenborough C.J. says:

> It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done.

In *Hayne v. Cummings*[2], Byles J. says:

> I apprehend it is a sovereign rule in the construction of all written documents, to give effect to the intention of the parties as expressed in the instrument itself, and to give effect if possible to every word, or at all events to every provision.

In *In re Jodrell*[3], Lord Halsbury L.C. says:

> For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document, and not to part of it; and, having looked at the whole of the document, to see (if I can) through the instrument what was the mind of the testator. Those are general principles for the construction of all instruments—and to that extent it may be said that they are canons of construction.

Even if the "Insurance Trust Declaration" and the remainder of the will were to be regarded as separate documents it would be my opinion that both should be looked at since the will refers to and is in some respects dependant upon the terms of the Declaration. In *Anderson's Case*[4], Jessel M.R. said at page 99:

> Where there are two contemporaneous documents executed and assented to by the same persons at the same time (and these really are so substantially, and are therefore to be treated as contemporaneous documents), it

[1] (1812), 15 East 530 at 541, 104 E.R. 444.
[2] (1864), 16 C.B. (N.S.) 421 at 427, 143 E.R. 1191.
[3] (1890), 44 Ch. D. 590 at 605.
[4] (1877), 7 Ch. D. 75.

1960

MONTREAL TRUST CO. *et al.* v. KRISMAN *et al.*

Cartwright J.

appears to me that the ordinary rule applies, according to which contemporaneous documents are to be read together, so that if there is any ambiguity in one it may be explained by the other;

In the course of the full and able arguments addressed to us reference was made to a number of sections of the *Insurance Act* and some questions, as to the effect that these might have in varying circumstances, were debated which do not seem to require decision in this case.

No question is now raised as to the two policies in which the widow of the testator was named as beneficiary.

As to the remaining policies all of which were payable to the estate of the testator it is clear that he had the right to dispose of their proceeds either by will or by declaration in any way in which he saw fit. In particular if he saw fit to designate his wife as beneficiary he could in the instrument by which he so designated her have stated such contingency or limitation as he wished. He could, for example, have provided that she should receive $15,000 on his death if she were then living and $15,000 on each anniversary of his death on which she was still living, and that on her death any balance remaining should go to other persons or fall into the residue of his estate.

In my opinion on the true construction of the will the testator did not attach any contingency or limitation to the designation of his wife. The opening words of the "Insurance Trust Declaration" are as follows:

I HEREBY DECLARE AND DESIGNATE my wife, Bessie Klein, to be the preferred beneficiary within the meaning of the "Insurance Act" of British Columbia of the Life Insurance policies effected by me . . . (here follow words identifying all the policies).

These words appear to me to be unequivocal words of absolute gift which, upon the declaration taking effect, gave the wife an immediate vested interest in the whole of the proceeds of the policies. These words are followed by a semi-colon and the clause continues:

I HEREBY DIRECT that the proceeds of all the before mentioned policies are to be held in a separate trust fund to be called my Insurance Trust Fund, the Trustees thereof to be the Trustees hereinbefore named in this my Will who are hereby charged with the administration thereof; AND I DIRECT that my trustees pay to my wife, Bessie Klein, the sum of Fifteen Thousand ($15,000.00) Dollars per year out of the capital or accumulated revenue of the aforesaid Insurance Trust Fund; said year to commence upon the day of my death and the said payments of Fifteen Thousand ($15,000.00) Dollars per year to continue until the entire capital and income of the said fund is used up.

No doubt the whole of the declaration is to be considered, but I am quite unable to construe the words last quoted as cutting down the absolute gift made in the opening words to a gift of an annuity payable contingently on the wife surviving from year to year until the fund is exhausted.

In my view, on the true construction of the whole clause, upon the death of the testator the legal title to the fund made up of the proceeds of the policies in question vested in the trustees and the beneficial title to the whole fund vested indefeasibly in the widow. The direction to pay the fund to the widow at the rate of $15,000.00 a year did not deprive her of the right to demand the whole fund at once, or at any time, had she seen fit to do so.

It has often been said that the difficulty in cases of this sort, where words of immediate gift are followed by a direction to pay at a time or times in the future, is to decide whether there is a substantive gift followed by a direction to pay, or whether the only gift is in the direction to pay. In the case at bar I have already stated my view that there is a clear gift in the opening words of the declaration which is not cut down by any other provision in the will.

From reading the whole of the Declaration in the light of the provisions of clauses (i) and (ii) of paragraph (*f*) it is obvious that the testator did not intend or anticipate that his widow should receive immediate payment of the whole fund. His expressed intention is that she should receive it in annual instalments of $15,000.00. This intention is defeated not by reason of any difficulty in construction of the terms of the will but by the operation of the rule of law usually referred to as the rule in *Saunders v. Vautier*[1], which makes it clear that when a vested interest has once been given restrictions postponing the enjoyment of the gift after the donee has become *sui juris* are ineffective.

[1] (1841), Cr. & Ph. 240, 41 E.R. 482.

1960

MONTREAL TRUST CO. et al. v. KRISMAN et al.

Cartwright J.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the defendants, appellants: Guild, Nicholson, Yule, Schmitt, Lane & Collier, Vancouver.*

*Solicitors for the plaintiffs, respondents: Russell & DuMoulin, Vancouver.*

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1960

*Jun. 2, 3
Jun. 24

CHARLES GARCEAU .....APPELLANT;

AND

MAURICE R. OUELLETTE .....RESPONDENT;

AND

LOUIS H. SIDELEAU .....MIS-EN-CAUSE.

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

*Contracts—Building contract—Extension to building—Final cost—Whether contract at fixed price—Whether settlement of all claims—Action to enforce builder's privilege—Civil Code, art. 1690.*

By a contract between the appellant and L, the latter undertook to build an extension or addition to the hotel owned by the appellant. L was furnished with a sketch and rough plan and specification. The contract stipulated the payment of $16,000 in instalments. L was to be paid 10 percent as his fee, but agreed, in the event that the contract was to run in excess of the $16,000, to waive this percentage charge on the excess, on condition that the appellant pay the installments as before. The eventual cost far exceeded the amount of $16,000. The appellant paid the contract price and give two promissory notes to L for $3,000 each, paying both at maturity. He refused to pay the excess, and took the position that the contract was a contract at a fixed price within art. 1690 of the *Civil Code*, and furthermore that L had accepted the second promissory note in full and final settlement of all his claims.

The respondent, as trustee of the estate of L, a bankrupt, took an action to enforce a builder's privilege. The appellant took an action to have the registration of such privilege declared null and void. The respondent's action was allowed and the appellant's dismissed by the trial judge. These judgments were reversed by the Court of Appeal.

*Held:* Both appeals should be dismissed.

There was no evidence to support the contention that the second note was accepted by L in final settlement of all his claims. Moreover, no fee for L's services was included in the total payments made by the appellant.

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*PRESENT: Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.

The sketch and plan furnished by the appellant could do no more than give a general idea of the extent and character of the work to be done, and it was obvious that the parties had contemplated that there would be changes and alterations and that the estimated cost would be exceeded. The contract was not undertaken at a fixed price and art. 1690 had therefore no application.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing two judgments of Cliche J. Appeals dismissed.

*R. Bouchard, Q.C.*, and *G. Normandin, Q.C.*, for the appellant.

*A. Forget*, for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—These appeals are from judgments of the Court of Queen's Bench[1], unanimously reversing two judgments of the Superior Court, the judgments in the Court below in the one case allowing respondent's action to enforce a builder's privilege in the amount of $10,121.21, and in the other dismissing appellant's action asking that the registration of such privilege be declared null and void.

Respondent is the trustee of the estate of one Raoul Lamont, a bankrupt, who in April 1953 had entered into a contract with appellant to construct an extension or addition to a hotel owned by the latter at Coaticook, Quebec. The facts are fully set out in the judgment of Mr. Justice Taschereau in the Court below and I need refer to them only briefly.

The contract to which I have referred is dated April 18, 1953, and it reads as follows:

18 avril 1953.

Contrat entre Mr. Charles Garceau de Coaticook, Que. pour une annexe à l'Hotel "Child" de 40' x 80' d'une étage de 14', fini tel que plans et devis que j'ai en mains et avec la coopération de Bernard Poitras et le Propriétaire. Ceci avec un pourcentage de 10% sur un montant de $16,000.00. S'il y a un excédent, je me charge de continuer le contrat sans aucune charge de pourcentage à condition que M. Charles Garceau, propriétaire de l'Hotel Child se charge de payer la différence de ce montant de $16,000.00 avec condition de $500.00 par mois jusqu'au règlement de la dette finale.

[1] [1960] Que. Q.B. *186*.

1960

GARCEAU v. OUELLETTE et al.

Abbott J.

Condition de règlement pour la première somme de $16,000.00

Premier paiement de $5,000.00 le 30 avril 1953
Deuxième paiement de $5,000.00 le 30 Mai 1953
Troisième paiement de $5,000.00 le 30 Juin 1953.
Balance de $1,000.00 sur règlement au mois de $500.00 par mois et au même condition s'il y a excédent du montant du contrat.

(signé) C. GARCEAU
(signé) RAOUL LAMONT

Concurrently with the execution of this agreement appellant furnished Lamont with a coloured sketch and rough plan and specification of the proposed extension. This sketch and plan were both filed as exhibits and it is clear that the details of construction of the proposed building, contained in the said plan, are very meagre indeed.

Lamont started work on April 20, 1953, and the whole project was completed on July 17, 1953. It is common ground that the cost of the work substantially exceeded the amount of $16,000 mentioned in the written contract. The Court below found that the cost of the work done and materials furnished by Lamont (aside from any compensation for his own services) amounted to $32,340.98. There was ample evidence to support that finding and, in fact, the appellant made no attempt to challenge its accuracy.

Appellant paid $16,000 in the manner specified in the contract and subsequent to the completion of the work he also paid suppliers of material to the extent of $1,473.77 and gave Lamont two promissory notes for $3,000 each, dated July 17, 1953, and July 24, 1953, respectively, both of which were paid at maturity. Total payments made by appellant therefore amounted to $23,478.77.

As I have said, appellant made no attempt to establish that the cost of the work done and materials supplied was not in excess of $30,000. Moreover, a report of Jean Julien Perrault, an architect who was appointed as an expert by the learned trial judge, established that the work done and materials furnished by Lamont had given an added value to the appellant's property of $30,900.

In his defence and at the trial appellant took the position (1) that the contract of April 18, 1953, was a contract at a fixed price within the meaning of art. 1690 of the *Civil*

*Code,* that he had authorized and paid for additions and alterations to a total amount of $7,478.70 only, and was liable for no further amount and (2) that in taking the promissory note for $3,000 dated July 24, 1953, to which I have referred, Lamont had accepted it in full and final settlement of all his claims.

As to appellant's second ground of defence, I am satisfied that there is no evidence to support his contention that the note for $3,000 dated July 24, 1953, was accepted by Lamont in final settlement of all his claims. Lamont denied that this note was in full and final payment of his claim, his evidence on this point being as follows:

Q. Maintenant, je vous repose la même question parce qu'il y a un fait nouveau: Lorsque ce billet du vingt-quatre (24) juillet "cinquante-trois" ('53), PG-6, a été donné, est-ce qu'il a été question que c'était en paiement final, qu'il ne vous devait plus rien?

R. Non. Moi, j'ai demandé ça pour qu'il me donne une chance pour passer ça à ma banque pour que je paye d'autres créanciers.

Q. Pour éviter la faillite?

R. Pour éviter la faillite, justement.

Moreover, it is to be observed that no fee for Lamont's services was included in the total payments of $23,478.70 made by appellant. Appellant obtained no final receipt from Lamont and the note for $3,000 dated July 24, 1953, bears no indication that it was given by appellant and accepted by Lamont in full and final settlement.

The question as to whether the contract in issue here comes within the provisions of art. 1690 of the *Civil Code* depends, of course, upon the interpretation and effect to be given to the agreement of April 17, 1953. In the Court below Mr. Justice Taschereau speaking for the Court held that it was not a contract at a fixed price under the terms of art. 1960 C.C. I share that view and there is little I can usefully add to what he has said in this respect.

Article 1690 C.C. contains an exception to the general rules as to proof and, as such, it must be strictly interpreted. Commenting on this article, Faribault in his "Traité du Droit Civil du Québec", vol. XII, page 450, says:

On distingue le marché à forfait absolu ou pur et simple, et le marché à forfait relatif. Il est absolu lorsque le propriétaire ne s'est pas réservé le droit ou le privilège de modifier les plans et devis durant le cours des travaux. Il n'est que relatif dans le cas contraire. L'article 1690 n'a d'application que si le contrat à forfait est absolu: lorsque ce contrat est relatif, on doit appliquer les règles ordinaires de la preuve.

1960

GARCEAU v. OUELLETTE et al.

Abbott J.

Comme l'article 1690 est une exception à la règle générale de la preuve, il doit être interprété restrictivement. Il n'a d'application que s'il existe un marché à forfait pur et simple, accompagné de plans et devis. Il ne peut s'appliquer si le contrat prévoit une possibilité de modifications dans les plans et devis, ou si ces derniers font entièrement défaut.

As I have stated, the details contained in the sketch and plan furnished to Lamont when the contract was entered into are very meagre indeed. It is obvious that such a sketch and plan could do no more than give a general idea of the extent and character of the work to be done, and it is equally obvious, in my opinion, that both parties contemplated there would be changes and alterations and that the cost would exceed $16,000. The only feature of the contract which is clear and precise is that the contractor Lamont would be paid for his services an amount limited to $1,600, being 10 per cent of $16,000.

The contract in issue here, even if undertaken upon a plan and specifications within the meaning of those terms as used in art. 1690 C.C.—as to which I have some doubt—was not, in my opinion, undertaken at a fixed price, and art. 1690 has therefore no application.

For the foregoing reasons and for those of Mr. Justice Taschereau in the Court below, with which I am in agreement, both appeals should be dismissed with costs.

*Appeals dismissed with costs.*

*Attorney for the appellant: R. Bouchard, Coaticook.*

*Attorneys for the respondent: Tremblay, Monk, Forget, Bruneau & Boivin, Montreal.*

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1959

*Nov. 16, 17

1960

June 24

LUCIEN RINGUET AND MAURICE PAGE (*Defendants*) ..... APPELLANTS;

AND

LEO PAUL BERGERON (*Plaintiff*) .....RESPONDENT;

AND

ST. MAURICE KNITTING MILLS LIMITED ..... MIS-EN-CAUSE.

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

*Companies—Majority shareholders agreeing to vote themselves directors of company and to vote unanimously at all meetings—Penalty provision—Whether agreement valid—Whether breach actionable—Public interest—The Quebec Companies Act, R.S.Q. 1941, c. 276.*

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*PRESENT: Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.

The parties, as shareholders of the *mise-en-cause* company, entered into an agreement to acquire control of the company's shares. Each party undertook *inter alia,* (1) to vote for their election to the board of directors; (2) to ensure the election of the defendant R as president, of the defendant P as vice-president and general manager, and of the plaintiff B as secretary-treasurer and assistant general manager; (3) to vote unanimously at all meetings of the company. The agreement further provided that on a breach of it by one of the parties, his shares were to be transferred to the others in equal parts. When the plaintiff was subsequently excluded from the management of the company, he sued for breach of contract. The sole defence was that the contract was contrary to public order. The trial judge dismissed the action. The judgment was reversed by the Court of Appeal.

*Held* (Taschereau and Fauteux JJ. *dissenting*): The appeal should be dismissed.

*Per* Abbott, Judson and Ritchie JJ.: The agreement did not tie the hands of the parties in their capacity as directors so as to contravene any of the provisions of the *Quebec Companies Act*. It was no more than an agreement among shareholders owning or proposing to own the majority of the issue shares to unite upon a course of policy or action and upon officers whom they would elect. There was nothing illegal or contrary to public order. It was a well-known, normal and legal contract, frequently encountered in current practice. The clause specifying unanimity in voting had no reference to director's meetings, but to shareholders' meetings. No question of public order arose in a private arrangement of that kind.

*Per* Taschereau and Fauteux JJ., *dissenting*: The requirement of the agreement to vote unanimously applied to directors meetings as well as to shareholders' meetings. Such binding of the parties in their capacities as directors was contrary to their duties as directors. It was contrary to the fiduciary relationship which directors have towards a company and which requires them to give their entire ability to the best interests of the company and its shareholders. This abdication of duties rendered the agreement invalid, and since the clause requiring the unanimous vote was not severable, the penalty was not enforceable.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Lajoie J. Appeal dismissed, Taschereau and Fauteux JJ. dissenting.

*M. Crête* and *D. Levesque,* for the defendants, appellants.

*C. A. Geoffrion* and *G. Geoffrion,* for the plaintiff, respondent.

The judgment of Taschereau and Fauteux JJ. was delivered by

FAUTEUX J. (*dissenting*):—Les appelants se pourvoient à l'encontre d'une décision majoritaire de la Cour d'Appel[1] maintenant, contrairement au jugement de la Cour supérieure qui l'avait rejetée, l'action intentée contre eux par l'intimé Bergeron.

[1] [1958] Que. Q.B. 222.

1960

RINGUET *et al.* v. BERGERON

Fauteux J.

Cette action repose sur un contrat notarié signé le 3 août 1949 par les appelants et l'intimé. La question en litige est, comme il appert ci-après, une pure question de droit touchant la légalité de ce contrat dont la validité est niée par les appelants et affirmée par l'intimé.

A la date de cette convention, Ringuet, Bergeron et Pagé détenaient, avec quatre autres actionnaires, tous les sept dans une égale proportion, tout le capital-action émis de la St. Maurice Knitting Mills Limited, compagnie incorporée par lettres patentes le 30 janvier 1947 sous le régime de la première partie de la *Loi des compagnies de Québec.*

Désireux de s'assurer le contrôle de l'entreprise de cette compagnie, les appelants et l'intimé prenaient les uns envers les autres, dans ce contrat, divers engagements destinés à cette fin. C'est ainsi que chacune des parties à la convention s'engageait, particulièrement, à ne pas disposer de ses actions sans le consentement de chacune des autres parties; à acheter en parts égales les actions qui pouvaient être offertes par leurs héritiers respectifs ou par les autres actionnaires; à voter leurs actions pour leur élection au conseil d'administration; à assurer, en permanence, l'élection de Ringuet comme Président, Pagé comme Vice-Président et Gérant-Général et l'intimé comme Secrétaire-Trésorier et Assistant Gérant-Général; à voter pour assurer des salaires déterminés à chacune des parties au contrat; à ne pas demander la modification de la présente convention ni l'attaquer en justice ou autrement sans le consentement unanime des deux autres parties contractantes; à voter unanimement, sur tout objet nécessitant un vote, à toutes assemblées de la compagnie (clause 11) et à accepter, comme sanction de toute violation du contrat, la perte de ses actions, au bénéfice des deux autres parties contractantes (clause 12).

Il convient de citer au texte les clauses 11 et 12 dont les dispositions sont particulièrement invoquées au soutien de la proposition d'invalidité du contrat:

> 11. Dans toutes assemblées de ladite compagnie, les parties aux présentes s'engagent et s'obligent à voter unanimement sur tout objet qui nécessite un vote.
>
> Aucune des parties aux présentes ne pourra différer d'opinion avec ses co-parties contractantes en ce qui concerne le vote. Le vote prépondérant du Président devra toujours être en faveur des deux parties contractantes.
>
> 12. Si une des parties ne se conforme à la présente convention, ses actions seront cédées et transportées aux deux autres parties contractantes en parts égales et ce gratuitement.

Telle est la sanction de la non exécution d'aucune des clauses de la présente convention par l'une des parties contractantes.

Dans une seconde convention, exécutée le 3 février 1950 par les appelants, l'intimé et le mis-en-cause Jean, il fut pourvu à l'admission de Jean dans le groupe formé par les appelants et l'intimé pour le contrôle de la compagnie, à l'acquisition des actions d'un autre actionnaire et l'engagement, assurant les salaires fixés à la première convention, fut réitéré. Cette seconde convention laisse subsister la première qui seule contient la clause pénale dont l'application est réclamée par la présente action.

De la date du contrat en litige, soit du 3 août 1949 à 1952, les parties à ce contrat en observèrent les termes. Mais en juin 1952, les appelants, à des assemblées du conseil d'administration et des actionnaires, cessèrent, au mépris de leurs engagements, d'assurer l'élection de l'intimé au bureau de direction, d'assurer sa nomination au poste de secrétaire-trésorier et d'assistant gérant-général et de lui voter le salaire convenu. C'est alors que Bergeron poursuivit les appelants et invoquant ces violations du contrat du 3 août 1949, demanda l'application de la sanction prévue à l'article 12, soit le transfert à son bénéfice de toutes les actions détenues par Ringuet et Pagé.

Jean et la compagnie furent mis-en-cause, pour qu'ils puissent prendre connaissance du jugement à intervenir et s'y conformer.

Les faits allégués au soutien de cette action sont admis par les défendeurs appelants qui plaident en droit l'invalidité de la convention.

La Cour supérieure rejeta l'action pour un motif auquel il n'y a pas lieu de s'arrêter. Outre d'avoir été écarté par la Cour d'Appel, il a été abandonné par les appelants.

En appel, M. le Juge en chef Galipeault interpréta l'obligation de voter unanimement, contenue en la clause 11, comme ne s'appliquant qu'aux assemblées d'actionnaires et non à celles des directeurs. Par inadvertance, il considéra, —ce qui n'est pas, soit dit en toute déférence,—que les parties à la seconde convention constituaient, à la date d'icelle, tous et les seuls actionnaires de la compagnie. Avec ces vues, il conclut à la validité de cette clause et partant du contrat.

1960

RINGUET et al. v. BERGERON

Fauteux J.

MM. les Juges Pratte et Owen, adoptant une interprétation différente de cette clause, déclarèrent que l'obligation touchant la solidarité du vote s'appliquait aussi bien aux assemblées des directeurs qu'aux assemblées des actionnaires. Partant de cette interprétation, M. le Juge Pratte jugea la clause contraire à l'ordre public et la considérant comme l'une des conditions essentielles à l'assentiment donné par les parties au contrat, il conclut que cette stipulation viciait la convention même en laquelle elle se trouvait. M. le Juge Owen, d'autre part, indiqua qu'il inclinait à partager l'opinion de son collègue sur l'invalidité de la clause en question mais étant d'avis qu'il s'agit là d'une clause accessoire et non essentielle, il ne crut pas nécessaire de déterminer la question de validité. Pour ces motifs, il conclut avec le Juge en chef au maintien du contrat et de l'action.

Je crois que les conclusions auxquelles M. le Juge Pratte est arrivé sur l'interprétation, l'inséparabilité et l'invalidité de la clause 11 sont bien fondées.

Interprétation. Il se peut qu'en soi, isolée du texte de la convention et considérée exclusivement au regard de la Loi des compagnies, l'expression "Dans toutes assemblées de ladite compagnie . . .", apparaissant au début de la clause 11, puisse s'interpréter comme n'embrassant que les assemblées d'actionnaires. Là n'est pas la question. Il faut donner à cette expression un sens conforme à l'intention des parties au contrat où elle se trouve. Et pour ce, il faut tenir compte des règles d'interprétation et, particulièrement, de celle édictée à l'art. 1018 C.C. voulant que les clauses d'un contrat s'interprètent les unes par les autres en donnant à chacune le sens qui résulte de l'acte entier. Les parties ont voulu assurer leur élection comme officiers de la compagnie aussi bien que le traitement se rattachant à ces fonctions. Cette intention ne pouvait être réalisée que par les décisions du conseil d'administration. Aussi bien, pour donner effet à leur volonté, elles ont stipulé l'unanimité du vote "dans toutes les assemblées de ladite compagnie" c'est-à-dire dans les assemblées du conseil d'administration comme dans les assemblées des actionnaires.

Inséparabilité. De la lecture du contrat, il apparaît également que chacune des parties a voulu se garantir contre toute contingence de nature à empêcher la réalisation de

l'intention commune et adopter les mesures les plus efficaces pour assurer le respect intégral des engagements pris à cette fin. Comme dit M. le Juge Pratte, cette clause ne peut être considérée comme une clause purement accessoire et n'ayant joué aucun rôle déterminant dans la conclusion du contrat.

Invalidité. C'est au regard du contrat lui-même et de la situation existant à la date de son exécution que cette question doit être considérée. Si la convention était alors invalide, elle n'a pu être subséquemment validée par suite d'événements subséquents. Suivant la situation alors existante, il y avait, à la date de ce contrat, sept actionnaires dans la compagnie, chacun, comme déjà indiqué, détenant un nombre égal d'actions et tous étant éligibles, en droit, et susceptibles d'être élus, en fait, au conseil d'administration. Les questions qui se posent sont de savoir si dans de telles circonstances, les parties au contrat pouvaient, comme elles l'ont fait, comme directeurs, s'engager d'avance, aveuglément et pour toujours, sous la sanction d'une peine extrêmement sévère, à ne prendre que des décisions agréables à leurs co-contractants et à renoncer pour toujours, à moins que ceux-ci ne soient d'accord avec elles, à partager l'opinion d'un autre directeur de la compagnie, même s'il leur apparaissait que le bien de la compagnie exigeait qu'elles le fissent. Avaient-elles le droit d'ainsi irrévocablement aliéner la liberté de choisir sans contrevenir à leurs devoirs comme directeurs, à la lettre ou du moins à l'esprit de la *Loi des compagnies?*

Sur la nature des devoirs d'un directeur de compagnie, il paraît suffisant de référer à la description qu'en donne Wegenast, 1931, The Law of Canadian Companies, et Masten & Fraser, Company Law of Canada, 4th ed. Le premier, aux pages 364 et 365, s'en exprime comme suit:

> The simplest accurate description of the relationship of director is to call it a fiduciary relationship, that is to say, a relationship requiring the exercise of fidelity, having in view the purpose for which directors are appointed, as well as the statutory provisions under which the appointment is made.

Et il ajoute, à la page 366:

> This, then, is what is meant when the directors are spoken of as trustees. The various powers committed to them as directors are held by them in trust, to be used, not for the benefit or aggrandisement of the directors as individuals, but in good faith for the company as a whole.

1960

RINGUET et al. v. BERGERON

Fauteux J.

Dans le second, on peut lire à la page 580:

It is a director's duty to give his whole ability, business knowledge, exertion and attention to the best interests of the shareholders who have placed him in that position: *Re Iron Clay Brick Mfg. Co.* (1889) 19 O.R. 113, 123. Directors by reason of their fiduciary obligations in the exercise of their powers are bound to act with the utmost good faith for the benefit of the company: *The Sun Trust Company Ltd. v. Bégin* (1937) S.C.R. 305, at p. 307.

Dans *Motherwell v. Schoof*[1], la Cour Suprême d'Alberta eut à considérer la validité d'une convention faite par deux directeurs, aux termes de laquelle ils avaient, dans une clause, convenu qu'au cas de leur désaccord sur toute question soulevée au conseil d'administration, le conflit serait soumis aux décisions d'un arbitre et qu'ils voteraient conformément à ces décisions. Dans une autre clause de la convention, ils se sont engagés, comme directeurs, à se nommer, l'un comme Président de la compagnie et l'autre comme Gérant de la compagnie. Sur la validité de la première et de la deuxième de ces clauses, M. le Juge Clinton J. Ford exprima les vues suivantes aux pages 818 et 819:

In my opinion this contravenes s. 92 of the Dominion *Companies* Act, 1934, which empowers the directors to administer the affairs of the company in all things and to make or cause to be made for the company any description of contract which the company may by law enter into. The discretion of the directors to act in the administration of the affairs of the company is fettered by the agreement and, in so far as it does so, it cannot be valid. The attempt to bind the directors in their decision as to whom to appoint as president or manager or otherwise is also, in my opinion, invalid, as contrary to the provisions of the section above referred to and, also, to s. 90(d) of the Act.

Les prescriptions de l'art. 80 de la *Loi des compagnies de Québec,* applicables à la compagnie mise-en-cause, supportent, je crois, la proposition d'invalidité d'une clause telle que la clause 11 ayant pour effet d'obliger, en certaines circonstances, l'une des parties contractantes à virtuellement abdiquer ses pouvoirs vis-à-vis la compagnie, au bénéfice de ses co-contractants. L'article 80 de la première partie de la *Loi des compagnies de Québec* édicte que:

80. Les affaires de la compagnie sont administrées par un bureau de direction composé d'au moins trois membres.

[1] [1949] 4 D.L.R. 812.

Le règlement n° 8 des règlements de la compagnie édicte que:

BY-LAW NO. 8 DIRECTORS

The affairs of the company shall be managed by a Board of seven (7) directors of whom four (4) shall form a quorum.

De telles dispositions ont un caractère impératif et prohibitif. Dans *In Re Alma Spinning Company*[1], Jessel, M.R., eut à déterminer l'effet d'une semblable disposition et l'opinion à laquelle il s'est arrêté est exprimée comme suit aux pages 685-686:

The words of the 35th article of association are these: "The business of the company shall be conducted by not less than five, nor more than seven, directors." Very simple words. If there were no interpretation of them, I should hold them as equivalent to saying, there shall never be less than five nor more than seven directors. The words no doubt are, "the business of the company shall be conducted"; but they are meant to point out what the number of directors of the company shall be—not merely by whom the business of the company shall be conducted. It was so decided in *Kirk v. Bell 16 Q.B. 290,* where the words were practically the same as we have here; and therefore, if I wanted a decision in point, there it is. The words there were—instead of "the business of the company shall be conducted by"—"the management of the affairs of the company shall be entrusted to" (which, of course, is the same thing) "not less than five, nor more than seven, directors;" and it was held that there must be at least five directors. I agree that that is the fair meaning of the clause.

Now comes the question, that being the proper meaning of the clause, is it to be treated as directory only, or as obligatory? If there were no decision I should have said on principle that it could not be merely directory—it is a negative and an affirmative. The shareholders have entrusted the management of their business to a certain number of persons, not to any other number. They say, in effect, "there shall not be less than five, nor more than seven, who shall manage our business; less than five shall not be the managers." If, in an ordinary case, persons appointed seven people to be their attorneys, and said, "they shall conduct the business, not being less than five," would anybody say that if the attorneys were below five they could conduct the business? Is there any distinction between that case and this? Or take the case of a man going away and leaving his business to three clerks, and giving them power to act for him, and to draw bills, not less than two to act together—could any one of them draw bills? I do not see the distinction on principle. The contract of this partnership, or *quasi*-partnership, is that the business shall be managed by not less than a certain number of persons: what right has a Court of Justice to say that it shall be managed by a less number, without the shareholders being consulted?

L'article 80 de la *Loi des compagnies de Québec* implique nécessairement une prohibition que les affaires d'une compagnie soient conduites par moins d'un certain nombre de

[1] (1880), 16 Ch. D. 681.

1960

RINGUET *et al.* v. BERGERON

Fauteux J.

personnes et il est certain que si l'un des directeurs constituant ce minimum s'engage à abdiquer, comme en l'espèce, en faveur d'un ou de plusieurs directeurs, son pouvoir de voter, son engagement constitue une violation de l'esprit, sinon de la lettre, de la disposition prohibitive.

Mais, dit-on de la part de l'intimé, il est de principe que les questions soumises au bureau de direction soient, en cas de conflit entre les directeurs, décidées par un vote majoritaire et de cela on déduit que la clause 11 n'est pas contraire à ce principe qui continue d'être appliqué lorsqu'il est donné effet à la clause. Après tout, ajoute-t-on, chacun des comparants n'a pas renoncé à la délibération, à la discussion, au droit de faire triompher son opinion, avant de se ranger à l'avis de la majorité qui, en principe, doit gouverner. Comme le signale M. le Juge Pratte, cependant, le principe de la décision par la majorité présuppose qu'il s'agisse d'une majorité réalisée par l'union de ceux qui ont une opinion commune. Il faut, en effet, que ceux qui donnent leur vote formant cette majorité soient libres de donner ce vote et que ce vote soit l'expression de leur opinion. Le directeur n'a pas, au conseil d'administration, un droit et un pouvoir limités à une voix consultative. Ce qu'il a, c'est le droit, le pouvoir de voter suivant l'opinion qu'il s'est formée sur la question à décider.

Pour ces raisons qui sont, en substance, celles données par M. le Juge Pratte, je maintiendrais l'appel avec dépens tant en Cour d'Appel qu'en cette Cour et rétablirais le dispositif du jugement de première instance.

The judgment of Abbott, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The respondent sued the appellants for a declaration that against each of them, he was entitled to certain shares of the St. Maurice Knitting Mills Limited registered in their names. In the Superior Court the learned trial judge dismissed the action. The Court of Queen's Bench (Appeal Side)[1] allowed the appeal and maintained the action. The two unsuccessful shareholders now appeal to this Court.

[1] [1958] Que. Q.B. 222.

The action was brought on an agreement dated August 3, 1949, between the respondent and the appellants. At that time these parties and four other persons each held 50 shares of the St. Maurice Knitting Mills Limited, a company incorporated by letters patent under Part I of the *Quebec Companies Act*. These shares constituted all the issued capital stock of the company. The purpose of the agreement was to provide for the acquisition of 50 shares from one Frank Spain and the division of these shares among the parties. With these 50 shares divided among them the parties then had control of the company and they agreed, among other matters, to vote for their election to the Board of Directors; to ensure the election of the appellant Ringuet as president of the company, of the appellant Pagé as vice-president and general manager, and of the respondent Bergeron as secretary-treasurer and assistant general manager of the company, all at stated and agreed salaries. They also agreed to vote unanimously at all meetings of the company and provided for a penalty for breach of the contract in the following terms:

11. Dans toutes assemblées de la dite Compagnie, les parties aux présentes s'engagent et s'obligent à voter unanimement sur tout objet qui nécessite un vote. Aucune des parties aux présentes ne pourra différer d'opinion avec ses co-parties contractantes en ce qui concerne le vote. Le vote prépondérant du Président devra toujours être en faveur des deux parties contractantes.

12. Si l'une des parties ne se conforme à la présente convention, ses actions seront cédées et transportées aux deux autres parties contractantes en parts égales, et ce gratuitement.

Tel est la sanction de la non exécution d'aucune des clauses de la présente convention par l'une des parties contractantes.

Two or three months later the parties also purchased the shares of another shareholder Robert Sevigny and divided them among themselves in accordance with the agreement. On the completion of this purchase, there remained only five shareholders in the company: the two appellants, the respondent, the mis-en-cause Gerard Jean, and Zénon Bachand. On February 3, 1950, the three parties to the first agreement entered into another agreement and included in this one the mis-en-cause Gerard Jean. The purpose of this agreement was to provide for the admission of Gerard Jean into the controlling group and for the acquisition of the shares of Zénon Bachand, the last of the minority shareholders. Two shares were issued from the treasury and the

1960

RINGUET et al. v. BERGERON

Judson J.

total issued shares were equally divided among the four individuals with the result that each held 88 shares. The contract of February 3, 1950, to which Jean was a party, contains no provision corresponding to clause 12 of the contract of August 3, 1949. It does not purport to replace or alter the earlier contract, which remains in full force and effect.

From August 3, 1949 to June 14, 1952 the three parties to the first contract observed its terms. There had during this period been certain increases in salary which were properly authorized and fixed by mutual consent. On June 14, 1952 the appellant Maurice Pagé, at a directors' meeting, began to take steps to oust the respondent from the management of the company, and at a shareholders' meeting held on July 21, 1952, the appellants and Jean voted themselves in as a new board of directors. The respondent says that he had no notice of this meeting and did not attend. He was not nominated and no votes were cast for his election as director of the company. The new board of directors held a meeting following the shareholders' meeting. Ringuet was elected president, Pagé was elected vice-president and Jean, secretary-treasurer. The respondent was thus completely excluded from the management of the company. He brought his action alleging that the appellants in failing to vote for his election to the board of directors and in not ensuring that he be appointed assistant general manager and secretary-treasurer, had violated the contract of August 3, 1949, and that he was entitled to enforce the penalty provided in clause 12 of the agreement. He claimed a transfer of 88 shares from each defendant. The facts were admitted in the pleadings and the sole defence was that the contract was contrary to public order.

The Superior Court rejected the action on the very narrow ground that clause 12 had no application when one party was suing the other two. No opinion delivered in the Court of Queen's Bench accepted this interpretation of clause 12 and no attempt was made in this Court to support the judgment at trial on this ground. In the Court of Queen's Bench the learned Chief Justice and Mr. Justice Owen found for the respondent, with Mr. Justice Pratte dissenting. The Chief Justice found nothing illegal in the agreement and decided that it should be given its full effect. The ratio of

the dissenting opinion is to be found in the distinction drawn between the rights of a shareholder and the obligations assumed on becoming a director. While majority shareholders may agree to vote their shares for certain purposes, they cannot by this agreement tie the hands of directors and compel them to exercise the power of management of the company in a particular way. This appears in the following extract from the reasons of Pratte J.:

> Mais la situation des directeurs est bien différente de celle des actionnaires. Le directeur est désigné pas les actionnaires, mais il n'est pas à proprement parler leur mandataire; il est un administrateur chargé par la loi de gérer un patrimoine qui n'est ni le sien, ni celui de ses co-directeurs, ni celui des actionnaires, mais celui de la compagnie, une personne juridique absolument distincte à la fois de ceux qui la dirigent et de ceux qui en possèdent le capital actions. En cette qualité, le directeur doit agir en bonne conscience, dans le seul intérêt du patrimoine confié à sa gestion. Cela suppose qu'il a la liberté de choisir, au moment d'une décision à prendre, celle qui lui paraît la plus conforme aux intérêts sur lesquels la loi lui impose le devoir de veiller.

There can be no objection to the general principle stated in this passage, but, in my view, it was not offended by this agreement. However, the conclusion of Pratte J. was that a director who has bound himself as this contract bound the parties has rendered himself incapable of doing what the law requires of him and that clause 11 requiring unanimity at all meetings had that effect. He also held that clause 11 was not severable and that therefore the agreement was invalidated in its entirety.

Owen J. agreed that the undertaking of unanimity at directors' meetings which he considered was required by clause 11 might be contrary to public order but that it was not necessary to decide this since the clause was severable from the other provisions of the agreement to which he gave full effect. The defendants had failed to comply with other clauses in the contract—the voting of Bergeron's salary, the election of Bergeron as a director of the company and his appointment as secretary-treasurer and assistant general manager.

The point of the appeal is therefore whether an agreement among a group of shareholders providing for the direction and control of a company in the circumstances of this case is contrary to public order, and whether it is open to the parties to establish whatever sanction they choose for a breach of such agreement.

1960

RINGUET et al. v. BERGERON

Judson J.

Did the parties of this agreement tie their hands in their capacity as directors of the company so as to contravene the requirements of the *Quebec Companies Act,* which provides (s. 80) that "the affairs of the company shall be managed by a board of not less than three directors"? I agree with the reasons of the learned Chief Justice that this agreement does not contravene this or any other section of the *Quebec Companies Act.* It is no more than an agreement among shareholders owning or proposing to own the majority of the issued shares of a company to unite upon a course of policy or action and upon the officers whom they will elect. There is nothing illegal or contrary to public order in an agreement for achieving these purposes. Shareholders have the right to combine their interests and voting powers to secure such control of a company and to ensure that the company will be managed by certain persons in a certain manner. This is a well-known, normal and legal contract and one which is frequently encountered in current practice and it makes no difference whether the objects sought are to be achieved by means of an agreement such as this or a voting trust. Such an arrangement is not prohibited either by law, by good morals or public order.

It is important to distinguish the present action, which is between contracting parties to an agreement for the voting of shares, from one brought by a minority shareholder demanding a certain standard of conduct from directors and majority shareholders. Nothing that can arise from this litigation and nothing that can be said about it can touch on that problem. The fact that this agreement may potentially involve detriment to the minority does not render it illegal and contrary to public order. If there is such injury, there is a remedy available to the minority shareholder who alleges a departure from the standards required of the majority shareholders and the directors. The possibility of such injurious effect on the minority is not a ground for illegality.

I think that this litigation can be decided on the simple ground that clause 11 has no reference to directors' meetings. Clause 11 refers to meetings of the company, that is,

shareholders' meetings, and not to meetings of the board of directors. On this point I agree with the Chief Justice, who stated his opinion in the following terms:

> Au surplus, y a-t-il quelque chose qui répugne à la loi, à l'ordre public et aux bonnes mœurs qu'un groupe d'actionnaires s'entendent pour contrôler et diriger une compagnie, pour devenir ses administrateurs, ses principaux officiers? Il n'était sûrement pas besoin d'un contrat écrit pour pareille entente qui intervient chaque jour dans le monde des compagnies, étant notoire qu'un grand nombre d'entre elles sont contrôlées par un groupe d'actionnaires qui souvent même ne représentent pas la majorité des actions.
>
> L'engagement des co-contractants à voter unanimement leurs actions dans les assemblées de la compagnie ne saurait lui-même, à mon avis, être invalide; après tout, chacun des comparants n'a pas renoncé à la déliberation, à la discussion, au droit de faire triompher son opinion avant de se ranger à l'avis de la majorité qui en principe doit gouverner.

I have the greatest difficulty in seeing how any question of public order can arise in a private arrangement of this kind. The possibility of injury to a minority interest cannot raise it. If this were not so, every arrangement of this kind would involve judicial enquiry. Minority rights have the protection of the law without the necessity of invoking public order. This litigation is between shareholders of a closely held company. The agreement which the plaintiff seeks to enforce damages nobody except the unsuccessful party to the agreement. No public interest or illegality is involved.

I would dismiss the appeal with costs.

*Appeal dismissed with costs,* TASCHEREAU *and* FAUTEUX JJ. *dissenting.*

*Attorneys for the defendants, appellants: Desilets, Crete & Levesque, Grand'Mere.*

*Attorneys for the plaintiff, respondent: Geoffrion & Prud'Homme, Montreal.*

1960

*May 9
June 24

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ALASKA PINE AND CELLULOSE LIMITED ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Taxation—Sales tax—Whether certain chemicals used in pulp mill exempt as catalysts or direct agents—Validity of regulation limiting time for claiming exemption—The Social Services Tax Act, R.S.B.C. 1948, c. 333, ss. s(l), 5(h), Sales Tax Regulations 3-11.*

Section 5(h) of the *Social Services Tax Act*, R.S.B.C. 1948, c. 333, provides for an exemption from sales tax of tangible personal property by way of chemical, animal, mineral or vegetable matter "used as catalyst, or as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation, or such tangible personal property as is used for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property for the purpose of retail sale".

In the operation of its pulp mills in British Columbia, the respondent company uses catalysts in its fire boxes and catalysts and direct agents in its boilers. It was admitted that none of these compounds entered into the company's final product except as an impurity.

The trial judge held that the company was not exempt from sales tax under s. 5(h) of the Act. The Court of Appeal held that the company was exempt and that the limitation of claims for exemption imposed by regulation 3-11 was invalid. The Crown appealed to this Court.

*Held* (Cartwright J. *dissenting in part*): The appeal should be dismissed.

*Per* Curiam: The proviso in regulation 3-11, making the allowance of the exemption conditional upon an application being made by the purchaser within six months after the purchase in respect of which the exemption is claimed, was *ultra vires*. The commodities in question were exempt by virtue of the opening words of s. 5 of the Act.

*Per* Kerwin C.J. and Abbott, Martland and Judson JJ.: On the assumption that the words "transformation or manufacture of a product" applied to the use of both catalysts and direct agents, the company was entitled to the exemption for the reason that catalysts and direct agents did not stand in relation to the final product "by contact or temporary incorporation" as required by s. 5(h) of the Act. The word "product" was not confined to the commercial products of a business.

*Per* Cartwright J., *dissenting in part*: The comma after the word "catalyst" was to be considered and the company was entitled to the exemption in regard to the substances which were used as catalysts. However, the company was not entitled to the exemption in regard to the substances which were used as "direct agents", because it was clear that they did not come in contact with and were not at any stage incorporated temporarily or otherwise with the wood-pulp.

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Judson JJ.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Maclean J. Appeal dismissed, Cartwright J. dissenting in part.

*W. G. Burke-Robertson, Q.C.*, for the appellant.

*C. C. Locke*, for the respondent.

The judgment of Kerwin C.J. and of Abbott, Martland and Judson JJ. was delivered by

THE CHIEF JUSTICE:—In the operation of its pulp mills in British Columbia the respondent, Alaska Pine and Cellulose Limited, uses catalysts in its fire boxes and catalysts and direct agents in its boilers. By leave of this Court Her Majesty the Queen in the right of the Province of British Columbia appeals from the judgment of the Court of Appeal[1] for that province and the two points involved are: (1) Whether under the *Social Services Tax Act*, R.S.B.C. 1948, c. 333, as amended, the company is exempt from the assessment for taxes on the purchase of these articles; (2) Even if so exempt, whether the company lost its right to exemption because it failed to comply with reg. 3-11 of the Lieutenant-Governor in Council promulgated in purported exercise of the powers conferred by s. 5(*h*) of the Act.

Subsection (1) of s. 3 of the Act, as amended, reads:

3. (1) Every purchaser shall pay to Her Majesty in right of the Province at the time of making the purchase a tax at the rate of five per centum of the purchase price of the property purchased.

Section 5(*h*) provides:

5. The following classes of tangible personal property are specifically exempted from the provisions of this Act:—

* * *

(*h*) Such tangible personal property by way of chemical, animal, mineral, or vegetable matter as the Lieutenant-Governor in Council may determine by regulation, used as a catalyst, or as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation, or such tangible personal property as is used for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property for the purpose of retail sale;

Regulation 3-11 reads:

3-11. Tangible personal property by way of chemical, animal, mineral, or vegetable matter purchased by manufacturers and used as a catalyst or as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation is exempt from the application of the

[1] (1960), 21 D.L.R. (2d) 24.

1960

THE QUEEN v. ALASKA PINE & CELLULOSE LTD.

Kerwin C.J.

tax; provided, however, that the exemption allowed by this regulation is conditional upon application being made by the purchaser within six months after the purchase of the tangible personal property in respect of which the exemption is claimed. The term "direct agent", as used in section 5(h) of the Act and in this regulation, shall mean only such chemical, animal, mineral, or vegetable matter as is used or consumed directly to produce a reaction or combination of materials comparable to that resulting from the use of a catalyst.

It might be here noted that counsel for the appellant, in connection with the second point, relies on subs. (1) of s. 32 of the Act and particularly the parts underlined:

32. (1) For the purpose of carrying into effect the provisions of this Act according to their true intent and of supplying any deficiency therein, and for the purpose of relaxing the strictness of the law relative to the incidence or the collection of the tax thereunder, in cases where, without relaxation, great public inconvenience or great hardship or injustice to persons or individuals could not be avoided, the Lieutenant-Governor in Council may make such regulations as are considered necessary or advisable.

While the matter was not explained in detail, it appears from exhibit 8, which is a letter from the company to the Commissioner (the official appointed to administer the Act) that the catalysts and direct agents were purchased by the company from Alchem Ltd. of Burlington, Ontario. This exhibit is among the papers sent to the Court but is not printed in the appeal case. Presumably to take care of such a situation subs. (3) of s. 3 enacts:

3. (3) Every person residing or ordinarily resident or carrying on business in the Province who brings into the Province or who receives delivery in the Province of tangible personal property acquired by him for value for his own consumption or use, or for the consumption or use of other persons at his expense, or on behalf of, or as the agent for, a principal who desires to acquire such property for the consumption or use by such principal or other persons at his expense, shall immediately report the matter in writing to the Commissioner and supply to him the invoice and all other pertinent information as required by him in respect of the consumption or use of such property, and furthermore, at the same time, shall pay to Her Majesty in right of the Province the same tax in respect of the consumption or use of such property as would have been payable if the property had been purchased at a retail sale in the Province.

Apparently under s. 25 of the Act an inspection of the company's records was had and a calculation made of the taxes claimed to be due. The Commissioner assessed the company for the amount of the taxes so calculated. By subs. (2) of s. 25 the same right to appeal was conferred as exists under ss. 14 and 15. Section 14 provides for an appeal to the Minister of Finance, which the company

took without success, and s. 15 for an appeal from the Minister's decision to a judge of the Supreme Court of the Province, which the Company also took to no avail.

The latter appeal came before MacLean J. Not all the taxes assessed against the company were involved in that appeal but there was in issue before him an assessment relating to the company's purchase of certain lumber. On a further appeal to the Court of Appeal no objection was taken to that part of his judgment. The company had been assessed the sum of $4,333.96, including interest, in respect of the only articles before the Court of Appeal, i.e., catalysts and direct agents. No evidence had been called on behalf of the present appellant before MacLean J. and counsel admitted that all the substances in question were either catalysts or direct agents. The company agrees that none of the boiler treatment compounds or combustion catalysts actually entered into the company's wood pulp—the company's final product—except as an impurity. It also agreed that no application for an exemption was filed by the company pursuant to the provisions of s. 3-11 of the regulations. The legality of reg. 3-11 will be considered later.

As to the first point, MacLean J. held in construing s. 5(*h*) of the Act that the comma following the word "catalyst" before the phrase "or as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation" was misplaced and that the clause should be read as restricting the exemption of catalysts to those that are used for the transformation or manufacture of a product, by a contact or temporary incorporation, as in the case of direct agents. In the Court of Appeal Davey J.A., with whose judgment O'Halloran J.A. agreed, was inclined to doubt whether that was so. As he points out, a catalyst is a term of art with a well understood meaning in chemistry, i.e., a material substance which alters the speed of a chemical reaction, the catalyst itself undergoing no change in composition as a result of the reaction. This is according to the evidence of Dr. Wright, Head of the Division of Chemistry of the British Columbia Research Council. The same witness testified that the term "direct agent" is not one ordinarily used in the science and lacks a precise meaning. Davey J.A. did not

1960

THE QUEEN v. ALASKA PINE & CELLULOSE LTD.

Kerwin C.J.

rest his judgment on the matter of punctuation but assumed that the words "transformation or manufacture of a product" applied to the use of both catalysts and direct agents.

Proceeding on that basis MacLean J. had held that "product" meant only a commercial product of a business, i.e., in the case of the company, wood pulp. For the reasons given by Davey J.A. I agree that "product" is not confined to the commercial products of a business and I have nothing to add to his elaboration of the subject. It is apparent, therefore, that I am unable to concur with Sheppard J.A. who agreed with the conclusion of MacLean J. that the company's claim for exemption failed,—but for the reason that catalysts and direct agents do not stand in relation to the product, the wood pulp, "by contact or temporary incorporation" as required by s. 5(*h*) of the Act.

The three Members of the Court of Appeal were in agreement that the proviso in Reg. 3-11, "provided, however, that the exemption allowed by this regulation is conditional upon application being made by the purchaser within six months after the purchase of the tangible personal property in respect of which the exemption is claimed.", was *ultra vires* the Lieutenant-Governor in Council. I agree with that conclusion on the sole ground that the commodities in question are exempt by virtue of the opening words of s. 5 of the Act: "The following classes of tangible personal property are specifically exempt from the provisions of this Act". If my understanding of the manner in which the assessment arose is correct, the company did not pay the taxes at the times of purchase, I am unable to agree with the submission of counsel for the appellant with respect to this point. His argument that the six months' limitation was imposed simply as a means of determining the class is answered by the fact that the class is fixed by the terms of s. 5 of the Act. His second contention was that the Lieutenant-Governor in Council had power to impose what counsel described as a six months' limitation on applications for exemption by virtue of the opening and concluding clauses of s. 32(1) of the Act, as underlined earlier in these reasons, because the taxes are payable at the time of purchase and because some

limitation was merely a deficiency which the Lieutenant-Governor in Council is authorized to supply. In this particular case the company paid the taxes only as a result of the assessment by the Commissioner, approved by the Minister, and, in any event, the Lieutenant-Governor in Council was not authorized to take away a right conferred by the statute.

The appeal should be dismissed with costs.

CARTWRIGHT J. (*dissenting in part*):—The questions raised on this appeal and the relevant provisions of the statute and the regulations are set out in the reasons of the Chief Justice.

I agree with the conclusion reached by the Chief Justice and by all the members of the Court of Appeal that the proviso in reg. 3-11, making the allowance of the exemption set out in s. 5(*h*) of the Act conditional upon an application being made by the purchaser within six months after the purchase in respect of which the exemption is claimed, was *ultra vires* of the Lieutenant-Governor in Council.

The facts are not in dispute. It is agreed that all the substances in respect of which exemption is claimed are either catalysts or direct agents. In the course of its manufacturing operations the respondent generates steam to operate its pulp mill. The catalysts are used in the fireboxes to aid in the combustion of soot and to produce a cleaner fire. The direct agents are used in the boilers to inhibit corrosion and prevent scaling. None of the catalysts or direct agents enter into the wood pulp and the steam generated does not come in contact with the wood pulp.

It is not questioned that the tax demanded is payable unless the respondent is relieved from liability by the exemption contained in s. 5(*h*), and the appeal turns on the construction of that clause.

In construing the clause it is my opinion that we should have regard to the punctuation and particularly to the comma following the word "catalyst". The *ratio decidendi* of those cases which held that punctuation in a Statute ought not to be regarded was that statutes as engrossed on the original roll did not contain punctuation marks. We

1960

THE QUEEN v. ALASKA PINE & CELLULOSE LTD.

Cartwright J.

were informed by counsel that in British Columbia statutes are presented to the Legislature for passing and are passed punctuated as they appear in the copies printed by the Queen's Printer; consequently the foundation of the earlier decisions has been removed.

In my opinion the following statement of Lord Shaw of Dunfermline in *Houston v. Burns*[1], which was the case of a will, is equally applicable to the construction of statutes; he said at page 348:

> Punctuation is a rational part of English composition, and is sometimes quite significantly employed. I see no reason for depriving legal documents of such significance as attaches to punctuation in other writings.

Reading the words of clause (*h*) of section 5 in their grammatical and ordinary sense with the assistance of the punctuation their meaning does not seem to me to be doubtful; two separate classes of tangible personal property of the kind included in the opening words, "Such tangible personal property by way of chemical, animal, mineral, or vegetable matter as the Lieutenant-Governor in Council may determine by regulation", are exempt; these classes are (i) such property used as a catalyst, and (ii) such property used as a direct agent for the transformation or manufacture of a product by contact or temporary incorporation.

It follows that in my opinion the respondent is entitled to the exemption claimed in regard to the purchase of the substances which were used as catalysts.

The case of the other substances with which we are concerned is more difficult. It is conceded that these substances are "direct agents" but it is contended for the appellant that they are not used "for the transformation or manufacture of a product by contact or temporary incorporation". It is argued that in the facts of the case at bar the word "product" must mean the wood pulp which is produced by the operations of the respondent and it is clear that the direct agents do not come in contact with and are not at any stage incorporated temporarily or otherwise with the wood-pulp. This argument found favour with MacLean J., who

[1] [1918] A.C. 337.

rejected the argument that the boiler sludge produced as a result of the action of the direct agents could be regarded as a product in the following words:

> This would require one to give a strained and unnatural meaning to the word "product" appearing in the context which it does. The whole clause is obviously concerned with exemptions for manufacturers, and I think that the "product" of this appellant is wood pulp, and not boiler sludge.

Sheppard J.A. would have affirmed the judgment of the learned Judge of first instance on this point on the ground that even if the sludge might be regarded as a product (a question which he found it unnecessary to decide) the direct agents became an integral part of the sludge and could not be said to stand in relation to it "by contact or temporary incorporation".

The majority in the Court of Appeal in rejecting the view of MacLean J., dealt with the matter as follows:

> On that aspect of the case the learned Judge held that "product" in that context means only a commercial product of a business—in this case, wood pulp.
>
> With deference I cannot agree. In my opinion "product" as there used is not confined to the commercial products of a business. If it were "transformation" would be part of the manufacturing process and would be included in the word "manufacture". In that sense it would be redundant.
>
> I find support for that view in the fact that the second part of clause (*h*) specifically restricts the exemption thereby allowed to personal property manufactured into or attached to other personal property for the "purpose of retail sale".
>
> The last words clearly indicate that under the second part of clause (*h*) the end product must be a commercial product. But those restricting words are conspicuously absent in the first part of the clause. The omission is, I think, intentional, because the products there meant are the products of manufacturing processes regardless of the stage at which they are produced, beginning, middle, or end, or whether they are waste or commercial.
>
> What that part of the clause requires for exemption is that the substance be used to transform or manufacture any product of the processes used regardless of whether the product be waste or commercial. "Transformation" relates to waste products, and "manufacture" refers to commercial products.

With respect it appears to me that in the concluding words of clause (*h*):—

> or such tangible personal property as is used for the purpose of being processed, fabricated, or manufactured into, attached to, or incorporated into other tangible personal property for the purpose of retail sale.

1960

THE QUEEN v. ALASKA PINE & CELLULOSE LTD.

Cartwright J.

the emphasis is not on the distinction between waste products and commercial products but on the distinction between property intended for retail sale and property intended for other purposes such as, for example, wholesale sale.

On this branch of the matter I am in agreement with the reasoning of MacLean J. that to interpret the word "product" in clause (*h*), as including boiler sludge would be to give it an unnatural meaning. If that meaning had been intended some such word as "substance" would have been more appropriate than the word "product". In view of my agreement with MacLean J. on this point it becomes unnecessary for me to examine the ground upon which Sheppard J.A. proceeded.

For the above reasons I would allow the appeal in part and direct that the judgments below be set aside and that judgment be entered declaring that the respondent is entitled to the exemption claimed in respect of its purchases of catalysts but is not entitled to the exemption claimed in respect of its purchases of direct agents. As success has been divided I would direct that there should be no order as to costs in the courts below or in this Court.

*Appeal dismissed with costs,* CARTWRIGHT J. *dissenting in part.*

*Solicitor for the appellant: G. L. Murray, Vancouver.*

*Solicitors for the respondent: Ladner, Downs, Locke, Clark & Lennox, Vancouver.*

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1960

*Mar. 18, 21, 22 June 24

DRYDEN CONSTRUCTION COMPANY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Contracts—Road construction—Time of the essence—Contractor unable to complete work in time—Work completed by principal—Claim for deficiencies in payments—Claim for compensation—Quantum meruit.*

*PRESENT: Locke, Cartwright, Fauteux, Martland and Ritchie JJ.

The plaintiff company undertook to construct a road for the defendant. Time was stated to be of the essence. Slow progress was made by the plaintiff with the work, and in order to complete the work on time, the road was shortened and also built to grades lower than originally agreed upon. Eventually, the plaintiff ceased all work under the contract, and contending that the defendant was in default under the contract in refusing to entertain a claim for substantial deficiencies in payments due, treated the contract as terminated by the defendant. The plaintiff claimed the deficiencies and the defendant claimed compensation for breach of the contract. The trial judge maintained the action, but this judgment was reversed by the Court of Appeal.

*Held*: The appeal should be dismissed.

The terms of the written contract applied throughout to the work performed by the plaintiff. Conclusive evidence proved that the plaintiff had not completed the work to the satisfaction of the engineer by the time it abandoned the work, nor was it shown that it had been released of its obligation to complete the whole length of the road. The alleged breach of contract by the defendant was not established. The plaintiff was not entitled to *quantum meruit* but only to contract unit prices; and the defendant was entitled to damages for breach of contract by virtue of the plaintiff's refusal to complete the work.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Wells J. Appeal dismissed.

*A. L. Flemming, Q.C.*, and *Meredith Flemming, Q.C.*, for the plaintiff, appellant.

*R. F. Wilson, Q.C.*, *R. L. McDonald, Q.C.*, and *C. E. Woollcombe*, for the defendant, respondent.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of Ontario[1] by which the appeal of the present respondent from the judgment of Wells J. was allowed, the judgment at the trial set aside and the cross-appeal of the present appellant dismissed.

On April 9, 1954, the appellant, therein described as the contractor, and the respondent entered into an agreement for the construction of approximately 8½ miles of a road from a designated point on Provincial Highway no. 105 westerly to Station 450 of the said road. The respondent was at the time in the course of constructing an electric generating station at Manitou Falls on the English River, and the proposed road was to provide access to this undertaking.

[1] [1958] O.W.N. 349, 14 D.L.R. (2d) 702.

1960

DRYDEN CONSTRUCTION CO. v. HYDRO-ELECTRIC POWER COMM. OF ONT.

Locke J.

Prior to the making of the contract the appellant had been invited to tender for the work and had been furnished with a form of the contract which would be made if the tender made was accepted, the general specifications which would be applicable, drawings which indicated the location and a profile of the proposed road, and further detailed information as to the proposed work.

In view of the contention of the contractor that the nature of the location for the proposed road had been misrepresented to it, certain of the terms of the tender that was made dated February 13, 1954, and which was accepted are to be considered.

The tender recited that the appellant had visited the location of the road, examined the documents above referred to, and was fully informed as to the nature of the work and the conditions relating to its performance and understood that the quantities tendered for were approximate only and subject to either increase or decrease.

The instructions to the tenderers which were in the appellant's possession before the tenders were made contained the information that tenderers were required to examine the conditions at the site before submitting their tender and that the road was urgently required and the completion date should be September 1, 1954.

The documents described as instructions to tenderers, information for tenderers, which contained the above mentioned statements, the general specifications with accompanying drawings and the standard specifications of the respondent as enumerated in the agreement, were by their terms to be read with and form part of the contract.

By para. 6 of the contract the contractor agreed to construct the road on or before September 1, 1954, in strict accordance with the contract and to the approval of the engineer, and to do all work under the direction of the engineer whose directions as to the construction and meaning of the exhibits were declared to be final.

The respondent agreed to determine the contract price for the work on the basis of the schedule of unit prices, which were those proposed by the appellant in its tender, applied to the quantities of the several works items actually performed, as computed by the engineer, in accordance with the drawings and specifications.

In dealing with the main claim of the appellant, the prices which apply are those for earth excavation (including borrow) of .50 cts. per cubic yard and rock excavation of $1.75 per cubic yard.

Para. 8 of the contract stated that the contractor agreed that it was fully informed regarding all of the conditions affecting work to be done and labour and materials to be furnished for the completion of the work, that this information was secured by personal investigation and research and not from the commission or its estimates, and that it will make no claim against the commission based on any estimate or representation of the commission or the engineer, or any representative of either.

Para. 11 reads:

> The Commission, without invalidating the Contract, may make changes by altering, adding to or deducting from the work subject to adjustments for compensation or extension of time as may be agreed between the parties hereto.

Para. 13 obligated the contractor to prosecute the work with all skill and diligence so as to complete the same in accordance with the contract and declared that if the contractor did not, in the opinion of the engineer, carry on the work with sufficient diligence and speed to ensure completion in accordance with the contract, the commission might terminate the agreement and at its option complete the work in such manner as it should think fit, the contractor to be liable for any loss sustained by the commission by reason of the contractor's failure to complete the work.

Para. 16 provided that any loss or damage arising out of the nature of the work, or from any unforeseen circumstances in the prosecution of the work or any unusual obstructions or difficulties, should be sustained and borne by the contractor at his own cost.

Para. 21 provided that the decision of the engineer should control as to the interpretation of the drawings and specifications during the execution of the work and that he should be the sole judge of the work, material and plant, both as to quality and quantity, and that his decision on all questions of dispute relating to any of these matters should be final.

1960

DRYDEN CONSTRUCTION CO. v. HYDRO-ELECTRIC POWER COMM. OF ONT.

Locke J.

The general specifications forming part of the contract provided that payment for compaction should be included in the tendered unit price for earth excavation.

The standard specifications for general grading operations made applicable to the contract provided by para. 18 that "earth excavation shall include the removal of all material that does not come under the classification of rock." Para. 21 provided, *inter alia*, that back-fill material, if specified, should be paid for at the contract unit price for the material used. Para. 28 provided that all rock excavated should be used for rock embankment construction and material from earth cuts or earth borrow should be used for earth embankment, if approved by the engineer. Para. 43 provided in part:

> Payment for earth and rock embankment construction shall be included in the contract unit prices per cubic yard for excavation. . . In addition, payment will be made for:
>
> (c) Borrow material at the contract unit price per cubic yard for earth or rock excavation for the material actually used in embankments.

The cross section of the proposed road shown upon the plan submitted to the contractor showed that it was to be constructed of what may properly be described as three courses, the lower course being described in the cross section as being of earth or rock-fill. Above this, there was to be placed 12 inches of selected granular base B material and, above that, 6 inches of 5/8 inch crushed gravel. The top course was to be given what was described as Bituminous Surface Treatment, in accordance with designated specifications. The granular base course was defined in the standard specification as being selected from deposits of pit-run gravel, sand or other granular materials which have a physical structure not affected by water and elements, and the Class B mentioned, it was said, might be used directly from the pit without processing if the material conformed with the specification requirements which were then stated in para. 7.

Included in the information supplied to the tenderers was a statement that an extensive body of material suitable for road construction had been located by the commission near the junction of the proposed access road and the

provincial highway and that no other areas in the vicinity of this section of the road had been investigated up to the time the information was furnished.

The appellant's tender was made during the winter, at a time when the area in which the proposed road was to be constructed was covered with snow. While the profile plan which was exhibited to the appellant indicated the nature of the ground at various places along the course of the proposed road, this was information which the commission had obtained by enquiry and was not, by the terms of the tender and the contract, guaranteed to be accurate. In the result, not long after the appellant commenced its work, it was found that this information was in many respects quite inaccurate. There was, however, close to the point of the commencement of the road, the large deposite of suitable granular material referred to, from which the great majority of the material of this nature used in the construction of the road throughout its course was obtained. The evidence appears to me to justify the conclusion that, in the main, the material from this source was suitable for the selected granular base course required by the contract and the specification.

The form of tender supplied by the commission for use by proposed tenderers also contained estimates of, *inter alia,* the quantities of the various kinds of material to be excavated, the estimated extent of the muskeg excavation being 8,000 cubic yards. These estimates, which were described as such, turned out to be quite inaccurate and a very much greater quantity of material was excavated from muskegs than the estimate indicated.

By the terms of the contract the appellant agreed to construct the road westerly to Station 450 of the said road. Its course was shown upon a drawing which was made part of the contract. The profile plan referred to in the tender showed the proposed levels of the road and the location of these stations, they being 100 feet apart. Whether their location was marked on the ground along the proposed right-of-way is not stated.

Donald Murphy, the president of the appellant company, was in active charge and direction of the work from the outset. For the respondent, P. G. Campbell, the resident engineer for the construction work at Manitou Falls, was

1960

DRYDEN CONSTRUCTION CO. v. HYDRO-ELECTRIC POWER COMM. OF ONT.

Locke J.

appointed the project manager in connection with the construction of the road. W. G. Baggs, a professional engineer employed by the respondent, was appointed as the divisional engineer in charge of the construction and was in constant touch with the work throughout.

According to Murphy, when the work had progressed to a point between Stations 25 and 35, it was necessary to excavate and back-fill a considerable area of muskeg and, upon the direction of Baggs, granular material brought from the borrow pit above mentioned was used for this purpose. It was Murphy's contention, advanced at this time and never abandoned by him, that under the terms of the contract the appellant was entitled to be paid for granular material used, either as back-fill, embankment or otherwise, in connection with the work, at the price stipulated in the agreement for the selected granular base course which was .68 cts. per ton, or approximately $1.02 per cubic yard. Baggs, on the other hand, said that the only material that would be paid for at this rate was that used for the course 12 inches in depth described as selected granular course in the plan and the agreement, and that all other granular material used would be paid for only as earth excavation for which the price of .50 cts. per cubic yard was payable.

The claim advanced by Murphy on behalf of the appellant was based upon a term of para. 21 of the standard specification which said:

> Back-fill material if specified will be paid for at the contract unit price for the material used.

Since the engineer directed that granular material should be used, it was contended that the price for that material agreed upon for the selected granular base course was applicable. This contention was made on behalf of the appellant at the trial and in the Court of Appeal and, in both Courts, it was found that as there was no contract unit for granular material or gravel as such, apart from the 12 inches of selected granular base course, when used elsewhere it must be deemed to come under the heading of earth excavation, payment for which was provided for in para. 7 of the contract. By the terms of para. 43 of the specification above mentioned this payment included placing the material as part of the road construction.

By a tender in writing dated June 7, 1954, the appellant offered to supply 14,000 tons of $\frac{5}{8}$ inch crushed gravel to be delivered to a 4.8 mile stretch of the road, and 4,000 tons to be stock-piled at the gravel pit area "G" which was close to the point where the road commenced, at prices which were stated. This offer was accepted in writing by the respondent on July 20, 1954, and this material which was required for the top course of the road was laid by the appellant up to Station 95.

Slow progress was made by the contractor with the work. This was undoubtedly due in part to the fact that the terrain encountered was less favourable for road construction than Murphy had anticipated and to bad weather. By July 21st, when they were working at about Station 95, less than 2 miles from the point of commencement, Campbell wrote to Murphy pointing out that the agreement required the work to be completed by September 1, 1954, that he had repeatedly drawn to the contractor's attention that it was behind schedule and that when asked how it was proposed to improve the speed of the work no satisfactory answer had been given. The letter stated that the project manager had recommended to his superiors that the commission itself take over the completion of the last $1\frac{1}{2}$ miles of the road and carry out the work by its construction department. Apparently, Murphy raised no objection to this.

At a meeting at Dryden, held on or about July 22nd, Campbell informed Murphy that he proposed to reduce the grade of the road and gave him a written memorandum as to the changes to be made between Stations 103 and 145. The purpose of this, according to Campbell, was to reduce the quantities of materials to be moved so that the work might be completed on time. Apparently, an extension of time for completing the work was discussed at this meeting as on the same date Murphy wrote to Campbell confirming a discussion of the subject and saying that it was expected to have the road completed by September 15 to the full width but not to the profile grade. Murphy did not object to the commission taking over the part of road indicated and the work continued.

According to Murphy, he was instructed by Baggs not to put any more of the $\frac{5}{8}$ inch crushed material on the road past Station 95. He was indefinite as to the date when this

1960

DRYDEN CONSTRUCTION CO. v. HYDRO-ELECTRIC POWER COMM. OF ONT.

Locke J.

occurred, saying that it was either in the first or second week of August. Campbell denied that any such instructions were given. Baggs was not asked as to this but a letter written by him to D. Ganton, the superintendent of the appellant company, on August 9, 1954, in which he drew the superintendent's attention to various matters connected with the work which he considered required attention, was put in evidence and included the following statement:

> Before placing $\frac{5}{8}$ inch crushed gravel between Sta. 95 plus 00 and Sta. 145 plus 00 the road surface is to be brought to final grade as indicated on my Memo to you re "List of grades to be adhered to and considered as profile grade".

The list of grades referred to were those shown in the memorandum which had been given to Murphy on July 22nd. Murphy acknowledged having seen this letter at the time and the instructions appear to be completely inconsistent with his statement that work of laying this material had been stopped.

As the progress made with the work continued to be unsatisfactory and as Murphy contended that the work already done had not been paid for in accordance with the agreement, a meeting was arranged between him and some of the senior officials of the commission and one of its solicitors in Toronto early in August. Murphy was represented by a solicitor at these meetings but there is a conflict of evidence as to what was actually agreed upon. It is, however, common ground that the parties agreed that the commission should take over the $1\frac{1}{2}$ miles of the road above mentioned and the appellant be released of any obligation as to that portion of the work and that the time of completion be extended to September 15th.

The work which had commenced in April had then been in the main completed to Station 185, though the top course of $\frac{5}{8}$ inch crushed gravel had not been laid past Station 95, and an equal distance of the road remained to be completed. In view of the urgency of having a usable road for hauling freight by September 15th, further changes in the work were then directed by Campbell. On August 17, he wrote to Murphy in the following terms:

> In view of the importance of having a road through to the powersite by September 15th, we have requested you to concentrate on placing fill, only to a depth required to carry your haulage equipment; thus providing us with a road bed of reasonable grades, over which we can haul freight.

Since this material will be placed as common fill and will in most cases be of sufficient depth to meet our requirements for a finished road bed, some method of paying you for the top 12 inches of this fill, as selected granular base course, will have to be agreed upon.

We are prepared to pay you for a volume of selected granular base course 12 inches thick and 29½ feet wide over the total length of the road from Sta. 0 plus 00 to 370 plus 00. This volume to be converted to a weight basis by applying a factor of 3,600 pounds per cubic yard of material compacted in the road bed.

Please study this proposal and advise if you are in agreement with this method of determining the quantity of material to be paid for as selected granular base course.

Further instructions as to this work were given by Baggs in a letter to the superintendent of the appellant which read in part:

It is requested that your company concentrate on placing fill only to a depth required to carry your haulage equipment. From Sta. 193 plus 00 to 370 plus 00, except for several muskeg and rock excavations, the road is strictly a fill proposition, and grades should be kept to at least sub-grade, and where possible, lower. In order to do this, it will be necessary that the road bed, before fill is placed, be well drained, and in a reasonably dry condition. This can only be made possible by paying particular attention to lateral and offtake ditches.

This letter was dated August 20, 1954.

No written reply was made to either of these letters. The appellant, however, proceeded with the work, using granular material where fill was required for the lower course and, the appellant contends, placed the 12 inch granular base course to Station 370. This road which was referred to by the parties as a "skin" road from Station 185 was lower than the grade shown upon the profile, this being accomplished by lowering the lower course required by the original contract. This portion of the road as constructed was apparently sufficient to carry the trucks which brought the material for the construction.

In spite of this change which very materially reduced the amount of work to be done by the contractor, Station 370 was not reached until about September 22nd.

Murphy then took the attitude for the first time that the work to be performed by the appellant had been completed. On September 28, 1954, the appellant wrote to Campbell saying that since the base road was completed the appellant would no longer require the services of a machine which it had rented from the commission.

1960

DRYDEN CONSTRUCTION CO. v. HYDRO-ELECTRIC POWER COMM. OF ONT.

Locke J.

The reasons assigned by the appellant for declining to carry out the terms of the written agreement must be carefully considered. On September 11, 1954, Murphy had written to the general manager of the respondent stating that the monthly estimates made on the instruction of the respondent's engineer upon which payments were made differed so materially from the work actually done that the appellant found its credit jeopardized and unless the matter was remedied the appellant would be unable to continue. There was enclosed with this letter a statement purporting to show the difference between the various materials actually placed in the road according to the appellant's figures, and those allowed by the engineer for the months May to August inclusive. According to this statement, while payment had been made by the respondent for 16,180 tons of granular material in June, the appellant had placed 52,430 tons on the road and in the other months very large discrepancies were shown. As to the granular material, it is admittedly the fact that in preparing these figures all granular material placed upon the road, whether or not it formed part of the granular base course, was treated as material for which the appellant was entitled under the contract to payment at the rate of $1.02 per ton instead of .50cts., as contended by the engineers. This contention was based upon an interpretation of the contract which the learned trial judge and the Court of Appeal have held to be erroneous.

On October 1, 1954, Murphy wrote to J. R. Montague, the director of engineering of the respondent at Toronto, in response to a request that he state what were the appellant's claims. In this letter it was stated that the appellant's contension was that all quantities of granular material used as backfill sections over critical material (meaning material unsuitable for use as fill), all through cuts of critical material, all back-fill of muskeg excavation and all fill through wet sections must be classified as granular base course and paid for at the contract unit price for such material.

On October 7, 1954, J. H. Amys, Q.C., who had attended the meeting with the Hydro Commission above mentioned as solicitor for the appellant, wrote to the respondent saying that Campbell had declined to have the quantities of

selected granular base course material calculated in accordance with an agreement that he had made with Murphy and that the appellant took the attitude that the commission had defaulted in its obligations under the contract and that such default justified it in treating the contract as terminated by the Hydro-Electric Power Commission of Ontario. The reference to the agreement said to have been made between Campbell and Murphy as to the measurements of granular material was one which they had agreed upon early in the work but which Campbell had thereafter decided was unsuitable as a means of accurately determining the quantities and declined to carry into effect.

On the day following, a letter was sent to the respondent in the name of the appellant company saying that, as the commission had refused to entertain its claim for substantial discrepancies due under the contract which, it was said, amounted as of September 30th to approximately $100,000, the appellant treated the contract as terminated by the commission and that such termination justified the appellant in ceasing further work under the contract. The contract referred to at the end of this letter was described as being Manitou Falls Generating Station Access Road Construction Contract. The only contract that answered that description was that of April 9, 1954.

The cause of action set up in the statement of claim was that in the course of attempting to carry out the contract of April 9, 1954, the parties had found that the drawings did not describe the road required by the defendant for the purposes of its enterprise, that the plaintiff had been verbally requested by the defendant to construct a shorter road at the general location indicated in the written contract, but in conformity with the actual conditions found on the terrain rather than with those shown on the drawings, and that payments were to be made as the work progressed and that it was an implied term that the plaintiff would be paid a reasonable price for its materials and labour. It was further alleged that:

> The plaintiff proceeded with the said work which the defendant accepted but the defendant did not carry out its undertaking to make payments as the work progressed and as a result the plaintiff was obliged to stop work on the road.

1960

DRYDEN CONSTRUCTION CO. v. HYDRO-ELECTRIC POWER COMM. OF ONT.

Locke J.

In respect of the cause of action thus pleaded the defendant claimed the sum of $457,245.14 for breach "of contract on building the road", or alternatively on a *quantum meruit* basis.

In response to a demand for particulars the plaintiff said that the request to construct a shorter road had been made by Campbell on or about July 21, 1954. As to the allegation that the defendant had accepted the road, the plaintiff said that the defendant had taken over and used the work done by the plaintiff in the Fall of 1954, thereby accepting it.

The defence denied that the plaintiff had been requested to construct a shorter road and set up the terms of the contract and the documents incorporated in it as an answer to the claim. It was further denied that the defendant had accepted the road and alleged that as the plaintiff had failed to carry out the work required the defendant had been compelled to complete such work at an expense of $17,925.07. This amount, while claimed originally as a counterclaim, was later added to the statement of defence by way of set off.

The learned trial judge found, as has been stated, that for the granular material used in the construction of the road other than for the granular base course 12 inches in depth, the appellant was entitled to be paid .50 cts. per cubic yard, being the price specified in the contract for earth excavation. The claim pleaded that a new contract had been substituted for that of April 9, 1954, was rejected and the plaintiff was found entitled to recover for the work performed up to Station 186 in accordance with the prices fixed by the written contract. Wells J. however, considered that the situation was different in respect to the work done from Station 186 to Station 370. Referring to the letter of August 17, 1954, above quoted, the learned judge found that the directions there given did not amount to an abandonment of the contract but that the effect of it was to take away from the contractor for the remaining portion of the road what were referred to as the two most valuable items of the contract, namely, the laying of the $\frac{5}{8}$ inch crushed gravel and the laying of the selected granular base course from Station 186. Pointing out that while paragraph 11 of the contract permitted the respondent to make changes by altering, adding to or deducting from the work,

the right was "subject to adjustments for compensation or extension of time as may be agreed between the parties hereto", and it was said that this implied that proper compensation should be made and that no such adjustments were ever made. The reasons continue:

> The failure to make such compensation was, in my view, a serious breach of the contract by the defendant Commission, and, in view of such breach and failure, the plaintiff was, in my view, entitled to stop work as he did. He would have, I think, been entitled to do it earlier.

In these circumstances the learned judge considered that the amount of the compensation should be calculated and that this could be done only by requiring the defendant to pay for what had been done as on a *quantum meruit*. It was further held that there was not any "clear understanding with Mr. Murphy, and I accept his evidence and that of his witnesses that so far as they understood their work was through when the skin road was put through and the road finally trimmed and cleaned up." It was, accordingly, not necessary to consider the claim of the present respondent to set off against any moneys owing to the appellant its costs of completing the road in accordance with the written contract.

The trial judge further allowed the plaintiff company to amend by claiming a number of sums as extras to which I will make reference later.

The unanimous judgment of the Court of Appeal was given by Laidlaw J.A. It was found that the terms of payment prescribed by the written contract applied throughout and directed that the judgment at the trial be set aside. Upon the vital question as to the basis upon which the appellant was entitled to payment for granular material used other than for the 12 inch granular base course, in agreement with the trial judge, it was held that the price applicable was .50 cts. per cubic yard under the terms of the contract and that the changes made, first at Station 95 and thereafter at Station 186, did not make the work of construction radically different from that which was undertaken by the appellant under the contract. After pointing out that the reduction in grade was made by reducing the dept of the earth and rock-fill only and that the necessity for this reduction was occasioned by the urgent need of the

1960

DRYDEN CONSTRUCTION CO. v. HYDRO-ELECTRIC POWER COMM. OF ONT.

Locke J.

respondent to have the whole length of the road in a usable state by September 15th as agreed, the learned judge said that the reductions thus made were an accommodation to and for the advantage of the appellant since, in the event of non-completion of the road on or before September 15th, the respondent might have exercised its contractual right to declare the contract forfeited and have proceeded to hold the appellant liable in damages for breach of contract. Upon the evidence the learned judge concluded that the appellant knew that, after placing the earth and rock-fill and building the base course overlying it from Station 186 to Station 370, the respondent expected that at a later date the surface course of $\frac{5}{8}$ inch crushed stone would be laid by the appellant in accordance with the contract and that both parties fully understood that the contract continued in force and effect notwithstanding the reduction in the grade.

For the reasons given in the judgment at the trial and in the Courth of Appeal, I agree that under the terms of the contract the granular material used, other than for the base granular course, was to be paid for at the rate fixed for earth excavation, including "borrow", that is .50 cts. per cubic yard. The pit run gravel that was used was borrow material. I also agree with the learned judges of the Court of Appeal that the terms of the written contract applied throughout to the work performed by the appellant.

The contract made between the parties dated April 9, 1954, was executed under their respective corporate seals. The contractor, as I have pointed out, agreed to construct a road in accordance with the specifications and that all phases of the work should be performed to the satisfaction of the engineer on or before September 1, 1954. Time was declared to be material and of the essence of the contract.

In order to succeed it was necessary for the appellant to establish that in some manner it had been released of its obligation to complete the road throughout its length, including the construction of the lower course and the granular base course from Station 186 to Station 370, and the laying of the top course and the application of the bituminous surface treatment from Station 95 to the end of the road, to the satisfaction of the engineer. That the appellant had not completed this work to the satisfaction of the engineer on October 8, 1954, when it abandoned the work, is conclusively proven by the evidence.

With great respect I disagree with the finding at the trial that the respondent was then in default under the contract and that the appellant was entitled to elect to treat such contract as repudiated by the respondent.

I find nothing in the evidence to support a contention that the appellant was released of its said obligation under this contract. The letters referred to directing the work to be done forthwith between Stations 186 and 370 did not say that the contractor was relieved of its obligation to lay the top course upon the road from Station 95 to Station 370 and to apply the bituminous surface treatment, or that the work was not to be carried out to the satisfaction of the engineer. The reason for the orders then given by the engineer are made apparent by the evidence. The road was urgently needed by September 15th for transporting freight to the large construction works being carried on at Manitou Falls and less than one month of the new time stipulated for completion remained and half of the road remained to be constructed. At that time the appellant had spent four months upon the first half of the road and even that work was not completed.

The learned trial judge, after considering the evidence, found that when these instructions were given to Murphy it was not made clear to him that he was to do anything more than comply with the directions then given. I would not so interpret the evidence but, even if this were correct, it does not assist the position of the appellant. The written contract still remained in force, the grade between Stations 186 and 370 had not been completed to the satisfaction of the engineer and the top course had not been laid past Station 95. It was not necessary for the engineer to point out to the appellant or its officers its obligations under the contract.

This covenant of the appellant remaining unfulfilled, the respondent was entitled to insist upon its performance unless in some manner it was estopped by the actions of the engineer from doing so. As to this there is no plea of estoppel in the appellant's pleadings and estoppel must be pleaded. I may add that if there were such a plea, any such contention, in my opinion, is untenable upon this evidence.

1960

DRYDEN CONSTRUCTION CO. v. HYDRO-ELECTRIC POWER COMM. OF ONT.

Locke J.

I have carefully examined the evidence of the witnesses Murphy, Campbell and Baggs and the correspondence affecting the matter and, having done so, I share the view expressed by Laidlaw J.A. that both parties understood that the written contract continued in force throughout and that Murphy knew that, after completing what has been referred to as the skin road, the engineer expected that the remainder of the work would be completed forthwith. There is evidence in the record of a discussion in the cookhouse of the appellant company on September 21, 1954, between Murphy and C. T. Enright, the roads supervisor of the respondent commission, at which time Enright says that Murphy stated that he would keep his entire crew working full time until he had got the skin road through to Station 370, at which time he would give his men a holiday of four days and then he would come back and finish up the road, but that one of the conditions for coming back was that he would get "a revision of prices on certain materials." Baggs was present and heard this statement by Murphy and gave evidence to the same effect. The latter, when asked about it, admitted that he had been there and talked to Enright but said that he did not remember saying that they would not do any further work unless they were paid. The judgment at the trial, dealing with this conversation, says that Murphy denied this but this, with respect, was inaccurate since he merely said that he did not remember making the statement. While referring to the fact that Baggs had given evidence to this effect, no mention was made of the fact that Enright also had sworn to it. The statement in the letter of October 8, 1954, above referred to, that the appellant was justified in "ceasing *further* work under the contract", is completely inconsistent with the idea that at that time Murphy considered the work to be done had been completed.

It will be seen that the reason assigned by the appellant for treating the contract as repudiated by the respondent and itself discharged from doing further work was not the reason upon which that action was justified in the judgment at the trial. The letter of September 11, 1954 complained that the monthly payments that were being made were not in accordance with the contract, the complaint being based upon the respondent's refusal to pay for the granular

material in accordance with Murphy's construction of the agreement. The letter of October 1st from Murphy to the director of engineering of the respondent made it perfectly clear that this was the complaint and the letters of October 7th and 8th based the appellant's refusal to do further work on the alleged fact that approximately $100,000 was owing to the appellant for the work already done, this referring to the same matter.

These letters contain no complaint that the effect of the instructions given by the engineers in August was to deprive the contractor of the profitable work of laying the granular base course and the top course of the road. There was good reason for this since this work had not been taken away from the appellant, though the time for completing it was deferred. As the evidence discloses, the appellant repudiated the contract upon grounds which have been held to be and are untenable and the usual consequences must follow.

Apart from the claims made in respect of the construction of the road, the appellant claimed an amount for supplying certain 5/8 inch crushed gravel under the terms of the contract of July 20, 1954. That contract fixed a price for 14,000 tons of this material to be delivered to a 4.8 mile stretch of the road at $1.78 per ton, and 4,000 tons to be stock piled at a specified gravel pit for which the price was .97 cts. per ton.

In addition, the appellant claimed to recover under a further contract dated July 31, 1954 for 2,938 tons of crushed gravel concrete aggregate and 8,582 tons of concrete sand which it claimed to have delivered. The statement of defence denies that the appellant had delivered any of the 5/8 inch crushed gravel under the contract of July 20, but admitted that the plaintiff had delivered material under the contract of July 31 to a total slightly in excess of that claimed, in respect of which it was admitted that the appellant was entitled to a credit of $9,247.39.

The price provided for the 5/8 inch crushed gravel, other than that which was to be stock piled, included the delivery of this material on to the road and this had not been done, the appellant contending that it had been stopped from doing so. This fact was found against it in the judgment at the trial.

1960

DRYDEN CONSTRUCTION CO. v. HYDRO-ELECTRIC POWER COMM. OF ONT.

Locke J.

In dealing with this claim, Wells J. directed that there be a reference to the Master to determine the amount payable in respect of the 5/8 inch crushed gravel less a fair and reasonable amount to be deducted from the contract price for the haulage of such part of the said material as should have been delivered by the plaintiff. In respect of the claim for the material produced under the contract of July 31st, the Master was directed to give credit to the plaintiff in the amount of $9,192.04, a sum less than the amount admitted as payable in the statement of defence.

The judgment of the Court of Appeal, as entered, directed the Master to enquire as to the amount of the credit to be allowed for the 5/8 inch crushed gravel referred to, being the cost to the plaintiff of producing such material, plus a reasonable percentage of such cost as profit. No mention was made of the credit to be allowed in respect of the material covered by the contract of July 31.

No objection was made to the form of this reference to the Master and, as the amount of the credit to which the appellant is admittedly entitled on the pleadings is not in question and will be taken into account by the Master, I think it unnecessary to amend the judgment of the Court of Appeal in this respect.

In addition to these claims, the appellant was permitted by the judgment at the trial to claim various amounts as extras and the pleadings were amended to claim certain sums should it be held that the appellant was not entitled to be paid as on the basis of a *quantum meruit* for its entire claim.

As to all of these claims I agree with the reasons for judgment of Mr. Justice Laidlaw and am of the opinion that they are properly dealt with in the judgment of the Court of Appeal.

I would dismiss this appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Flemming, Smoke & Burgess, Toronto.*

*Solicitors for the defendant, respondent: Day, Wilson, Kelly, Martin & Campbell, Toronto.*

TEXADA MINES LIMITED (*Plaintiff*) ..APPELLANT;

AND

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA (*Defendant*) ..... RESPONDENT;

AND

THE ATTORNEY-GENERAL OF ONTARIO ..... INTERVENANT.

1960

*Feb. 16, 17, 18 Jun. 13

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Constitutional law—Taxation—Validity of Mineral Property Taxation Act, 1957 (B.C.), c. 60 and Regulations—Tax on minerals in situ—Nature of legislation—Export tax—Reference to other related legislation and to history of subject-matter—The Iron Bounty Act, 1957 (B.C.) c. 9.*

The Mineral Property Taxation Act, 1957 (B.C.), c. 60, provides that the Lieutenant-Governor in Council may declare any portion of the province to be a producing area in respect of designated minerals and that every owner of land including minerals therein or minerals within a producing area shall pay annually a tax computed on the value of the minerals, but not exceeding 10 per cent. of the value of the minerals, as assessed under the Act. This tax was in addition to any other tax imposed on land by any other Act. The plaintiff company owns iron ore mineral claims in an area declared to be a producing area in respect of iron ore, and is engaged in the business of mining iron ore which it sells exclusively for export.

Contemporaneously with the passing of this Act, the Legislature enacted the *Iron Bounty Act,* 1957 (B.C.), c. 9, which permitted the payment of a bounty in respect of certain classes of iron charged directly to a steel furnace from ore smelted within the province. The highest bounty was to be paid in respect of iron ore mined within the province and on which tax had been paid. There is no smelter on the west coast of the province.

The trial judge held that the Act was *ultra vires,* but this judgment was reversed by the Court of Appeal.

*Held:* The Act was invalid as imposing an export tax.

The true nature of an impugned statute is not necessarily to be determined alone from its language, and where other statutes of the Legislature on related subjects have been passed prior to or contemporaneously with it, their history and evidence as to their effect may properly be considered in determining what is the true nature of the statute. *Reference re Alberta Legislation,* [1939] A.C. 117.

The true nature and purpose of the legislation was not the raising of revenue for provincial purposes under head 2 of s. 92 of the *B.N.A. Act.* Its purpose was to encourage manufacturing activities in the

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

1960

TEXADA MINES LTD. v. ATTY.-GEN. OF BRITISH COLUMBIA

province by the imposition of such a high rate of taxation upon iron ore in place as to either impede or render economically impossible the export of the ore, under the business conditions prevailing in 1958. The evidence showed that the properties in question, if taxed at that rate, could not be operated profitably unless a smelter were established thus enabling the recovery of the tax and a bounty of $5 in addition. It was significant that the *Iron Bounty Act,* passed contemporaneously, increased the maximum bounty from $3 to $5, thus pointing out to those engaged in iron mining, which had been singled out from other mining activities and subjected to a tax at this extraordinary rate, a way by which they could recoup themselves. The real nature of the tax was, therefore, an export tax, and as such, it was indirect and *ultra vires* of the Legislature. *Reference re Alberta Legislation,* [1939] A.C. 117; *McDonald Murphy Lumber v. A.G. for British Columbia,* [1930] A.C. 357, applied. *C.P.R. v. A.G. for Saskatchewan,* [1952] 2 S.C.R. 231, distinguished.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Sullivan J. Appeal allowed.

*J. D. Arnup, Q.C.,* and *A. B. Ferris,* for the plaintiff, appellant.

*M. M. McFarlane, Q.C.,* and *G. S. Cumming,* for the defendant, respondent.

*E. R. Pepper,* for the Attorney-General of Ontario, intervenant.

The judgment of the Court was delivered by

LOCKE J.:—In this action the present appellant asked for a declaration that the *Mineral Property Taxation Act,* being Chapter 60 of the Statutes of British Columbia for 1957, and certain regulations made under powers vested in the Lieutenant-Governor in Council of the Province by the said statute are *ultra vires,* and further for a declaration that the appellant is not liable to make certain returns demanded of it under the provisions of the regulations.

Sullivan J., by whom the action was tried, held the Act to be *ultra vires.* While it necessarily followed from this finding that the regulations based upon the statute were also beyond the powers of the Lieutenant-Governor in Council, this fact was declared in the formal judgment entered and it was further found that the demands referred to in the statement of claim were unauthorized and the appellant not liable to pay any tax in respect of iron or concentrates or other iron products under the Act.

[1](1959), 19 D.L.R. (2d) 705, 28 W.W.R. 529.

This judgment, in so far as it declared the statute itself to be *ultra vires* the Legislature, was set aside by the Court of Appeal but Davey and Sheppard JJ. A., a majority of the Court, were of the opinion that s. 4 of the regulations passed was invalid.

The Act in question by s. 3 provides that the Lieutenant-Governor in Council may from time to time by order declare that any portion of the province designated in such order constitutes a producing area for the purpose of the Act, and by such order or by a separate order designate the mineral or minerals in respect of which the portion of the province therein designated is constituted a producing area.

Section 4 provides that every owner of land including minerals therein or of minerals within a producing area is liable for and shall pay annually to the Minister of Finance for the use of Her Majesty in the right of the province a tax computed on the value of the minerals mentioned, and declares that "the Minister for the raising of a revenue for provincial purposes shall levy annually on every such owner" the said tax. The section provides that the tax shall be paid at such annual rate as the Lieutenant-Governor in Council may from time to time prescribe, not exceeding 10 per cent. of the value of the minerals as assessed under the Act, and that such taxes are due and payable on the 2nd day of July of the year in which the taxation roll on which they are shown has been prepared.

Section 5 provides that the assessor shall assess annually at their fair value all such minerals situate in a producing area and shall enter a description of the property assessed upon the assessment roll.

Section 8 provides that all taxes assessed or imposed by virtue of the Act shall be in addition to any other tax imposed on land by any other Act.

By s. 9, Parts VIII, IX, X and XI of the *Taxation Act*, R.S.B.C. 1948, c. 332, are deemed to be incorporated in the Act and are expressly made applicable to the provisions thereof.

By s. 10 the Lieutenant-Governor in Council is authorized to make such regulations, not inconsistent with the spirit of the Act, as are considered necessary or advisable, and such regulations shall have the same force and effect as if incorporated in it.

1960

TEXADA MINES LTD. v. ATTY.-GEN. OF BRITISH COLUMBIA

Locke J.

Section 12 provides that, where under any Act of the Legislature an owner has paid to the Crown a royalty on any mineral or minerals, the amount paid by the owner on account of such royalty shall be deemed *pro tanto* as payment on account or in full of the tax payable under the Act.

At the same session of the Legislature the *Iron Bounty Act* was passed as chap. 9. By this Act the Minister of Mines, with the approval of the Lieutenant-Governor in Council, is permitted to enter into an agreement with any person whereby the Crown will pay to that person out of the Consolidated Revenue Fund a bounty on each ton of 2,000 lbs, of pig-iron, sponge-iron or fluid-iron charged directly to a steel furnace from ore smelted within the province. The statute restricts the payment of bounty to 100,000 tons of iron in any one year, or more than 1,000,000 tons of iron in the aggregate.

The maximum bounty which may be made payable under such an agreement is $5 per ton for ore mined within the province and on which a royalty or a tax under the *Mineral Property Taxation Act* has been paid to the Crown: $3 per ton on iron from ore mined within the province on which neither a royalty nor a tax under the said Act has been paid to the Crown, and $2 per ton on iron from ore mined out of the province.

By an order in council approved on October 30, 1957, regulations made pursuant to the provisions of the Act were approved. These declared an area comprised of Vancouver Island and adjacent islands included within the meaning divisions of Alberni, Nanaimo and Victoria, to be a producing area. The expression "mineral" where used in the regulations was declared to mean naturally occurring compounds of iron which are or may be used in the production of metallic iron, and "ore" to mean a natural mineral or mineral aggregate containing iron in such quantity, grade and chemical combination as to make extraction of the iron practicable. The information required from the owners of such minerals in a producing area referred to in s. 6 of the Act was specified, and it was directed that it should be given to the assessor on or before November 15 of each year commencing with the year 1957. A formula was prescribed for determining the assessed value of such mineral in the producing area and the annual rate of taxation was

declared to be 8 per cent. of the assessed value as so ascertained. The assessor was directed to prepare the assessment roll, commencing with the assessment roll for the calendar year 1958, and that this should be done in each subsequent year.

Amendments were made to these regulations for the year 1959, describing in more detail the information to be given to the assessor, the nature of which it is unnecessary to consider in dealing with the questions to be determined.

The appellant is incorporated under the laws of British Columbia and owns certain Crown granted lands and mineral claims on Texada Island, which lies off the West coast of the province between the mainland and Vancouver Island. It is thus included in the producing area declared by the order in council. The company was in the year 1957 engaged in the business of mining iron ore which was concentrated at the site and, at the relevant times, was sold in this form for export principally to Japan and Germany. No sales were being made in Canada. There was not during the period of these operations, and there is not now, a smelter for the treatment of iron ore on the West coast of British Columbia and, accordingly, no means whereby pig-iron, sponge-iron, fluid-iron or steel could be produced from the appellant's ore.

It was shown by the evidence of Allen D. Christensen, the president of the appellant company, that the iron content of the ore in the appellant's mine was only sufficient to yield a very narrow margin of profit on the available export market. During the year 1957 the average sale price had been $6.90 a ton of concentrates. The average cost of production at the property at the time of the hearing in June of 1958 was stated as being $6.75 to $6.80 a ton. It is the contention of the appellant that if the tax of 8 per cent. upon the assessed value of the property was added to the cost of production, the operation could not have been carried on at a profit and, presumably, would have been shut down in the year 1958, in the absence of an available smelter in the province where the ores produced could have been treated. If there had been such a smelter in the year 1958, with the assistance of the maximum bounty under the *Iron Bounty Act* it may be safely assumed that the operation would have been profitable.

1960

TEXADA MINES LTD. v. ATTY.-GEN. OF BRITISH COLUMBIA

Locke J.

The appellant alleges that the purpose of the impugned legislation was to impose an export tax on iron ore or concentrates sold for export from the province and that such tax is an indirect tax. It is further said that the tax imposed by the *Mineral Property Taxation Act* is a tax upon the ore rather than upon the land from which it is mined and, as such and in the ordinary course, is added to the sale price of the commodity and, accordingly, is indirect.

The true nature of this legislation is not to be determined alone from the language of the statute and, as was done in this Court in the reference *Re Alberta Statutes*[1] and by the Judicial Committee on the appeal[2], where other statutes of the Legislature passed prior to and contemporaneously with the Act dealing with the taxation of banks were considered, statutes such as the *Iron Bounty Act,* the *Taxation Act* and the history of each of these statutes and evidence as to the effect of the legislation upon iron mining in the province may properly be considered in determining what is its true nature.

For more than forty years the Legislature of British Columbia has endeavoured by legislation to encourage the establishment of a smelter for the treatment of iron ore and the necessary facilities for the production of steel at the West coast. The first of the *Iron Bounty Acts* was c. 11 of the Statutes of 1918, which permitted the Lieutenant-Governor in Council to enter into an agreement for the payment of a bounty on pig-iron in a lesser amount than that provided by the statute of 1957. Later statutes provided for the payment of bounty on both pig-iron and steel in varying amounts.

Other legislation with the same end in view was introduced into the *Taxation Act* of the province in 1922. Chapter 75 of the statutes of that year repealed and replaced the *Taxation Act,* R.S.C. 1911, c. 222, and by s. 83 provided that, in addition to all other taxes imposed by the said Act or any other Act, there should be assessed, levied and collected quarterly from every owner of a mine a tax of .37½ cts. per ton upon all iron ore removed from the property, but that the tax should not apply in respect of iron ore mined and used in the province as a flux for the smelting

[1] [1938] S.C.R. 100, 2 D.L.R. 81.
[2] [1939] A.C. 117, [1938] 3 W.W.R. 337, 404, 4 D.L.R. 433.

of ores or other metals. This section appeared as s. 47 in R.S.C. 1948, c. 332, and, with the remainder of the sections contained in Part III of the *Taxation Act*, was repealed by the *Mineral Property Taxation Act* in 1957. We are informed, however, that no attempt was ever made to enforce payment of the tax imposed by the *Taxation Act*. Apparently, the reason for this, at least from and after the year 1929, was that by the decision of the Supreme Court of British Columbia in the case of *McDonald Murphy Lumber Company v. Attorney General for British Columbia*[1], a tax apparently considered to have been of a similar nature imposed upon timber cut within the province was held to be *ultra vires*. The decision of Morrison C.J. was upheld by the judgment of the Judicial Committee[2].

In that case s. 58 of the *Forest Act* 1924 imposed a tax upon all timber cut within the province, except that upon which a royalty was payable, but provided that in the case of timber used or manufactured in the province there should be a rebate of almost the entire amount of the tax. The Act prohibited the export of any timber without an accompanying certificate that the tax due in respect of it had been paid. It was contended by the paintiff in that action that the legislature was invalid on the ground that the tax imposed was an export tax and so fell within the category of duties of customs and excise which Parliament had exclusive power to impose by virtue of s. 122 of the *British North America Act* and, further, that it was indirect taxation and therefore not within the legislative power of the province under head 2 of s. 92. It was shown in evidence that the insignificant part of the tax imposed which was not rebated had not in practice been collected by the province, which appeared to demonstrate, if further demonstration was needed, that the true nature of the levy was an export tax. While, as the record in this case shows, it was also contended that the legislation trespassed upon the jurisdiction of Parliament under head 2 of s. 91 as being in relation to the regulation of trade and commerce, that question was not dealt with.

[1](1929), 41 B.C.R. 473, 2 W.W.R. 529, 4 D.L.R. 951.
[2][1930] A.C 357, 1 W.W.R. 830, 2 D.L.R. 721.

1960

TEXADA MINES LTD. v. ATTY.-GEN. OF BRITISH COLUMBIA

Locke J.

At the trial of this action Sullivan J. considered the earlier legislation in arriving at the conclusion that the statute itself was invalid as being an attempt, under the guise of imposing a direct tax upon an interest in land, to regulate or restrain the export of ore and concentrates from the province. While that learned judge, in the course of his judgment, referred to certain statements purporting to have been made by the Premier of the Province and the Minister of Mines to the effect that the legislation was designed to discourage the export of iron ore so that eventually an integrated steel industry could be established in the province, he made it clear that he came to his conclusion without reference to this. That such statement had been made was not proven at the trial and had the evidence been tendered it would, no doubt, have been rejected as inadmissible.

In the Court of Appeal, O'Halloran J. A. found that the tax being upon the minerals in place was a direct tax and referred to the decision of this Court in *Canadian Pacific Railway v. Attorney General of Saskatchewan*[1]; as determining that question. That learned judge said in part:

> This Court is now relieved of the necessity of examining the many constitutional decisions wherein an *ultra vires* indirect tax has been held to exist where the subject matter upon which the tax was imposed was not a tax upon land, since the Supreme Court of Canada in the above mentioned Saskatchewan case (1952) 2 S.C.R. 231, applied to substantially similar legislation (the similarity will be examined later), the reasoning of the Judicial Committee in the *Esquimalt and Nanaimo Railway case* above mentoned.

And again:

> The first accepted principle is that if a Statute is found in its pith and substance to be land tax, then the Court is no longer concerned with whether it has many of the indicia of an indirect tax (which it might if it were not a land tax), or of an excise or export tax in the sense that is described in a variety of high constitutional decisions wherein the tax under consideration was not a land tax.

A passage from the judgment of the Judicial Committee in *Attorney General of British Columbia v. Esquimalt and Nanaimo Railway*[2], is then referred to, in which Lord Greene said in part:

> Their Lordships think an intention must not in the absence of clear words, be ascribed to a responsible Legislature of enacting a provision which would be a deliberate and unworthy sham.

[1] [1952] 2 S.C.R. 231, 4 D.L.R. 11.

[2] [1950] A.C. 87 at 114, 1 D.L.R. 305, 64 C.R.T.C. 165, [1949] 2 W.W.R. 1233.

Concluding that the true nature of the *Mineral Property Taxation Act* was taxation upon an interest in land, O'Halloran J. A. found the statute to be *intra vires*.

Sheppard J.A. was of the opinion that the true nature of the taxation was a direct tax upon the minerals *in situ* and neither a tax on the income derived from it nor on the commodities produced. He considered, therefore, that it was distinguishable from such cases as that of *The King v. Caledonian Collieries Ltd.*[1], where the tax was a levy upon the gross revenue received by the owner from the sale of coal from his mine. While mentioning the decision of the Judicial Committee in the *McDonald Murphy Lumber Company* case, he did so only to point to that part of the judgment of Lord MacMillan, at p. 365 of the report, where it is said that a tax levied on personal property, no less than a tax levied on real property, may be a direct tax where the taxpayer's personal property is selected as the criterion of his ability to pay, but that a tax like the one in question, levied on a commercial commodity on the occasion of its exportation, cannot be described as a tax whose incidence is, by its nature, such that normally it is finally borne by the first payer, and is not susceptible of being passed on.

I am unable, with great respect, to agree with the conclusions of these judgments.

The question to be determined is not whether a tax upon minerals in the ground is a tax upon land and *prima facie* a direct tax, a proposition which no one would contest, but rather is whether the *Mineral Property Taxation Act* is an enactment in the exercise of the provincial power to raise a revenue for provincial purposes by direct taxation, or legislation the true nature of which is to impose an export tax upon the export of ore and concentrates from the Province and an indirect tax and which trespasses upon the legislative authority of Parliament as to the regulation of trade and commerce.

The argument in the Saskatchewan case was confined to the question as to whether the tax was indirect and, in my opinion, the decision, other than upon that aspect of the matter, does not touch the issues to be decided here.

[1] [1928] A.C. 358, 2 W.W.R. 417, 3 D.L.R. 657.

1960

TEXADA MINES LTD. v. ATTY.-GEN. OF BRITISH COLUMBIA

Locke J.

It is to be remembered that in the Saskatchewan case the taxation imposed upon lands found to be within a producing area was at a rate not exceeding 10 mills on the dollar of the assessed value. The present legislation authorizes an annual tax of 10 per cent. of the assessed value, or ten times the rate which might be imposed in Saskatchewan, a material matter to be considered. This point is not mentioned in the judgments delivered in the Court of Appeal. The extent of the tax imposed was one of the decisive matters that were considered in holding the *Bank Taxation Act of Alberta* invalid, both in the judgments of this Court delivered by Sir Lyman Duff[1] and of the Judicial Committee on the appeal[2].

In the *Alberta* case, that the *Bank Taxation Act* was *ultra vires* as being in relation to banks and banking was considered to have been made clear by the fact that the taxation while in form direct was so excessive as to be in effect prohibitive, and that to operate a bank in the province, created under Dominion power, would have been financially impossible.

No one would seriously contend, since the judgment of the Judicial Committee in *Bank of Toronto v. Lambe*[3], that it was not within provincial powers under head 2 of s. 92 to impose direct taxes upon banks operating within the province for the purposes mentioned, but that was not the question. Sir Lyman Duff said (p. 127) that the question there to be determined was as to whether it was an enactment in exercise of the provincial power to raise a revenue for provincial purposes by direct taxation, or was it legislation which in its true character related to the incorporation of banks and banking. The answer to this question, he said, was to be found by ascertaining the effect of the legislation in the known circumstances to which it was to be applied.

There were at the time of the enactment of the Act here in question three small iron mines operating, or which had recently operated, in the producing area containing Vancouver and Texada Islands and, apparently, none elsewhere in the province. Of these three the property of the appellant had been operating since 1952 and, up to the time

[1] [1938] S.C.R. 100 at 127, 129. [2] [1939] A.C. 117 at 132.
[3] (1887), 12 App. Cas. 575.

of the trial in June of 1958, some 1,600,000 tons of iron concentrates had been produced from the ore in the claims. According to the evidence of A. D. Christensen, the price realized over this six year period had fluctuated between $6.90 and $8.40 a ton and, as stated, during 1957 had averaged approximately $6.90. These were all apparently marginal properties and one of them on Vancouver Island had been shut down at the end of 1956. One of them was described by this witness as a "break even proposition."

It is stated in the factum of the appellant that the tax at the rate of 8 per cent. would amount to .55 cts. a ton—presumably a ton of concentrates—but this appears to have been calculated by taking 8 per cent. either of the average cost of production or the selling price, which is not the manner contemplated by the Act. It was, however, shown that in the assessment notice sent by the Provincial assessor to the appellant for the year 1958 the minerals were valued for assessment purposes at $973,200. A tax at the rate levied for the year 1958 would on this basis amount to something in excess of $77,000. If fixed at the maximum rate authorized by the Act it would exceed $97,000. While there is no evidence as to the tonnage of ore or concentrates produced during the year 1957, if it be assumed that the mine production was substantially the same for the years 1952 to 1957 inclusive, the average annual production would be approximately 265,000 tons. Taking the assessor's figure for the year 1958 and assuming the tonnage to be the same, the tax levied would amount to something over .29 cts. a ton which, in view of the scant margin of profit, would be prohibitive. To impose taxation at this rate upon the appellant's operation and upon the operation on Vancouver Island which was currently showing no profit would, presumably, result in both of these mines being shut down.

Since 1896, mines and minerals in British Columbia have been regarded for the purpose of taxation as a separate class of property and, since 1897 and until the passing of the *Mineral Property Taxation Act* of 1957, the assessment and taxation thereof have been regulated either under the *Assessment Act* or the *Taxation Act*.

The rate of tax imposed upon all persons operating mines by s. 8 of c. 46 of the Statutes of 1896 was 1 per cent. of the assessed value of the ore removed during the taxation

1960

TEXADA MINES LTD. v. ATTY.-GEN. OF BRITISH COLUMBIA

Locke J.

year. This tax at the same rate was continued by s. 10 of the *Assessment Act,* R.S.B.C. 1897, c. 179. In the revision of 1911 the same tax at the rate of two per cent. was imposed by s. 155 of the *Taxation Act,* R.S.B.C. 1911, c. 22, on the assessed value of the ore mined, other than coal, during the taxation year. The tax on coal was fixed at .10 cts. per ton shipped, exported or delivered. The *Taxation Act,* R.S.B.C. 1924, c. 254, by s. 79 imposed a tax of 2 per cent. on the income from, or the output of, a mine (other than a gold mine) of 2 per cent. and a tax at the same rate on coal. By s. 59 of the *Taxation Act,* R.S.B.C. 1936, c. 282, the tax on the output of any mine (not excluding a gold mine) was continued at 2 per cent. on the assessed value of the ore removed during the taxation year, or a tax on the owner's income from the mine under the *Income Tax Act,* whichever tax was greater in amount. The special tax on iron ore of .37½ cts. a ton above mentioned, which was first imposed in 1922, was continued by s. 62 of the *Taxation Act* in the revision of 1936. The same rate of 2 per cent. upon the output or the owner's income from the mine under the *Income Tax Act* was continued in s. 44 of c. 332 of R.S.B.C. 1948, and this formed part of the Part III of the Act which was repealed in 1957 by the statute under consideration.

In comparing the quantum of these taxes which have been imposed upon minerals since 1896 and those imposed upon iron ore by the Act in question, it is to be remembered that the taxes imposed by these earlier *Taxation Acts* were upon the assessed value of the ore removed in the taxation year, while the annual taxation imposed under the *Mineral Property Taxation Act* is upon the assessed value of all of the minerals on the property, a very different matter.

While there are very extensive mining activities carried on in British Columbia, it is significant that in administering the Act the order in council has been restricted to iron ore alone. Gold, silver, lead, zinc, copper and various other precious and base metals are mined, but none of these minerals in place have been subjected to any taxation under the Act in question. The very high rate of the tax authorized, which would in ten years' time impose in the aggregate an amount of tax equal to the assessed value of the minerals, indicates, in my opinion, that the true nature and purpose of the legislation is something other than the

raising of revenue for provincial purposes under head 2 of s. 92. Section 8 of the Act expressly provides that the taxation imposed under it shall be in addition to any other tax imposed on land by any other Act, but the iron mines alone bear this heavy additional burden.

It appears to me to be clear that the section which imposed the tax of .37½cts. per ton on iron ore removed from the premises of a mine in 1922, but exempted such ore as was mined and used in the province as a flux in the smelting of ores and other metals, was passed with the same end in view as was s. 58 of the *Forest Act* which was found to be *ultra vires* in the *McDonald Murphy Lumber Company* case. Both were designed to encourage manufacturing activities in British Columbia by imposing what was found to be in the case concerning s. 58 a tax on export. That this was the true nature and purpose of the tax imposed by the amendment of 1922 appears to have been recognized by the provincial taxation authorities, as no attempt was ever made to enforce it.

In my opinion, the impugned legislation which repealed s. 44 of the *Taxation Act* seeks to accomplish the same purpose indirectly by the imposition of such a high rate of taxation upon iron ore in place as to, under the conditions prevailing in 1958, either impede or render impossible from a business standpoint the export of the ore or concentrates produced from the only iron mines in the province. Upon the evidence it would appear that the properties cannot be operated profitably if taxation at the rate either authorized or levied in respect of the year 1958 be imposed, unless a smelter be established at the West coast and the appellant thus enabled to recover the tax and a very substantial bounty in addition. If there were such a smelter, the appellant would apparently qualify for the maximum bounty of $5 per ton if it paid the tax under the *Mineral Property Taxation Act*.

It is not without significance that the *Iron Bounty Act* of 1927, passed contemporaneously with the *Mineral Property Taxation Act*, increased the maximum bounty which might have been paid under c. 32 of R.S.B.C. 1948 from $3 to $5 per ton. To those engaged in iron mining which

1960

TEXADA MINES LTD. v. ATTY.-GEN. OF BRITISH COLUMBIA

Locke J.

had been singled out from other mining activities and subjected to a tax at this extraordinary rate it was thus pointed out the means by which they could recoup themselves.

Since the Judicial Committee based their finding that s. 58 of the *Forest Act* was *ultra vires* on the ground that the real nature of the tax was an export tax and the further ground that, as such, it was indirect, it was apparently regarded as unnecessary to deal with the question as to whether it was also invalid as infringing upon the exclusive power of Parliament to legislate in relation to the regulation of trade and commerce. For the same reason, it is not necessary for the determination of this appeal to deal with that issue.

I would allow this appeal and direct that judgment be entered declaring that the *Mineral Property Taxation Act*, being c. 60 of the Statutes of British Columbia for 1957, is *ultra vires* the legislature of that province. The appellant is entitled to its costs in this Court.

*Appeal allowed with costs.*

*Solicitors for the plaintiff, appellant: Davis, Hossie, Campbell, Brazier & McLorg, Vancouver.*

*Solicitors for the defendant, respondent: Lawrence, Shaw, McFarlane & Stewart, Vancouver.*

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1960

*Mar. 1
Jun. 24

GENERAL MOTORS ACCEPTANCE CORPORATION OF CANADA, LIMITED (*Plaintiff*) ..... APPELLANT;

AND

FEDERATION INSURANCE COMPANY OF CANADA (*Defendant*) .. RESPONDENT.

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

*Surety—Bond or guarantee policy—Sale of stolen car by licensed dealer—Bond issued to associates doing business under a firm name—Dissolution of partnership—Business continued under same name by*

*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Martland JJ

*one of the partners—Claim by owner of amount paid to recover possession of car from third party—Whether guarantor liable—The Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 21.*

Certain automobiles were sold by their purchasers to H.P. Automobile Co., a licensed dealer, in defiance of the fact that they were still the property of the plaintiff. H.P. Automobile Co. resold them to third parties, thereby dealing in stolen property. The plaintiff, in order to recover its property, had to indemnify the third parties, and subsequently sued the defendant as guarantor under a bond or guarantee policy covering H.P. Automobile Co. under s. 21 of the *Motor Vehicles Act*.

Originally, H.P. Automobile Co. was owned by two partners doing business under that name. Together they had applied for and received from the defendant a bond or guarantee policy under s. 21. The partnership was subsequently dissolved, but one of the partners continued alone under the firm name, and it was he who had acquired and resold the plaintiff's automobiles.

The trial judge allowed the action, but this judgment was reversed by a majority in the Court of Appeal. The defendant argued in this Court that, following the dissolution of the partnership, both the licence and the guarantee policy had become obsolete with the consequence that neither the policy nor s. 21 of the Act could be invoked by the plaintiff.

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

*Per* Curiam: By the terms of the guarantee policy furnished to the provincial Treasurer, the defendant and the two partners bound themselves and their successors, and stipulated that this obligation would remain until the licence was terminated. Although the defendant had reserved to itself the right to cancel its undertaking by given written notice to the provincial Controller of Revenue, not only had it not done so, but it had renewed it for another year. The defendant was, therefore, bound *vis-à-vis* the provincial Treasurer for the duration of a definite period, and could not, in the circumstances of this case, disengage itself of that obligation by invoking a contingency which s. 21 and the terms of the guarantee policy do not recognize as having that effect. To hold otherwise would render the provisions of s. 21 illusory and would produce results irreconcilable with the true object of the special provision making an exception to the common law in matters concerning motor vehicles.

*Per* Martland J.: There is nothing in the Act which would suggest that a licence issued to two or more persons carrying on a business should cease to have effect merely on the death or withdrawal from business of one of them. In this case, the cancellation might have been justified, but it was not, in fact, made. Since the defendant must have intended to give a bond which would comply with s. 21, that bond remained effective so long as one of the partners, by virtue of the existence of the dealer's licence, continued to be enabled to act as a dealer.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Salvas J. Appeal allowed.

[1] [1960] Que. Q.B. 240.

1960

GENERAL MOTORS ACCEPTANCE CORP. OF CANADA. v. FEDERATION INSURANCE COMPANY OF CANADA

*G. Desjardins* and *K. C. Mackay,* for the plaintiff, appellant.

*G. Emery,* for the defendant, respondent.

The judgment of Kerwin C.J. and of Taschereau, Fauteux and Abbott JJ. was delivered by

FAUTEUX J.:—Au cours de février 1954, Hilaire Paquette et Marcel de Blois, faisant affaires ensemble sous la raison sociale "Hilaire Paquette Automobile Cie", obtenaient de l'intimée un cautionnement dont la production, entre les mains du Trésorier provincial, est exigée de toute personne recherchant un permis pour faire le commerce de véhicules automobiles. *Loi des véhicules automobiles,* S.R.Q. 1941, c. 142, art. 21. Le cautionnement fourni, et accepté par l'autorité, est dans la forme d'une obligation assumée à l'endroit du Trésorier de la province, suivant laquelle l'intimée et Hilaire Paquette Automobile Cie se sont engagés conjointement et solidairement et ont, de la même façon, lié leurs successeurs respectifs pour la durée de la période de temps s'écoulant du 28 février 1954 au 28 février 1955 inclusivement. Cette obligation est dans les termes suivants:

*"Bond No. 6253*

KNOW ALL MEN BY THESE PRESENTS that we, HILAIRE PAQUETTE AUTOMOBILE CIE. hereinafter called the "DEALER" and FEDERATION INSURANCE COMPANY OF CANADA hereinafter called the "SURETY" are severally held and jointly bound into THE HONORABLE THE TREASURER OF THE PROVINCE OF QUEBEC, in the penal sum of TEN THOUSAND DOLLARS ($10.000.00) of lawful money of Canada, to be paid unto the said "Treasurer" for which payment well and truly to be made, we jointly and severally bind ourselves and our respective heirs, executors, administrators, successors and assigns, firmly by these presents.

SEALED with our seals and dated this 18th day of February, 1954.

WHEREAS the Dealer hath applied The Honorable the Treasurer of the Province of Quebec for a Licence which when issued, will permit the Dealer to sell motor vehicles, under the provisions of the Quebec Motor Vehicle Act R.S.Q. 1925, from the 28th day of February, 1954 to the last day of February 1955 both days inclusive.

NOW THEREFORE, the condition of this obligation is such that, such licence being granted, if the Dealer has paid or caused to be paid, all sums which he is or may become liable to pay to any owner as described in Section 21 of said "Act", then this obligation shall be void and of no effect, but otherwise shall be and remain in full force and virtue.

PROVIDED, HOWEVER, and upon the express conditions:

A. That all liability of the Surety shall cease with the cancellation or suspension of the Licence by the said "Treasurer", but the Dealer and Surety shall remain liable hereunder for all sums payable as aforesaid from the effective date of this Bond up to such termination.

B. PROVIDED, HOWEVER, that the Surety shall have the right to cancel this Bond at any time upon giving sixty days written notice to the Comptroller of Provincial Revenue at Quebec, but the Surety shall be liable hereunder for all sums payable as aforesaid from the effective date of this Bond up to the expiration of the notice herein mentioned.

C. The Surety hereby consents to waive all the benefits of discussion under this Bond."

Sur remise, à l'autorité provinciale concernée, de cette obligation et de la demande du permis de commerçant, en laquelle apparaissaient les noms des deux sociétaires ci-dessus mentionnés, la licence fut accordée et émise au nom de la raison sociale Hilaire Paquette Automobile Cie. En satisfaction des exigences de l'art. 21, cette licence fut, demeura et était affichée en évidence, dans l'établissement où se faisait ce commerce d'automobiles, lorsque se sont produits les faits ci-après, donnant lieu au présent litige.

Advenant le 5 juin 1954, de Blois, qui n'avait pas encore apporté sa contribution en biens à la société, s'en retira. Le fait de cette dissolution de société et le fait de la continuation du commerce sous la même raison sociale, par Hilaire Paquette seul, furent, le même jour, dénoncés par des enregistrements appropriés au bureau du protonotaire du district judiciaire en lequel était conduit ce commerce. Mais rien dans la preuve ne suggère que ces mêmes faits aient été dénoncés au bureau des licences et ce qui est certain, c'est que cette licence, expirant le dernier jour de février 1955, n'a pas été révoquée par l'autorité.

Dans le cours des opérations subséquentes à cette dissolution de société, soit le 18 novembre 1954, Hilaire Paquette Automobile Cie vendait à Peter Oprici un Oldsmobile, au prix de $4,323.90, payé comptant. Cette voiture était la propriété de l'appelante; et il est admis qu'elle lui avait été volée par un certain Deschambault de qui Hilaire Paquette Automobile Cie l'avait achetée. Pour en recouvrer la possession, l'appelante remboursa Oprici du prix qu'il avait payé et invoquant l'engagement précité et les dispositions de l'art. 21 de la *Loi des véhicules automobiles,* demanda par action en justice à ce que l'intimée et Hilaire Paquette

1960

GENERAL MOTORS ACCEPTANCE CORP. OF CANADA. v. FEDERATION INSURANCE COMPANY OF CANADA

Fauteux J.

soient condamnés *in solidum* à lui rembourser le montant payé par elle à Oprici. L'intimée contesta cette action et Hilaire Paquette et L. N. Buzzell, ce dernier ès-qualité de syndic à la faillite d'Hilaire Paquette, produisirent une intervention où ils déclarèrent s'en rapporter à justice.

La Cour supérieure fit droit à cette demande et son jugement fut infirmé en appel[1] par une décision majoritaire. D'où le pourvoi devant cette Cour.

A l'audition devant nous, l'intimée a déclaré abandonner tous les moyens soulevés par elle en Cour supérieure et en Cour d'Appel, sauf le suivant. Elle a soumis en substance que, par suite et de la date de la dissolution de société, la licence de commerçant émise au nom d'Hilaire Paquette Automobile Cie, aussi bien que l'engagement consenti conjointement et solidairement par les membres de cette société et l'intimée à l'endroit du Trésorier provincial, sont devenus caducs, avec la conséquence qu'Hilaire Paquette Automobile Cie avait cessé, depuis juin 1954, d'être licencié et que, depuis lors, ni cet engagement ni les dispositions de l'art. 21 ne pouvaient être validement invoqués par l'appelante au soutien de son action.

De son côté, l'appelante a soumis que l'acceptation de ces prétentions de l'intimée rendrait illusoires les dispositions de l'art. 21 et produirait des résultats manifestement irréconciliables avec l'objet véritable de cette disposition spéciale faisant exception au droit commun en ce qui concerne le commerce de véhicules automobiles.

L'interprétation des dispositions de l'art. 21 doit se faire conformément aux règles d'interprétation édictées à la *Loi concernant les statuts,* S.R.Q. 1941, c. 1, dont l'art. 41, particulièrement, prescrit ce qui suit:

> 41. Toute disposition d'un statut, qu'elle soit impérative, prohibitive ou pénale, est réputée avoir pour objet de remédier à quelque abus ou de procurer quelque avantage.
>
> Un tel statut reçoit une interprétation large, libérale, qui assure l'accomplissement de son objet et l'exécution de ses prescriptions suivant leurs véritables sens, esprit et fin.

Dans *Industrial Acceptance Corporation v. Couture*[2], M. le Juge Rand note avec justesse, à la page 45, que les dispositions de l'art. 21 doivent être interprétées en les considérant dans l'arrière-plan des arts. 1487 *et seq.* C.C.,

[1] [1960] Que. Q.B. 240. [2] [1954] S.C.R. 34.

régissant, dans le cas de vente d'une chose volée, les droits du propriétaire dépossédé par le vol et le droit de celui qui, de bonne foi, achète une chose volée. Sur la raison d'être et l'objet de l'art. 21, le savant Juge ajoute:

> The subject of purchase, sale and other dealings, in motor vehicles has been accorded a special code and the reasons behind that action, taken in the interest of public order, are not far to seek. The legislature was bringing under control a business of huge dimensions involving property of high value but exposed in a special manner to all sorts of fraudulent trafficking.

Pour assurer ce contrôle, la Législature a assujetti le droit de faire le commerce des véhicules automobiles à l'obtention d'un permis. Ce permis de commerçant, comme d'ailleurs les autres permis prévus par la même loi, vaut au maximum pour un an et expire le dernier jour de février suivant immédiatement la date de son émission, sujet au droit du Ministre de l'annuler, en suspendre les effets et en exiger la remise au département. Pour l'obtenir, le commerçant doit déposer entre les mains du Trésorier provincial un cautionnement souscrit à l'endroit de ce dernier et garantissant au propriétaire d'un véhicule automobile volé, vendu par un commerçant licencié, le remboursement du prix que ce propriétaire a payé à tout acheteur de ce véhicule pour en recouvrer la possession sur revendication comme chose volée. La durée de ce cautionnement correspond à la durée de la licence et il ne peut y être mis fin avant la date d'expiration de la licence ou celle de son annulation ou suspension par le Ministre. Ce cautionnement demeure en la possession du Trésorier provincial que la loi constitue en quelque sorte fiduciaire du public acheteur.

Le public, d'autre part, est incité à n'acheter que d'un commerçant licencié; et c'est la sanction de la disposition que l'acheteur qui fait affaires avec un commerçant non licencié perd les droits accordés sous le droit commun à celui qui achète une chose volée d'un "commerçant trafiquant en semblables matières." En somme, et comme il a été noté par cette Cour dans *Home Fire and Marine Insurance Company v. Baptist*[1] et *Industrial Acceptance Corporation v. Couture, supra,* la Législature a, par les dispositions de l'art. 21, ajouté, d'une part, au droit commun en accordant une protection additionnelle au propriétaire dépossédé par le vol

[1] [1933] S.C.R. 382, 4 D.L.R. 673.

1960

GENERAL MOTORS ACCEPTANCE CORP. OF CANADA. v. FEDERATION INSURANCE COMPANY OF CANADA

Fauteux J.

et soustrait, d'autre part, au droit commun en enlevant à celui qui achète, d'un commerçant non licencié, une chose volée, le droit d'exiger du propriétaire la revendiquant comme volée, le remboursement du prix qu'il a payé.

L'article 21 prescrit enfin que la licence du commerçant doit être affichée en évidence dans son établissement et que, dans tout contrat de vente, référence soit faite au numéro et à la date d'expiration de cette licence. Cette publicité de la licence manifeste, pour le public, la légitimité de l'établissement; et ces références au contrat donnent à l'acheteur de bonne foi l'assurance de la sécurité de ses droits.

Aux termes de l'obligation souscrite à l'endroit du Trésorier provincial, l'intimée et les deux associés de la société Hilaire Paquette Automobile Cie se sont, comme déjà indiqué, engagés conjointement et solidairement et ont, de la même façon, engagé leurs successeurs respectifs. Ils ont stipulé que cette obligation demeurait tenante jusqu'à l'expiration ou l'annulation ou suspension de la licence. Il est vrai que l'intimée s'était réservé le droit d'annuler son engagement en donnant un avis écrit de soixante jours au Contrôleur du revenu provincial à Québec. Il suffit de dire que non seulement l'intimée n'a jamais annulé cette obligation, mais qu'elle l'a renouvelée, lors de son expiration, pour une autre année. L'intimée s'est ainsi engagée vis-à-vis le Trésorier provincial pour toute la durée d'un temps bien défini et, dans les circonstances de cette cause, ne peut se dégager de son obligation en invoquant, comme moyen d'extinction de cette obligation, une contingence que les dispositions de l'art. 21 et les termes du cautionnement souscrit ne reconnaissent pas comme ayant cet effet. Il est bien évident que l'acceptation des prétentions de l'intimée rendrait illusoire cet article spécial de la loi relativement au commerce des véhicules automobiles, et empêcherait l'accomplissement de son objet et l'exécution de ses prescriptions suivant leurs véritables sens, esprit et fin. Retenir ces prétentions aurait pour résultat d'assujettir la valeur du cautionnement déposé entre les mains du Trésorier provincial à des contingences qu'il serait au pouvoir de celui qui est tenu de le fournir de faire naître à sa guise. Et pour satisfaire adéquatement à l'obligation implicite qu'il a comme fiduciaire, le Ministre serait dans la nécessité de

vérifier constamment et quotidiennement au bureau d'enregistrement des raisons sociales de tous les districts judiciaires de la province s'il y a eu des modifications aux enregistrements des raisons sociales au nom desquelles les permis de commerçants ont été octroyés. Dans une telle vue de la loi, la fin pour laquelle ce cautionnement est requis ne pourrait être atteinte et l'acheteur de bonne foi perdrait, sans raison valide, les droits qu'il avait sous le droit commun.

Partageant les vues exprimées par M. le Juge Salvas, de la Cour supérieure, et par M. le Juge Martineau, dissident en Cour d'Appel, je maintiendrais l'appel avec dépens tant en Cour d'Appel qu'en cette Cour, et rétablirais le jugement de première instance.

Au cours de l'audition, les procureurs ont informé cette Cour que la question ici considérée se présente dans trois autres appels inscrits à cette Cour. La présente et ces trois autres causes portent les numéros 6311, 6312, 6313 et 6314 des dossiers de la Cour d'Appel de Québec. Les procureurs ont déclaré accepter que la décision rendue dans la présente instance s'appliquerait dans ces trois autres causes.

MARTLAND J.:—I agree with the reasons of my brother Fauteux and with his proposed disposition of this appeal. I merely wish to add the following comments:

On March 16, 1954, there was issued to Hilaire Paquette and to Marcel De Blois, who were together carrying on business under the firm name of Hilaire Paquette Automobile Co., a dealer's licence pursuant to s. 21 of the *Motor Vehicles Act,* which was their authority to deal in motor vehicles in the Province of Quebec. On June 5, 1954, De Blois withdrew from the business. Thereafter the business continued to be carried on, under the same firm name, by Hilaire Paquette. The licence was never cancelled.

The respondent contended that the licence was automatically terminated upon the dissolution of the partnership between Paquette and De Blois. There is, however, nothing in the Act which would suggest that, where a dealer's licence has been issued to two or more persons carrying on a business together, the licence shall automatically cease to have effect in the event of the death or withdrawal from business of one of them, if the others continue to

1960

GENERAL MOTORS ACCEPTANCE CORP. OF CANADA. v. FEDERATION INSURANCE COMPANY OF CANADA

Martland J.

carry on the business thereafter. I agree with Martineau J. that, while the dissolution of the partnership in this case might have justified the cancellation of the licence by the Minister, it was not, in fact, cancelled. In the absence of such cancellation, in my view the licence remained effective to enable the existing business, of which Paquette was named in the licence as an owner, to be continued by him until the licence expired on February 28, 1955, pursuant to s. 23 of the Act.

The respondent contends that the bond which it had issued was discharged when the partnership between Paquette and De Blois was dissolved. While generally a surety for the conduct of a partnership will be discharged from liability if the firm is changed, that is not always the case. The question is as to the intention with which the bond was given, by the surety. This intention, in respect of the present type of bond, must be ascertained having in mind the provisions of s. 21 of the *Motor Vehicles Act,* pursuant to which it was issued as a prerequisite to the granting of the dealer's licence.

The provisions of that section, inter alia, provide:

> No surety may terminate the security before the last day of February following the date of the issue of the guarantee policy; and the licence shall cease to be in force from the moment that the security ceased to exist.

The purpose of the bond, which was given in favour of The Honorable the Treasurer of the Province of Quebec, was to guarantee to the owner of a stolen motor vehicle, sold by a licensed dealer, reimbursement of the price which such owner has paid to the buyer of the stolen motor vehicle in order to recover possession of it. The respondent must have intended to give a bond which would comply with s. 21, which would enable a dealer's licence to be issued to the applicants for the bond and which would provide the required guarantee during such time as dealings in motor vehicles occurred pursuant to the authority of the licence which was issued. This being so, in my opinion, not withstanding the dissolution of the partnership between Pa-

quette and De Blois, the bond remained effective so long as Paquette, by virtue of the existence of the dealer's licence, continued to be enabled to act as a dealer in motor vehicles.

*Appeal allowed with costs.*

*Attorneys for the plaintiff, appellant: Desjardins, Ducharme & Choquette, Montreal.*

*Attorneys for the defendant, respondent: Létourneau, Quinlan, Forest, Deschênes & Emery, Montreal.*

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

AND

IMPERIAL OIL LIMITED ..... RESPONDENT.

1960
*Mar. 25, 28, 29
Oct. 4

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Income tax—Determination of base on which depletion allowance calculated—Whether profits should be treated on an individual well basis—Whether losses of loss producing wells must be deducted from profits of profitable producing wells—Whether unrelated drilling, exploration and other costs deductible—Whether deduction of "unrealized profits" should be allowed—Income Tax Act, 1948 (Can.), c. 52, s. 11 (1) (b)—Income Tax Regulations, s. 1201 as amended by Order in Council 4443, August 29, 1951—Income Tax Amendment Act, 1949 2nd Sess. (Can.), c. 25, s. 53 (1).*

In computing its income for 1951, the respondent oil company claimed that the depletion allowance to which it was entitled under s. 11(1)(*b*) of the *Income Tax Act* and s. 1201 of the Income Tax Regulations was $13,023,666.59. The company contended that, under the decision of this Court in *Home Oil Ltd. v. Minister of National Revenue*, [1955] S.C.R. 733, for the purpose of computing the profits to establish the base on which the allowance is to be calculated, the profits from each of its wells should be treated individually.

The Minister set the allowance at $790,067.36, and arrived at the base on which this amount was calculated by deducting from the profits of profitable wells (1) losses of loss wells, (2) unrelated drilling, exploration and other costs, and (3) unrealized profits in supply, manufacturing and marketing inventories.

The Exchequer Court allowed a deduction only for losses of loss wells. The Minister, in appealing this decision, sought to have his assessment confirmed in full, and the respondent cross-appealed, claiming that a deduction of losses on loss wells should not have been allowed.

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*PRESENT: Kerwin, C.J., Taschereau, Locke, Cartwright, Martland, Judson and Ritchie JJ.

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

*Held* (Cartwright, Martland and Ritchie JJ. *dissenting in part*): The appeal should be allowed, and the cross-appeal should be dismissed. The Minister's notice of re-assessment should be affirmed.

*Per* Kerwin C.J. and Taschereau, Locke and Judson JJ.: Subsections 1 and 4 of s. 1201 of the Regulations, when read together, make it plain that the losses of the company's loss producing wells must be deducted from the profits of its profitable producing wells in computing the allowance to which it is entitled. Subsection 4, which defines what are the profits referred to in subs. 1 in cases where the taxpayer operates more than one well, is within the authority of s. 11(1)(*b*) of the Act.

Regulation 1201, as redrafted in 1951, legislated away not only the well by well basis for the determination of profits, but also the limitation on the application of the old subs. 4, now subs. 5, to the deduction of items, referred to in s. 53 of the Act, in relation only to the profitable wells. Section 53 items, required to be deducted from reasonably attributable profits, are not now required to be related to the profitable wells mentioned in subs. 1. If they have been deducted in computing the taxpayer's taxable income, they must be deducted in computing the allowance, whether related or unrelated to the aforementioned wells. *Home Oil Ltd. v. Minister of National Revenue*, [1955] S.C.R. 733, distinguished.

The respondent's argument that s. 11(3) of the Act supported its submission that Regulation 1201 still required the application of the Home Oil judgment on unrelated costs was rejected.

As the producing department of the company was not, in fact, a separate entity for tax purposes, the respondent was not entitled to so consider it, nor to include the "unrealized profit" in supply, manufacturing and marketing inventories as part of the "profits" of that department.

*Per* Cartwright and Ritchie JJ., *dissenting in part*: The aggregate of the profits from all wells operated by the taxpayer cannot be determined for the purpose of subs. 4 until the profits of each have been computed, and as subs. 5 requires a deduction to be made in computing these profits, it follows that s. 53 costs, specified in subs. 5, must be deducted in respect of each well.

It would make the provisions of subs. 4 quite purposeless if *all* the s. 53 costs were required to be deducted in computing the profits of *each* of a number of wells, and as subs. 5 requires the deduction to be made both "in computing the profits . . ." and "for the purpose of this section" it can only be complied with by deducting, in computing the profits of each well, such of the s. 53 costs as can be related thereto.

*Per* Martland J., *dissenting in part*: The computation of profits for the purpose of s. 1201 has to be made on an individual well basis. Subsection 5 requires that in computing the profits attributable to the production of oil or gas from operating wells, account must be taken of any amounts expended for exploration and drilling in relation to such wells, which have been included in the aggregate of costs deducted by the taxpayer in computing income under the authority of s 53.

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

APPEAL from a judgment of Thorson P., of the Exchequer Court of Canada[1], allowing the respondent's appeal from its 1951 income tax assessment. Appeal allowed in toto and cross-appeal dismissed, Cartwright, Martland and Ritchie JJ. dissenting in part.

*C. F. H. Carson, Q.C., T. Sheard, Q.C., A. Findlay, Q.C., T. Z. Boles* and *G. W. Ainslie,* for the appellant.

*A. S. Pattillo, Q.C., A. J. Macintosh, J. G. MacDonell,* for the respondent.

THE CHIEF JUSTICE:—This appeal by the Minister of National Revenue and cross-appeal by Imperial Oil Limited from the judgment of the Exchequer Court[1] raise a question as to the proper deductions to be made by the company in computing its income for the 1951 taxation year under no. 1201 of the Regulations passed pursuant to s. 11(1)(*b*) of the *Income Tax Act,* 1948 (Can.), c. 52, as amended.

Because of the nature of some of the arguments advanced on behalf of the parties, it might be recalled that s. 3 of the Act provides that the income of a "taxpayer" for a taxation year is his income for the year from all sources. Section 12(1) enacts that in computing income no deductions shall be made in respect of (*b*):

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part

Section 11(1)(*b*), as enacted by c. 25 of the Statutes of 1949, provides:

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year

* * *

(*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation

Subsection (3) of s. 11, as enacted by s. 4 of c. 25 of the Statutes of 1949, provides:

11. (3) Where a deduction is allowed under paragraph (*b*) of subsection (1) in respect of an oil or gas well, mine or timber limit operated by a lessee, the lessor and lessee may agree as to what portion of the allowance each may deduct and, in the event that they cannot agree, the Minister may fix the portions.

[1] [1959] C.T.C. 29, 59 D.T.C. 1034.

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Kerwin C.J.

The power to make the relevant regulations is conferred by s. 106(1)(*a*) of the Act:

> 106. (1) The Governor in Council may make regulations
> (*a*) prescribing anything that, by this Act, is to be prescribed or is to be determined or regulated by regulation

Section 1200 of the Regulations, which is in Part XII, headed "Deduction in Respect of Oil Wells, Gas Wells and Certain Mines", reads:

> 1200. For the purposes of paragraph (*b*) of subsection (1) of section 11 of the Act there may be deducted in computing the income of a taxpayer for a taxation year amounts determined as hereinafter set forth in this Part.

This section of the Regulations is the same for the taxation year 1951 as for the years 1949-50. Some of the problems now arising were considered by this Court in *Home Oil Limited v. Minister of National Revenue*[1] with reference to the taxation years 1949-50, but, as s. 1201 of the Regulations, which was there under discussion, is different from the section as it is to be applied to the 1951 taxation year, the two versions should be considered together and they appear conveniently opposite each other in the reasons of Mr. Justice Judson.

I agree with his conclusions and reasons and merely add these remarks to emphasize

(*a*) The new Regulation 1201 has the effect of making the decision of this Court in the Home Oil case inapplicable;

(*b*) In view of s. 3 of the Act, referred to above, and generally because a company cannot sell to itself, the practice of Imperial Oil Limited, even if warranted by sound accounting principles, cannot prevail against the rule;

(*c*) In connection with the item of $19,992,588.33 "Unrelated drilling, exploration and other costs", while one witness for the company was not certain, I am satisfied that under s. 53 of the Act the company deducted this item in computing its taxable income.

I have considered the decision of the House of Lords in *Sharkey v. Wernher*[2], relied upon by counsel for the company, but I am unable to see that it is of any assistance in the present matter.

[1] [1955] S.C.R. 733, [1955] 4 D.L.R. 796.
[2] [1955] 3 All E.R. 493, 36 T.C. 275

While the reasons of the learned President indicated that he disallowed the appeal of the company as to losses of loss wells, the formal order merely states "that the said appeal be and the same is hereby allowed." The judgment of the Exchequer Court should be set aside, the appeal of the Minister allowed, the cross-appeal of the company dismissed and the Minister's notice of re-assessment affirmed. The Minister is entitled to his costs in the Exchequer Court and in this Court.

The judgment of Taschereau, Locke and Judson JJ. was delivered by

JUDSON J.:—This is an appeal from a judgment of the Exchequer Court[1] which allowed the appeal of the respondent company from its 1951 income tax assessment with costs. The company claimed that it was entitled under Regulation 1201 of the Regulations passed pursuant to s. 11(1)(*b*) of the *Income Tax Act* to an allowance of $13,023,666.59 for the year 1951. The Minister, in a notice of re-assessment, allowed only $790,067.36, and the company appealed. The same issues are also involved in appeals from the assessments for the 1952 and 1953 taxation years but, by agreement, the trial in the Exchequer Court was limited to the appeal for the year 1951. The company's contention is that for the purpose of computing its profits to establish the base on which the allowance under s. 11(1)(*b*) is to be calculated, the profits from each well should be treated individually. On two out of three issues in this appeal, the company's submissions are the same as those of the appellant company in *Home Oil Limited v. Minister of National Revenue*[2].

In that case, however, the Court had to consider Regulation 1201 as it applied to the taxation years 1949 and 1950, but by Order-in-Council P.C. 4443, dated August 29, 1951, Regulation 1201 in force in 1949 and 1950 was revoked and a new Regulation 1201 in the precise form set out below was substituted for it and made applicable to the 1951 taxation year. Consequently, the main problem is to determine to what extent the decision in the *Home Oil* case is affected by the change in the regulation.

[1] [1959] C.T.C. 29, 59 D.T.C. 1034.
[2] [1955] S.C.R. 733, [1955] 4 D.L.R. 796.

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Judson J.

I set out now s. 11(1)(*b*) of the Act and the old and new Regulation 1201, the old one applicable to the taxation years 1949 and 1950 and the new one to the year 1951:

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year

(*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation.

*For 1949 and 1950*

1201. (1) Where the taxpayer operates an oil or gas well or where the taxpayer is a person described as the trustee in subsection (1) of section 73 of the Act, the deduction allowed for a taxation year is 33⅓ per cent of the profits of the taxpayer for the year reasonably attributable to the production of oil or gas from the well.

(2) Where a person, other than the operator of an oil or gas well and the person described as the trustee in section 73 of the Act, has an interest in the proceeds from the sale of the products of the well or an interest in income from the operation of the well, the deduction allowed for a taxation year is 25 per cent of the amount in respect of such interest included in computing his income for the year.

*For 1949 and 1950*

(3) Where an amount received in respect of an interest in the income from the operation of a well is a dividend or is deemed by section 73 of the Act to be a dividend, no deduction shall be allowed under subsection (2) of this section.

*For 1951*

1201. (1) Where the taxpayer operates an oil or gas well the deduction allowed for a taxation year is 33⅓ per cent of the profits of the taxpayer for the year reasonably attributable to the production of oil or gas from the well.

(2) Where a person, other than the operator has an interest in the proceeds from the sale of the products of an oil or gas well or an interest in income from the operation of the well, the deduction allowed for a taxation year is 25 per cent of the amount in respect of such interest included in computing his income for the year.

*For 1951*

(3) Where an amount received in respect of an interest in the income from the operation of a well is a dividend or is deemed by the Act to be a dividend, no deduction shall be allowed under this section.

(4) Where the taxpayer operates more than one oil or gas well, the profits referred to in subsection one shall be the aggregate of the profits minus the aggregate of the losses of the taxpayer for the year reasonably attributable to the production of oil or gas from all wells operated by the taxpayer.

| *For 1949 and 1950* | *For 1951* |
|---|---|
| (4) In computing the profits reasonably attributable to the production of oil or gas for the purpose of this section a deduction shall be made equal to the amounts, if any, deducted from income under the provisions of section 53 of chapter 25 of the Statutes of 1949, Second Session, in respect of the well. | (5) In computing the profits reasonably attributable to the production of oil or gas for the purpose of this section a deduction shall be made equal to the amounts, if any, deducted in computing the taxpayer's income for the taxation year under the provisions of section 53 of Chapter 25 of the Statutes of 1949, Second Session. |

There are two differences between the old and the new regulation of importance in this appeal: First, subs. (4) is entirely new; second, subs. (5) of the new regulation is subs. (4) of the old with the words "in respect of the well" omitted at the end of the paragraph.

Subsection (4) of the old and subs. (5) of the new regulation both refer to a deduction under s. 53 of c. 25, Statutes of 1949, Second Session. Section 53, so far as relevant, is as follows:

> 53. (1) A corporation whose principal business is the production, refining or marketing of petroleum or petroleum products or the exploring and drilling for oil or natural gas, may deduct, in computing its income for the purposes of *The Income Tax Act*, the lesser of
>
> (*a*) the aggregate of the drilling and exploration costs, including all general geological and geophysical expenses, incurred by it, directly or indirectly, on or in respect of exploring or drilling for oil and natural gas in Canada
>
> (i) during the taxation year, and.....

The following table shows the claims of the company, the allowance made by the Minister, and the disposition of the case made in the Exchequer Court:

1. *CLAIMED BY COMPANY*

| | |
|---|---|
| Profits of profitable wells | $39,070,999.79 |
| Allowance claimed by company—33⅓% of above | 13,023,666.59 |

2. *ALLOWED BY MINISTER*

| | |
|---|---|
| Profits of profitable wells as computed by company | $39,070,999.79 |
| Losses of loss wells as computed by company | 8,066,012.55 |
| | $31,004,987.24 |
| Unrelated drilling, exploration and other costs | 19,992,588.33 |
| | $11,012,398.91 |

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Judson J.

| | | |
|---|---|---|
| Increase in unrealized profit in supply, manufacturing and marketing inventories | | 8,642,196.84 |
| | | $ 2,370,202.07 |
| Allowance 33⅓% of last item | | $ 790,067.36 |
| 3. *AS HELD BY THORSON P.* | | |
| Profits of profitable wells | | $39,070,999.79 |
| Losses of loss wells | | 8,066,012.55 |
| | | $31,004,987.24 |
| Allowance 33⅓% of last item | | $10,334,995.74 |

The company arrived at the figure of $39,070,999.79 by computing its profits from the production of oil or gas from its producing wells operated at a profit in 1951 on a well by well basis. It did make a deduction in arriving at this figure for drilling, exploration and other costs related to the particular wells but, as may be expected, these costs were of minor significance for these producing wells in the taxation year 1951.

As is apparent from the table set out above, the Minister made three further deductions from the figure of $39,070,-999.79:

(1) He deducted losses from loss wells, claiming that Regulation 1201(4) required this. The profits were not to be calculated having regard only to the profitable wells. On this point, and on this point alone, the judgment of the Exchequer Court sustains the Minister's assessment.

(2) The Minister deducted, in addition to the related drilling, exploration and other costs, unrelated costs of this character, claiming that this was required by Regulation 1201(5). The judgment of the Exchequer Court rejected this deduction on the ground that these expenditures were not reasonably attributable to the production of oil or gas in 1951 from any of the company's producing wells.

(3) The Minister deducted $8,642,196.84 because this amount represented unrealized profits of the company which had been regarded by the company as actual profits for the purpose of making the calculation of profits under Regulation 1201. This figure relates only to oil delivered by the producing department of the company to other departments and still unsold

by the company at the end of the year 1951. The company included this amount in its calculation for corporate purposes of the "profits" of the producing department, but did not include this amount in its calculation of the company's profits or of the company's taxable income. The judgment of the Exchequer Court rejects the Minister's deduction and allows this purely notional computation of profits for the purpose of the allowance under Regulation 1201.

The Minister, in this appeal, seeks to have his assessment confirmed in full. The company cross-appeals, claiming that a deduction should not have been allowed in the Exchequer Court of the losses on loss wells. These are the three issues before this Court. I would allow the appeal and confirm the assessment in full and dismiss the cross-appeal.

I will deal with the deductions made by the Minister under Regulation 1201 in the same order as they appear in the statement: (a) losses of loss wells; (b) unrelated drilling, exploration and other costs; (c) the unrealized inventory profit. The first two deductions were also considered in the *Home Oil* case. The third is new.

(a) *Losses of Loss Wells, $8,066,012.55.*

The question now is whether the company, notwithstanding the addition of subs. (4) to Regulation 1201, is still entitled to have its allowance computed on the basis solely of the profits from its profitable producing wells without deduction of its losses of its loss producing wells. This question was decided in the company's favour in the *Home Oil* case, in the absence of anything in the regulation corresponding to subs. (4). The judgment under appeal holds that this deduction must now be made. With this decision I agree. When subss. (1) and (4) are read together, words could not be plainer. However, the company still contends that the *Home Oil* judgment and the statute limit the scope of any regulation that may be made and compel the making of the allowance, if one is to be made, on the basis of the individual well. Consequently, it is argued, subs. (4) of the 1951 regulation, in purporting to require the deduction of the aggregate of losses reasonably attributable to the production of oil or gas from all wells operated by the taxpayer from the profits referred to in subs. (1), is not authorized

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Judson J.

by the Statute and is ineffective. This argument was rejected in the following passage of the reasons for judgment of the learned President[1]:

> The power to enact a regulation determining the amount of the deductible allowance permitted by Section 11(1)(*b*) of the Act and the base for its computation was granted in the broadest terms and I cannot see any limitation of it such as counsel suggests. The section of the Act does not specify what the base for the computation of the allowance should be or its amount. Thus, it was permissible to fix the profits reasonably attributable to the production of oil or gas as the base for the computation of the allowance and 33⅓ per cent of such base as its amount, as subsection (1) did. But it was also permissible to define such profits for application in cases where a taxpayer operated more than one well and some of the wells were loss producing, even if such definition altered the base fixed by subsection (1), as subsection (4) did. It contains a statutory definition of the profits referred to in subsection (1) for use in the cases stated in it. I see no objection to such a definition for use in the circumstances specified. In my opinion, subsection (4) is within the authority of Section 11(1)(*b*) of the Act. That being so, it is unnecessary to consider the question of its severability.

I agree with this in full and have nothing to add. It completely disposes of the cross-appeal, which fails and must be dismissed with costs.

(b) *Unrelated drilling, exploration and other costs, $19,992,588.33.*

These costs, in this amount, were not related to the production of oil or gas from any of the company's wells during the year 1951. The *Home Oil* case, on the old wording of the regulation, had decided that these costs were not to be deducted from the "reasonably attributable" profits under subs. (1). The basis of the decision in the *Home Oil* case is that unless s. 53 items are related to a profit producing well, they are not to be taken into account in determining the allowance under the regulation because wells are to be dealt with on an individual basis. Subsection (1) required a well by well treatment and the old subs. (4) required only the deduction of s. 53 items "in respect of the well". Therefore, unrelated s. 53 items disappeared from the computation. The judgment under appeal holds that this is still the law and that this is so notwithstanding the new subs. (4) and the deletion of the words "in respect of the well". In my respectful opinion, there is error in this conclusion, for I think that Regulation 1201 now requires

[1] [1959] C.T.C. at p. 50, 59 D.T.C. at p. 1046.

the following procedure in determining the base for the allowance to be granted to a taxpayer who operates more than one oil or gas well:

(1) Determine the profits or losses of each producing well in the normal manner by ascertaining the difference between the receipts reasonably attributable to the production of oil or gas from the well and the expenses of earning those receipts. At this point no s. 53 items are deductible for these are of a capital nature.

(2) Determine the aggregate of the profits of the profitable wells and the aggregate of the losses of the loss wells and deduct the aggregate of the latter from the aggregate of the former.

(3) Deduct from the amount of profits remaining, the exploration and drilling costs deducted under s. 53 in computing the taxpayer's income.

The judgment under appeal took the first and second steps but not the third. In spite of the scope of subs. (5), widened, in my opinion, by the deletion of the words "in respect of the well", and the addition of the new subs. (4), the Exchequer Court held, as did this Court in the *Home Oil* case, that s. 53 items were to be applied on a well by well basis and only in so far as they related to the profitable wells dealt with in subs. (1). To me, this is reading into the new regulation a limitation which I cannot find. To arrive at this result the assessor must first assume that subss. (1) and (5) are to be read together to the exclusion of subs. (4). If this is done, the problem is indeed one of well by well. But this is not an adequate statement of the problem because it ignores the presence of the new subs. (4). Where the taxpayer operates more than one well, the profits referred to in subs. (1) (i.e. the reasonably attributable profits) are to be computed in a new way—the aggregate of profits from the profitable wells minus the aggregate of the losses from the loss wells. Then subs. (5) comes into play.

It is this computation, made under the combined operation of subss. (1) and (4), which gives the profits reasonably attributable to the production of oil or gas for the purpose of subs. (5). Subsection (5) says, in computing the

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Judson J.

"reasonably attributable profits for the purpose of this section", not for the purpose of subs. (1) of this section. For the purpose of this section has already required the application of subss. (1) and (4) before we get to subs. (5). The reasonably attributable profits mentioned in subs. (5) are not on a well by well basis, taking only profitable wells, but on the composite basis as required by subs. (4). Then all s. 53 items must be deducted—not, as formerly, only those "in respect of the well".

Therefore, what the new 1951 regulation did was to legislate away not only the well by well basis for the determination of profits, as the learned President has already found, but also the limitation on the application of the old subs. (4), now subs. (5), to the deduction of s. 53 items in relation only to the profitable wells. The error in the judgment under appeal may be stated also in a slightly different way. Under the new formula supplied by the new regulation, the s. 53 items are not required to be reasonably attributable to the production of oil or gas from the wells mentioned in subs. (1). It is only the profits which have to be "reasonably attributable" and these "reasonably attributable" profits are to be computed in a defined way and from them a defined deduction must be made. It is, therefore, in my opinion, fundamental error in the judgment under appeal to arrive at "reasonably attributable" profits for the purpose of applying subs. (5) by considering only subss. (1) and (5) to the exclusion of subs. (4).

Section 53 items, required to be deducted from reasonably attributable profits, newly defined, are not now required to be related items. If they have been deducted in computing the taxpayer's taxable income—and there is no compulsion to do this—then they must be deducted in computing the allowance under Regulation 1201, whether related or unrelated to profitable wells mentioned in subs. (1).

That, I think, is all that is meant when subs. (5) speaks of "the amounts, if any" deducted under s. 53 of the Act. It simply means that whatever amounts the taxpayer deducts for determining taxable income must be deducted under Regulation 1201. The presence of these words in subs. (5), far from reinforcing the company's submission on the construction of the new regulation, seems to me to be entirely consistent with the Minister's submission and to

support the assessment. A taxpayer who deducts these s. 53 items in one place for the purpose of determining taxable income, must do so in another for the purpose of determining the allowance under Regulation 1201.

The company also appeals to s. 11(3) of the Act in support of its submission that Regulation 1201 still requires the application of the *Home Oil* judgment on unrelated costs. This point was not dealt with in the reasons delivered in the Exchequer Court. Section 11(3) provides:

> (3) Where a deduction is allowed under paragraph (*b*) of subsection (1) in respect of an oil or gas well, mine or timber limit operated by a lessee, the lessor and lessee may agree as to what portion of the allowance each may deduct and, in the event that they cannot agree, the Minister may fix the portions.

The argument is that the subsection authorizes only one allowance, which must be divided between lessor and lessee. Regulation 1201, in fact, grants what appear to be separate allowances to the lessor and lessee and there is no occasion, therefore, for the allowance to be divided under s. 11(3) of the Act. If the regulation made under s. 11(1) (b) had granted an allowance to a lessee in such terms that the drilling and exploration costs incurred by the lessee on other lands in which the lessor had no interest were permitted to reduce the allowances in respect of the well on the lessor's lands, the regulation would have operated unfairly.

As the regulation stands, if the operator of a well is a lessee, he is granted an allowance under subss. (1), (4) and (5). The lessor of the land on which the well is operated is granted a quite different allowance under subs. (2). Under the latter subsection the lessor is entitled to an allowance equal to 25 per cent of the amount in respect of his interest in the proceeds from the sale of the products of the well on his land included in computing his income for the year.

In my opinion, the separate allowances given by Regulation 1201, first, to the operator, and then to a person other than the operator, are authorized by the wide scope of s. 11(1)(b).

With the making of this regulation, the need for the application of s. 11(3) of the Act to oil or gas wells disappears. If, on the other hand, there is no statutory authorization for dealing with the allowance between operator

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Judson J.

and non-operator, as both the old and the new regulation do, there is no allowance at all given to anybody and that is the end of the litigation.

*(c) Increase in unrealized profit in supply, manufacturing and marketing inventories. . . $8,642,196.84*

This question is new and did not arise in the *Home Oil* litigation. The Minister claimed that the amount of $8,642,196.84 was not part of the profits of the taxpayer for the year reasonably attributable to the production of oil or gas from all wells of the company operated within the meaning of subs. (4) of Regulation 1201 and that the company was not entitled to include it in determining the base for its allowance. The appellant's submission is that although it may have been convenient for the company for its own corporate purposes to treat the producing department as a separate entity and to include this unrealized profit as part of the profits of the producing department, in fact, the producing department was not a separate entity and for tax purposes the company was not entitled to treat the producing department as a separate entity. The judgment of the Exchequer Court correctly, of course, drew a distinction between the company's taxable income, which was not under consideration in the case, and the profits from the production of oil or gas "reasonably attributable to the well". However, on a well by well basis of accounting, which the Exchequer Court adopted as the proper one, the inventory "had all moved out from the well to some other department as if it had been sold and was no longer in its hands. This was the opinion of the accountancy witnesses based on the assessment made. What happened to the inventory in the hands of other departments and how it affected the computation of the appellant's taxable income as a whole is outside the scope of the present inquiry". It is apparent that the judgment of the Exchequer Court did treat the producing department as a separate entity for the purpose of Regulation 1201.

In my opinion, this was error. It may have been convenient for the company for its own corporate purposes to treat the producing department as a separate entity and to include this "unrealized profit" as part of the "profits" of

the producing department. In fact, the producing department was not a separate entity for tax purposes and, therefore, the company was not entitled to treat the producing department in this way. If it makes any difference, and I do not think that it does, all the accountancy witnesses based their opinion in resisting the claim for deduction on the assumption that the producing department could be treated as a separate entity. No such assumption could be made in law. No company makes an actual profit merely by producing oil. There is no profit until the oil is sold. *International Harvester Co. of Canada v. Provincial Tax Commission*[1]. *Laycock v. Freeman, Hardy & Willis Ltd.*[2].

The judgment of the Exchequer Court should be set aside, the appeal of the Minister allowed, the cross-appeal of the company dismissed and the Minister's notice of reassessment affirmed. The Minister is entitled to his costs in the Exchequer Court and in this Court.

The judgment of Cartwright and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting in part*):—This appeal involves the construction to be placed on s. 1201 of the Income Tax Regulations in its amended form as passed by Order-in-Council P.C. 4443 dated August 29, 1951, but before embarking on any close analysis of the provisions of this section it is important to determine under what authority and for what purpose it was enacted.

This Order-in-Council was expressed as being passed "by virtue of the powers conferred by section 106 of The Income Tax Act", the relevant part of which reads as follows:

> 106. (1) The Governor-in-Council may make regulations
>
> (*a*) prescribing anything that, by this Act, is to be prescribed or is to be determined or regulated by regulation,

By s. 11(1)(b) of *The Income Tax Act*, 1948, it is provided:

> 11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year
>
> * * *
>
> (*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation;

[1] [1949] A.C. 36 at 49.
[2] [1939] 2 K.B. 1 at 6 and 11, [1938] 4 All E.R. 609.

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Ritchie J.

The Governor-in-Council expressly confined the relevant sections of the Regulations by which it exercised this authority to the requirements of the enabling legislation by enacting s. 1200 which reads:

> For the purposes of paragraph (*b*) of subsection (1) of section 11 of the Act there may be deducted in computing the income of a taxpayer for a taxation year amounts to be determined as hereinafter set forth in this Part.

Pursuant to this authority and in furtherance of these purposes, s. 1201 of the Regulations was originally passed by P.C. 6471 of December 22, 1949, and subsequently amended by P.C. 4443 hereinbefore referred to in which latter form it was in force during the taxation period in question. Subsection (1) of s. 1201 reads as follows:

> 1201. (1) Where the taxpayer operates an oil or gas well the deduction allowed for a taxation year is 33⅓ per cent of the profits of the taxpayer for the year reasonably attributable to the production of oil or gas from the well.

This subsection, taken alone, is clearly effective to fulfil the purposes of s. 11(1)(b) in the case of a taxpayer who operates a single oil or gas well and it not only establishes once and for all the percentage to be allowed by way of deduction under s. 1201 but also fixes "profits . . . reasonably attributable to the production of oil or gas from the well" as the primary ingredient in the computing of the base amount upon which such percentage is to be calculated.

Under ss. 11(1)(b) and 106(1) the method of calculating the allowance to be allowed is left to be dealt with entirely by regulation, and in my opinion it is within the ambit of the authority created by these sections for the Governor-in-Council to provide that when a number of wells are operated by one taxpayer he shall be required, in calculating the amount of his allowance, to make a deduction from the aggregate of the aforesaid profits from each well, equal to the aggregate of the losses from loss wells, provided always that in computing the reasonably attributable profits from the aggregate of which the deduction is to be made, the producing wells are dealt with individually.

In my view this is the effect of subs. (4) of s. 1201 which was first introduced by the amendment to the Regulations (P.C. 4443) and which was inserted between subs. (3) and the present subs. (5) which, in its old form, was subs. (4). Section 1201(4) reads as follows:

> (4) Where the taxpayer operates more than one oil or gas well, the profits referred to in subsection one shall be the aggregate of the profits minus the aggregate of the losses of the taxpayer for the year reasonably attributable to the production of oil or gas from all wells operated by the taxpayer.

It is to be observed that the word "profits" occurs twice in this subsection, and in my opinion it must bear the same meaning in both places so that the words "aggregate of the profits" must mean "aggregate of the profits referred to in subsection one" (i.e., the profits of the taxpayer for the year reasonably attributable to the well).

The word "aggregate" is defined in the Oxford English Dictionary as meaning "Collected into one body; formed by the collection of many units into one, association." Other dictionary definitions are in slightly different language but all indicate that in its primary sense and meaning the word implies a plurality of units whose total amount it represents.

It is upon "the profits reasonably attributable to the production of oil or gas from the well" that a taxpayer operating a single well is entitled to a deduction of 33⅓ per cent in computing his income tax, and it appears to follow from the above that in the case of a taxpayer operating more than one well it is these same profits which must be computed and then aggregated to find the profits reasonably attributable to all the wells which he operates from which he is required to deduct the aggregate of the losses from loss wells in order to determine the amount on which he is entitled to the 33⅓ per cent deduction.

It seems to me, therefore, that the first question facing the operator of one or more oil or gas wells who seeks a deduction under this section must be how he is to compute the profits reasonably attributable to the production of oil or gas from each well, and in this regard he is at once faced with the mandatory provisions of s. 1201(5) which read as follows:

> (5) In computing the profits reasonably attributable to the production of oil or gas for the purpose of this section a deduction shall be made equal to the amounts, if any, deducted in computing the taxpayer's income for the taxation year under the provisions of section 53 of Chapter 25 of the Statutes of 1949, Second Session.

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Ritchie J.

The relevant deduction is specified by the said s. 53 to be

> . . . the aggregate of the drilling and exploration costs, including all general and geological and geophysical expenses incurred by it (the corporate taxpayer) directly or indirectly on or in respect of exploring or drilling for oil or natural gas in Canada.

It is noteworthy that provision is made under s. 1201 for two different kinds of deduction, both of which are to be made in respect of "profits reasonably attributable to the production of oil or gas". The one under subs. (4) (i.e., losses of loss wells) is to be made *after* the profits from all wells operated by the taxpayer have been computed and aggregated, whereas the other under subs. (5) is to be made *"in computing"* these same profits for the purpose of the section.

As I take the view that the aggregate of these profits from all wells cannot be determined for the purpose of subs. (4) until the profits of each have been computed and as subs. (5) requires a deduction to be made "in computing" these profits, it follows that I am of opinion that the s. 53 costs specified in subs. (5) must be deducted in respect of each well.

It was strongly urged on behalf of the appellant that the procedure to be followed in determining the base for the allowance granted by the Regulation to a taxpayer that operates more than one oil or gas well is as follows:

1. Determine the profits or losses of each producing well in the normal manner by ascertaining the difference between the receipts reasonably attributable to the production of oil or gas from the well and the expenses of earning those receipts.
2. Determine the aggregate of the profits of the profitable wells and the aggregate of the losses of the loss wells and deduct the aggregate of the latter from the aggregate of the former.
3. Deduct from the amount of profits remaining, the exploration and drilling costs deducted under s. 53 in computing the taxpayer's income.

The difficulty which this reasoning presents to me is that, as I understand the provisions of subs. (5), a taxpayer is *not permitted* "to determine (i.e. compute) ... the profits of each producing well in the *normal manner*" for the purpose of this section (1201) if he has deducted under s. 53, in computing his income tax, any sums which are reasonably attributable to the production of oil or gas from such well.

On the contrary he is expressly required by subs. (5) to make the deduction of s. 53 costs *"in computing the profits* reasonably attributable to the production of oil or gas for the purpose of this section" and in my opinion these words carry the deduction there referred to back to the very first step which the taxpayer is required to take in making his calculation under subss. (1) and (4), namely, the computation of the reasonably attributable profits of each well.

The reasoning advanced on behalf of the appellant would require the taxpayer to compute the "profits reasonably attributable to the production of oil or gas from each well" without reference to the deduction for which provision is made in subs. (5) and would require him to deduct the s. 53 costs from the aggregate of such profits minus losses from loss wells without regard to whether or not such costs are reasonably attributable to the production of oil or gas from a well. I am of opinion, on the other hand, that whenever it is necessary for the purposes of s. 1201 for a taxpayer to compute the profits reasonably attributable to the production of oil or gas from a well, he is required to work out the amount, if any, of his s. 53 costs which is reasonably attributable to the production of oil or gas from that well, and if there is no such amount he is not required to make any such deduction. Although the calculating of the amount of such a deduction in reference to each well may appear at first glance to present difficulties, it is nonetheless apparent that the respondent's auditors have not found such difficulties insurmountable because they have made the appropriate deduction in compiling the "profits of profitable wells" for the purpose of presenting this claim.

The terms of s. 1201 have been hereinbefore considered without reference to the case of *Home Oil Company Limited v. Minister of National Revenue*[1], because that case was decided under Regulation 1201 before the enactment of subs. (4) and before the concluding words "in respect of the well" had been deleted from subs. (5).

The *Home Oil* case was thus decided when s. 53 costs were the only deduction authorized by the Regulation and before subs. (4) had made provision for the deduction of losses of producing wells from the aggregate of "the profits reasonably attributable to the production of oil or gas from the

[1] [1955] S.C.R. 733, [1955] 4 D.L.R. 796.

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Ritchie J.

well". The Court was, therefore, only directly concerned with the question of whether the s. 53 costs could be deducted as a lump sum in computing "the *profits* of the well" or whether the latter expression required a separate ascertainment for each profitable well. The decision of this Court, that the section then before it did not authorize such a deduction and that such profits should be separately ascertained, in my opinion applies with equal force to the amended Regulation, and the following observation of Rand J., speaking on behalf of the Court at p. 736, applies directly to the question at issue:

> The allowance under s. 53 is an overall allowance related to total income for a specific purpose; the ascertainment of profits for the purpose of Regulation No. 1201 is on the basis of reasonable relation to the source of income and for a different purpose; and I am unable to agree that the total allowance under s. 53 can be said to be made "in respect of" the profitable wells.

As has been observed, in the original Regulation 1201 as passed by P.C. 6471 of December 22, 1949, there was no provision equivalent to the present subs. (4), and the only express language used in that Regulation requiring that s. 53 costs were to be deducted on a well-to-well basis consisted of the last four words of the then subs. (4) (now subs. (5)), namely, the words "in respect of the well".

As the terms of the new subs. (4) in my view require the profits reasonably attributable to each well to be computed separately before they can be aggregated, and as under subs. (5) the s. 53 deductions must be made in computing those profits, it seems to me to follow that "the purpose of this section" as a whole (s. 1201) cannot be fulfilled unless the deductions for which provision is made in subs. (5) are made "in respect of the well", and it is, therefore, no longer necessary to employ those words in that subsection in order to convey the meaning that the deduction is to be made on a well-to-well basis.

It would make the provisions of subs. (4) quite purposeless if *all* the s. 53 costs were required to be deducted in computing the profits of *each* of a number of wells and as subs. (5) requires the deduction to be made both "in computing the profits..." and "for the purpose of this section" it seems to me that it can only be complied with by deducting, in computing the profits of each well, such of the s. 53 costs as can be related thereto.

To deduct all the s. 53 costs from the aggregate of the profits of *all* the wells is to leave this deduction out of account "in computing the profits" which have been aggregated and to deduct *all* the same costs from *each* well is to defeat "the purpose of this section", but if these costs are related to the individual wells and deducted in computing the profits of each, then it appears to me that the language of subs. (5) has been applied in such manner as to comply with the overall purpose of the Regulation and of the statute as interpreted by the *Home Oil* case.

My opinion as to the applicability of the above quotation from the decision of Rand J. in the *Home Oil* case to the present circumstances is based in some degree on the reasons last recited, but it is to be remembered also that there has been no material change in s. 11(1)(b) of the *Income Tax Act* since that decision was rendered, and that what was there said concerning the meaning and purpose of that subsection has lost none of its force by reason of the change in the Regulation.

In the present case the respondent claimed its allowance under s. 1201 for the year 1951 on the basis, first, that the aggregate losses from loss wells could not properly be deducted from the aggregate profits because subs. (4) was *ultra vires* the authority conferred by s. 11(1)(b), secondly, that the s. 53 deduction could only be made to the extent that the costs therein specified were reasonably attributable to the production of oil or gas from each well, and lastly, that there should be added to the profits reasonably attributable to each well an amount of unrealized profits based on notional sales, from the respondent's producing department to other of its departments, of oil not actually sold by the company during the taxation year.

The learned President of the Exchequer Court, in the course of the decision from which this appeal is asserted, held that subs. (4) of s. 1201 made valid and effective provision for the deduction of the aggregate of reasonably attributable losses from the aggregate of reasonably attributable profits in computing the allowance authorized by s. 11(1)(b). From this finding the Imperial Oil Company

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Ritchie J.

has entered a cross-appeal. I am of opinion that this cross-appeal should be dismissed and I agree with the views expressed by the learned President of the Exchequer Court when he said:

> The power to enact a regulation determining the amount of the deductible allowance permitted by section 11(1)(*b*) of the Act and the base for its computation was granted in the broadest terms and I cannot see any limitation of it such as counsel suggests.

As I have indicated, the provisions of subs. (4) do not appear to me to run contrary to the purposes of the section as a whole or of s. 11(1)(b) of the Income Tax Act because in my view subs. (4) requires the profits of each producing well to be separately computed. As the identity of each well is thus preserved as a unit in the aggregate amount which constitutes the basic ingredient of the calculation required by the subsection, I am of opinion that the allowance for which it provides is made "in respect of an oil well" and therefore *intra vires*.

As to the deduction under subs. (5) of s. 1201, the learned President has held that this is required to be made on a well-to-well basis. From this finding the Minister has appealed. For the reasons hereinbefore stated as well as those stated by the learned President, I am of opinion that the appeal from this finding should be dismissed.

The learned President further held that the unrealized profits reasonably attributable to each well should be taken into account for the purposes of s. 1201 and the Minister has appealed from this finding also. To agree with this finding requires the acceptance of the proposition that "the producing department" of the respondent is a separate entity and involves the recognition of the existence of a profit where there has been no actual sale. As I am unable to view the existence of "the producing department" as a separate entity in a realistic light, and as I feel that no profit exists for the purpose of this section until the oil is sold, I am unable to agree with the finding of the learned President in this regard and to this extent would allow the appeal.

In the result, I am of opinion that the amount of the deductible allowance to which the respondent was entitled in 1951 under s. 11(1)(b) of the Act and s. 1201 of the Regulations is $7,454,263.47 being 33⅓ per cent. of the base

of $22,362,790.40 which has been calculated by deducting the unrealized profits and the losses of loss wells from the profits of profitable oil wells as claimed by the company.

I would, therefore, allow the appeal in part and dismiss the counterclaim with costs to follow the event in both cases.

MARTLAND J. (*dissenting in part*):—The relevant facts are set out in the reasons of my brother Judson and do not require repetition. I am in agreement with his conclusions in respect of the cross-appeal and in respect of the contention by the appellant that the amount of $8,642,196.84, respecting increase in unrealized profits in supply, manufacturing and marketing inventories, was not part of the respondent's profits reasonably attributable to the production of oil or gas from all the wells of the company, so as to entitle the respondent to include it in determining the base for its allowance.

I have, however, reached a different conclusion in respect of the item of unrelated drilling, exploration and other costs in the amount of $19,992,588.33.

Regulation 1201 must be read in the light of ss. 12(1)(b) and 11 of the *Income Tax Act*. The former provides:

* * *

12. (1) In computing income, no deduction shall be made in respect of

* * *

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,

The relevant portions of s. 11 are:

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year

* * *

(*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation,

* * *

(3) Where a deduction is allowed under paragraph (*b*) of subsection (1) in respect of an oil or gas well, mine or timber limit operated by a lessee, the lessor and lessee may agree as to what portion of the allowance each may deduct and, in the event that they cannot agree, the Minister may fix the portions.

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Martland J.

The deduction in computing income permitted by Regulation 1201 is clearly a depletion allowance, as was stated by Rand J., who delivered the unanimous judgment of this Court in *Home Oil Company Limited v. Minister of National Revenue*[1]:

> That this allowance is made to offset the wasting capital resource is clear from the language of s. 12(*b*) which speaks of "depreciation, obsolescence or depletion", and if its purpose is not to be defeated, the producing wells must be dealt with individually.

Section 11(1)(b) refers to an allowance in respect of an oil or gas well. Section 11(3) makes provision for the portions of the allowance permitted which a lessor and a lessee may respectively deduct where an oil or gas well is operated by a lessee. This, to my mind, contemplates the determination of the depletion allowance on a well by well basis and this was the conclusion reached by this Court in the *Home Oil* case.

Subsection (1) of Regulation 1201 now under consideration reads as follows:

> 1201. (1) Where the taxpayer operates an oil or gas well the deduction allowed for a taxation year is 33⅓ per cent of the profits of the taxpayer for the year reasonably attributable to the production of oil or gas from the well.

It is similar in effect to the subsection which was under consideration in the *Home Oil* case and speaks of "profits of the taxpayer for the year reasonably attributable to the production of oil or gas from the well", which contemplates the determination of profits for each individual well of the taxpayer.

Subsection (4) of Regulation 1201 did not apply in the taxation years under consideration in the *Home Oil* case. It reads as follows:

> (4) Where the taxpayer operates more than one oil or gas well, the profits referred to in subsection one shall be the aggregate of the profits minus the aggregate of the losses of the taxpayer for the year reasonably attributable to the production of oil or gas from all wells operated by the taxpayer.

When this subsection refers to the "aggregate" of profits and the "aggregate" of losses reasonably attributable to the production of oil or gas from all wells operated by the taxpayer it must mean the aggregate of the profits and the

[1] [1955] S.C.R. 733 at 737, [1955] 4 D.L.R. 796.

aggregate of the losses attributable to the individual oil or gas wells from which oil or gas production was obtained. It is speaking of an aggregate of individual items. Consequently the computation must still be made on a well by well basis, but subs. (4) added a new feature to the Regulation in that losses on a per well basis in respect of wells operated at a loss had also to be computed and the aggregate of those losses had to be deducted from the aggregate of the profits earned by the individual profitable wells.

Subsection (5) reads as follows:

(5) In computing the profits reasonably attributable to the production of oil or gas for the purpose of this section a deduction shall be made equal to the amounts, if any, deducted in computing the taxpayer's income for the taxation year under the provisions of section 53 of Chapter 25 of the Statutes of 1949, Second Session.

It commences with the words "In computing the profits reasonably attributable to the production of oil or gas for the purpose of this section . . . " As above indicated, the computation of profits for the purpose of the section has to be made on an individual well basis. Subsection (1) refers to the profits from the well. Subsection (4) contemplates the obtaining of an aggregate of the profits resulting from the operation of the profitable wells and an aggregate of the losses resulting from the operation of the loss producing wells. When, therefore, subs. (5) refers to the computation of profits reasonably attributable to the production of oil or gas, it is speaking of a computation which has to be made on an individual basis for each well operated by the taxpayer. It calls for "a deduction of the *amounts*, if any, deducted in computing the taxpayer's income for the taxation year under the provisions of s. 53 of c. 25 of the Statutes of 1949, Second Session." In my view this is a requirement that the taxpayer, in respect of each individual well which he operated to produce oil or gas, must make a deduction of the amount, if any, in relation to that well which he had deducted in computing his income for the taxation year under s. 53 of c. 25 of the Statutes of 1949, Second Session.

The relevant portion of s. 53 provides as follows:

53. (1) A corporation whose principal business is production, refining or marketing of petroleum, petroleum products or natural gas or exploring or drilling for petroleum or natural gas may deduct in computing its income, for the purposes of *The Income Tax Act*, . . .

1960

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD.

Martland J.

(a) the aggregate of the drilling and exploration costs, including all general geological and geophysical expenses, incurred by it, directly or indirectly, on or in respect of exploring or drilling for oil or natural gas in Canada

(i) during the taxation year, and

(ii) during previous taxation years, to the extent that they were not deductible in computing income for a previous taxation year,

The deduction which may be made by a corporation which comes within the provisions of this subsection is an aggregate of costs incurred by it for drilling and exploring for oil or natural gas in Canada. The purpose of the subsection is clearly to provide an incentive for oil and gas exploration and for the drilling of wells for the production of those substances. Exploration costs may be incurred without wells necessarily being drilled in the area explored. Drilling costs may be incurred which result only in dry holes.

The purpose of s. 11(1)(b) of the Act is to provide a depletion allowance in respect of a wasting asset, one such asset being oil or gas produced from an operating well. Under Regulation 1201, in the case of an oil or gas well, such allowance is determined on the basis of a percentage of the profits reasonably attributable to the production of oil or gas from such a well.

As I see it, the purpose of subs. (5) of Regulation 1201 is to require that, in computing the profits attributable to the production of oil or gas from operating wells, account must be taken of any amounts expended for exploration and drilling in relation to such wells, which have been included in the aggregate of costs deducted by a taxpayer in computing income under the authority of s. 53.

Considerable stress was laid in argument on behalf of the appellant upon the fact that, when the new subs. (5) of Regulation 1201 was enacted to replace the former subs. (4), the words "in respect of the well", which appeared at the end of subs. (4), were eliminated. It was contended that the meaning of this subsection was thereby altered substantially so as to require the deduction of all drilling and exploration costs which had been claimed by a corporation under s. 53, whether such costs related to wells which it operated or not. I do not agree that the deletion of those words has that result. It is my view that the words were

omitted from the new subs. (5) so as to make it conform with the provisions introduced into Regulation 1201 by the new subs. (4). That subsection for the first time introduced the element of a deduction of losses from loss producing wells where a taxpayer operated more than one well. It involved aggregating profits from profitable wells and losses from loss producing wells. Consequently, where subs. (4) has application, consideration now has to be given to s. 53 expenditures in relation to all wells operated by the taxpayer, whether profitable or loss producing, and the words "in respect of the well" were no longer apt for that purpose.

I agree with the disposition of this appeal proposed by my brother Ritchie.

*Appeal allowed and cross-appeal dismissed with costs,* CARTWRIGHT, MARTLAND *and* RITCHIE JJ. *dissenting in part.*

*Solicitor for the appellant: A. A. McGrory, Ottawa.*

*Solicitors for the respondent: Blake, Cassels & Graydon, Toronto.*

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1960
*May 9, 10, 11, 12
Oct. 4

LESLIE MEYERS, EXECUTOR OF THE ESTATE OF EDWIN MEYERS, AND BANDY LEE (*Plaintiffs*) ..... APPELLANTS;

AND

FREEHOLDERS OIL COMPANY LIMITED AND CANADA PERMANENT TRUST COMPANY (*Defendants*) ..... RESPONDENTS;

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF SASKATCHEWAN (*Intervenant*).

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Contracts—Illegality—"Minerals Lease"—"Top lease"—Whether prior lease "non est factum, illegal and void"—Trial judge's finding as to plea of non est factum affirmed by Court of Appeal—The Securities Act, R.S.S. 1940, c. 287, ss. 2(10), 3(1), 17a, 20, as amended.*

*PRESENT: Locke, Cartwright, Fauteux, Martland and Judson JJ.

1960

MEYERS *et al.* *v.* FREEHOLDERS OIL CO. LTD. *et al.*

On July 7, 1950, one K, an agent of the respondent company F, visited the plaintiff M at the latter's farm-house and persuaded him to sign a document entitled "Minerals Lease", by which M granted and leased his mineral rights to F in return for shares in the company and certain royalty rights.

In June 1955, M executed a petroleum and natural gas lease to one L in respect of the same lands which had been the subject matter of the minerals lease to F. L. was engaged in a "top leasing" programme, whereby the top leases obtained would take effect upon the termination of the prior existing leases. It was implicit in this programme that steps would be taken to set aside the existing prior leases. An action was commenced by M and L seeking a declaration that the lease to F was "*non est factum*, illegal and void". It was alleged (1) that the obtaining of the mineral lease was a part of a fraudulent scheme by F and its promoters to deprive farmers of their mineral rights; (2) that the mineral lease was void, based on the plea of *non est factum;* (3) that it was rendered void by virtue of certain provisions of *The Securities Act*, R.S.S. 1940, c. 287, as amended. The action was dismissed at trial and that judgment was sustained by the Court of Appeal on equal division.

*Held:* The appeal should be dismissed.

As found by the learned trial judge, there was nothing in the evidence to support the appellant's first submission.

The finding of the learned trial judge, affirmed in the Court of Appeal, that the plea of *non est factum* was not established on the evidence, should not be disturbed. *Prudential Trust Co. Ltd. v. Forseth*, [1960] S.C.R. 210, and *Prudential Trust Co. Ltd. v. Olson*, [1960] S.C.R. 227, referred to.

With respect to the third submission, the respondents were afforded no protection by s. 20 of the Act, and their further contention that the transaction involved was not a trading in a security within the meaning of s. 2(10) of the Act was rejected.

F was registered as a broker under the Act for the purpose of trading in its own securities. A trade in which it was itself a party was, under s. 3(3)(c), one in which registration was not required and consequently was not the kind of trade which, under clause (a) or clause (c) of s. 3 (1), required the registration of K as a salesman. There was, therefore, no breach of s. 3(1) of the Act.

The purpose of s. 17a of the Act is not to prevent trading of an unauthorized kind, but is intended to prevent persons in their own residences from being sought out by stock salesmen. A breach of the section, in relation to a transaction otherwise lawful, results, not in preventing the contract from being valid, but in the incurring of a penalty by the person who is in breach of it. The breach of s. 17a by K, therefore, did not result in the agreement here in question being rendered void. *Mellis v. Shirley Local Board*, 16 Q.B.D. 446, applied; *McAskill v. The Northwestern Trust Co.*, [1926] S.C.R. 412, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Graham J. Appeal dismissed.

*L. McK. Robinson, Q.C.*, for the plaintiffs, appellants.

[1](1959), 28 W.W.R. 625.

*E. J. Moss* and *C. A. Lavery,* for Freeholders Oil Co. Ltd., defendant, respondent.

*E. C. Leslie, Q.C.,* and *W. M. Elliott,* for Canada Permanent Trust Co., defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The respondent, Freeholders Oil Company Limited (hereinafter referred to as "Freeholders"), was incorporated under the laws of the Province of Saskatchewan on January 4, 1950. One of the objects stated in its memorandum of association was

> To acquire lands and mineral rights from the freeholders owners thereof and to pool the same for and on their behalf and to vest control over their disposition in the owners of lands and mineral rights for the purpose of equitably distributing the rights and benefits over the same among members of the Company;

The articles of association provided that each member should have one vote on a poll at shareholders' meetings and not one vote for each share held by such member.

Freeholders proceeded to acquire mineral rights from land owners, some of whom had not previously granted leases of their petroleum and natural gas rights and some of whom had already granted such leases to other lessees. With respect to the former class, Freeholders would obtain the grant of a mineral lease of the minerals within, upon or under the lessor's lands for a term of 99 years, renewable at Freeholders' option. The consideration paid by Freeholders for such a lease consisted of the allotment to the lessor of one fully paid share in its capital stock for each acre of land involved. It also covenanted to pay and deliver to the lessor an undivided 20 per cent of the benefits or proceeds received by Freeholders from any disposition made by it of such minerals.

With respect to the latter class, Freeholders would take from the land owner an assignment of the royalties payable to him under his existing lease, together with the grant to Freeholders of a 99 year mineral lease running from the date of the assignment, which, however, would only take effect upon the termination of the existing lease. The consideration from Freeholders for such an assignment consisted of a covenant for the allotment of one fully paid share in its capital stock for each acre of land involved, of which one-half of the shares would be allotted forthwith and the

1960

MEYERS et al. v. FREEHOLDERS OIL CO. LTD. et al.

Martland J.

other one-half only when the mineral lease to Freeolders should take effect. Freeholders was to have the right to deal with and dispose of the assigned royalties, but covenanted to pay to the assignor 20 per cent of the benefits received by Freeholders from such disposition.

On the same date that Freeholders was incorporated its promoters also incorporated Western Royalties Limited (hereinafter referred to as "Western"). By an agreement made between the two companies dated April 20, 1950, Western agreed to act as manager of Freeholders for a period of five years and to pay the cost of organizing, managing and operating Freeholders during that period up to a sum not exceeding $10,000 in each year. In consideration of its services, Western was to receive an undivided 30 per cent interest in all mineral rights and royalties acquired by Freeholders. Freeholders agreed that if it earned a profit of not less than $250,000 in the five year period it would reimburse Western for its expenditures up to a total of $50,000.

In brief, therefore, the plan was that Freeholders would be the recipient of mineral rights and royalties acquired on its behalf. Western would provide the initial capital and management. Freeholders would be in a position to dispose of the mineral rights which it acquired. Western would have a 30 per cent undivided interest therein. The individuals who leased or assigned to Freeholders would each be entitled to 20 per cent of the proceeds of the disposition of those mineral rights which each had leased or assigned. The remaining 50 per cent would belong to Freeholders, in which company each lessor or assignor to it would have acquired a share interest. Essentially the scheme was one for the pooling of mineral rights and royalty rights, with Western receiving a 30 per cent interest in such rights in compensation for its provision of capital and the furnishing of management services.

The campaign for the acquisition of mineral rights and royalties for Freeholders was completed by August 1950. By that time it had acquired leasehold interests in some 23,000 acres and assignments of royalties in respect of previously leased lands of approximately 613,000 acres.

On August 9, 1951, Prairie Oil Royalties Company Limited (hereinafter referred to as "Prairie") was caused to be incorporated in Saskatchewan by Lehman Brothers,

investment bankers, of New York. It entered into an agreement of the same date with Western to acquire Western's 30 per cent interest in the mineral rights and royalties to which Western was entitled under its agreement with Freeholders. A price of $3.00 per acre was paid in respect of lands subject to mineral leases to Freeholders and $1.50 per acre in respect of lands the subject of assignment agreements to Freeholders. The purchase price was paid as to 75 per cent in cash and as to 25 per cent in the form of fully paid shares of the capital stock of Prairie. The necessary capital for Prairie was raised by the sale of its shares, chiefly to clients of Lehman Brothers.

In order to effect this sale of mineral interests a trust agreement was made between Freeholders and the respondent Canada Permanent Trust Company (hereinafter refererd to as "the Trust Company"), approved by Western and Prairie, whereby Freeholders assigned all its various mineral interests to the Trust Company, which agreed to hold the same in trust as to an undivided 30 per cent for Prairie and the remainder for Freeholders. The Trust Company agreed to issue three trust certificates in the form provided in the agreement, one for an undivided 30 per cent interest to Western and two respectively for an undivided 50 per cent interest and an undivided 20 per cent interest to Freeholders. Provision was made for the conversion of the latter certificate into certificates for individual parcels of land, which Freeholders could deliver to the individual land owners from whom it had acquired mineral rights.

The present case arose in respect of one of the mineral leases granted to Freeholders by Edwin Meyers (hereinafter referred to as "Meyers") on July 7, 1950, which related to the mines, minerals and mineral rights (referred to as "minerals") within, upon or under the North $\frac{1}{2}$ of Section 5, Township 6, Range 11, West of the 2nd Meridian in the Province of Saskatchewan. The document was entitled "Minerals Lease" and by it Meyers granted and leased to Freeholders the minerals, together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of them, to have and enjoy the same for a term of 99 years, renewable at Freeholders' option. The

1960

MEYERS *et al.* *v.* FREEHOLDERS OIL CO. LTD. *et al.*

Martland J.

consideration was 320 fully paid shares of the capital stock of Freeholders, to be allotted by it to Meyers. Clause 1 of the minerals lease provided:

> 1. Payment to Lessor:
>
> The Lessee shall have the full and absolute right to deal with, dispose of and make such agreements in relation to the said minerals, or any part thereof, as it shall from time to time deem advisable; Provided that the Lessee shall pay or deliver to the Lessor an undivided twenty (20%) per cent. of the benefits or proceeds received by the Lessee from any such agreement or disposition whether the same consist of a cash consideration or a royalty interest under a drilling lease or other contract for the production of any minerals; and in the event that the Lessee should receive a royalty interest the Lessee shall secure the issue and delivery to the Lessor of a Trust Certificate covering the said twenty (20%) per cent. interest in such form as the management of the Lessee shall designate, which interest shall be subject to the terms and conditions of the said Certificate and of this Agreement.

Meyers did not receive the share certificates for his 320 shares until December 11, 1951. On May 15, 1953, after consulting a solicitor, he filed a caveat against the lands in question, in which he alleged that the lease had been obtained by fraud and misrepresentation. Freeholders did not receive any notice of this caveat. Subsequently Meyers attended three shareholders' meetings of Freeholders, one in November 1953, and two in December 1954.

At the time the lease was granted in 1950 oil had not been discovered in the area in which Meyers' lands were situated. By 1955 there had been substantial development in that area and oil had been discovered in close proximity to Meyers' land.

In 1955 the appellant Bandy Lee (hereinafter referred to as "Lee") commenced a "top leasing" programme in that area. A top lease is one which takes effect upon the termination of a prior existing lease. It was implicit in Lee's programme that steps would be taken to set aside the existing prior leases. Meyers consulted another solicitor, who was acting on behalf of Lee, and then executed a petroleum and natural gas lease dated June 9, 1955, to Lee in respect of the same lands which had been the subject matter of the minerals lease to Freeholders. On the 27th of the same month he sent a letter of repudiation to Freeholders in respect of the mineral lease to it, which repudiation was not accepted by Freeholders.

On December 17 of the same year Meyers and Lee commenced action against the two respondents, seeking a declaration that the lease to Freeholders was *"non est factum,* illegal and void". Meyers died in December of the following year and the appellant Leslie Meyers is his sole executor.

The action was dismissed at the trial and that judgment was sustained by the Court of Appeal of Saskatchewan on an equal division.

Three main submissions were made by the appellants: (1) that the obtaining of the mineral lease was a part of a fraudulent scheme by Freeholders and its promoters to deprive farmers of their mineral rights; (2) that the mineral lease was void, based on the plea of *non est factum;* (3) that it was rendered void by virtue of certain of the provisions of *The Securities Act,* R.S.S. 1940, c. 287, as amended.

A great deal of evidence was tendered at the trial with reference to the first submission, which it is not necessary for me to review here. The learned trial judge found nothing in the evidence to support this submission. This claim was not supported by any of the judgments in the Court of Appeal and the detailed submission on this point presented by counsel for the appellants has failed to persuade me that the learned trial judge should have reached any other conclusion than that which he did.

With respect to the second point, the question of fact is as to what was stated to Meyers by Knox, the agent of Freeholders who obtained for it the execution of the minerals lease by Meyers. The appellants contend that Knox fraudulently misrepresented to Meyers the nature of the instrument which he was being asked to sign. This the respondents deny.

It is common ground that Knox visited Meyers at the latter's farm on July 7, 1950. It is also common ground that prior to this visit three other oil companies had sought to obtain leases from Meyers and in each case he had refused to make an agreement. His evidence was taken *de bene esse* before the trial. He alleged two main points on which he said that Knox had misrepresented the nature of the instrument.

1960

MEYERS *et al.* v. FREEHOLDERS OIL CO. LTD. *et al.*

Martland J.

The first was in respect of the matter of the royalty payable under the document by Freeholders to Meyers. The evidence at the trial was that the prevailing rate of royalty payable under petroleum and natural gas leases being granted to oil companies was 12½ per cent. According to Meyers, Knox represented to him that under the terms of the mineral lease which he was being asked to sign he would receive royalties at the rate of 20 per cent. In fact, of course, the minerals lease to Freeholders did not provide for a 20 per cent royalty, but provided for payment to Meyers of 20 per cent of the benefits or proceeds received by Freeholders on a disposition by it of the minerals. If Freeholders subleased the minerals, under the prevailing form of petroleum and natural gas lease, to an oil company, Meyers would only receive 20 per cent of the royalty payable to Freeholders under such sublease.

The second major misrepresentation alleged was as to the term of the lease. Meyers testified that Knox had led him to believe that, except as to the matter of royalty and as to payment of a consideration in the form of Freeholders' shares, the minerals lease submitted to him was similar to the so-called "standard" lease of the oil companies and he, therefore, concluded that it would be for a ten year term and not for a term of 99 years, subject to renewal.

Knox gave evidence that prior to working for Freeholders he had not had previous experience in negotiating mineral agreements. He only worked for Freeholders for about a month and then terminated his employment because of his lack of success in obtaining agreements. He only negotiated about 15 agreements for Freeholders. He recalled that he was furnished with a supply of yellow forms, green forms and white forms, which were respectively the assignment agreement form, the mineral lease form and the prospectus of Freeholders. He was instructed to furnish to each party whom he visited a copy of the prospectus and, in the ordinary course of events, he would have left a prospectus with Meyers, although he did not specifically remember either Meyers or the interview with him. On this point Meyers, when asked whether he had received a copy of the Freeholders prospectus, failed to give any answer.

Knox stated that he did not misrepresent the agreement to anyone. He testified that in the few cases where he was able to negotiate agreements the parties whom he approached were anxious to sign up immediately. His practice, so far as he could recall, was to explain in a general way that Freeholders was a pooling arrangement and that shares would be allotted in return for the execution of the agreement. He would then deliver a copy of the prospectus, with the form of agreement, to the persons whom he interviewed. He said that he did not in any way prevent them from reading the forms and he endeavoured to answer any questions that might be put as fully as he could. He said that he did not know anything about the forms of lease of other oil companies, or the length of the term of such leases. The only leases he had ever seen were those of Freeholders.

The learned trial judge accepted Knox's evidence and decided that the appellants had failed to discharge the onus of establishing fraud or misrepresentation on his part in the securing of the agreement. This finding was sustained by the Court of Appeal on an equal division.

Culliton J. A., who delivered the judgment of the Court of Appeal dismissing the appeal, after referring to the principles relating to the position of an appeal court with reference to findings of fact made by a trial judge, said:

> Learned counsel for the appellants argued that these principles did not apply to the learned trial judge's findings in this case. This argument was based on the contention that the only direct evidence as to the actual circumstances surrounding the execution of the lease was the de bene esse evidence of Meyers. It was argued that because of this the appeal court was in just as good a position to determine the effect and weight to be given to this evidence and the inferences to be drawn therefrom as was the trial judge. I cannot agree with this view. It seems apparent to me that in determining the truth or veracity of the de bene esse evidence, one of the dominant factors must be the credence to be given to the evidence of Knox, Broughton and Hardy, all of whom appeared before the trial judge, as well as the conduct and attitude of Meyers as disclosed in other evidence. In no other way could the de bene esse evidence be properly assessed.

The principles to which Culliton J.A. referred were considered in two recent cases in this Court: *Prudential Trust Company Limited v. Forseth*[1], and *Prudential Trust Company Limited v. Olson,* reported in the same volume at

[1] [1960] S.C.R. 210

1960

MEYERS *et al.* *v.* FREEHOLDERS OIL CO. LTD. *et al.*

Martland J.

p. 227. The situation in the present case is similar to that in the *Olson* case, except that in the present appeal there have been concurrent findings of fact.

I do not consider that the circumstances of this case are such as to warrant a reversal of the findings of fact made by the learned trial judge. There was sufficient evidence to warrant them. In addition to the evidence of Knox, there were matters on which the learned trial judge could properly rely in reaching the conclusion which he did. There is the fact that no complaint was made by Meyers regarding the minerals lease until the filing of his caveat in May 1953, which complaint at that time was not made to Freeholders, but was merely stated in the caveat filed. After the filing of the caveat he attended three shareholders' meetings of Freeholders in 1953 and in 1954 and made no complaint as to fraud or misrepresentation at any of those meetings, even though he did speak at one of them. His only complaint was as to delay on the part of the company in drilling. He did not attempt to repudiate the minerals lease until 1955, after he had already effected another lease to Lee. By then the situation regarding oil development in his area had greatly changed. The likelihood of oil production on his own land then made the lease with Lee a more attractive proposition than the pooling arrangement with Freeholders. In addition, there is the evidence of Broughton and Hardy, which the learned trial judge apparently accepted. Broughton, the president of Freeholders, and Hardy, a field man employed by Freeholders who had known Meyers for 25 years, visited Meyers at his farm in 1955, subsequent to the granting by Meyers of his lease to Lee. They testified that at that time Meyers made no complaint in respect of any of the provisions of the minerals lease to Freeholders, other than to say that he wanted a new lease with a 12½ per cent royalty and a drilling commitment. There was no suggestion that he had been misled into executing the lease to Freeholders and the conversation was quite friendly in tone. Meyers made no reference to the granting of the lease to Lee.

In my view, therefore, the finding of the learned trial judge, affirmed in the Court of Appeal, that the plea of *non est factum* was not established on the evidence should not be disturbed.

The third submission of the appellants is that the agreement between Meyers and Freeholders was void under the provisions of *The Securities Act*. The relevant facts in this connection are that Freeholders was registered under that Act as a broker (non-brokerage), but that Knox was not registered as a salesman under the Act. The minerals lease was executed by Meyers in his house on his farm. The Registrar of Securities, who was also the Registrar of Joint Stock Companies, was consulted by representatives of Freeholders before its operations commenced. In his opinion those operations were outside the provisions of the statute because they were, in essence, acquisitions of mineral interests and not an offer of securities to the public. For this reason he did not think that Freeholders required a licence under the Act but he did permit the issuance of a licence to Freeholders. He was fully informed of its intended method of operation and consented to the non-registration of its agents. He also consented to their calling at residences in connection with the carrying out of their duties.

The relevant sections of *The Securities Act* applicable at the times material to this action are the following:

*2.* In this Act, unless the context otherwise requires, the expression:

* * *

8. "Security" includes:

(*a*) any document, instrument or writing commonly known as a security;

(*b*) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company;

(*c*) any document constituting evidence of an interest in an association of legatees or heirs;

(*d*) any document constituting evidence of an interest in an option given upon a security; and

(*e*) any document designated as a security by the regulations.

* * *

10. "Trade" or "trading" includes any solicitation or obtaining of a subscription to, disposition of, transaction in, or attempt to deal in, sell or dispose of a security or interest in or option upon a security, for valuable consideration, whether the terms of payment be upon margin, installment or otherwise, and any underwriting of an issue or part of an issue of a security, and any act, advertisement, conduct or negotiation directly or indirectly designated as "trade" or "trading" in the regulations. R.S.S. 1930, c. 239, s. 2.

* * *

*3.* (1) No person shall:

(*a*) trade in any security unless he is registered as a broker or salesman of a registered broker;

1960

MEYERS *et al.* v. FREEHOLDERS OIL CO. LTD. *et al.*

Martland J.

(*b*) act as an official of or on behalf of a partnership or company in connection with a trade in a security by the partnership or company, unless he or the partnership or company is registered as a broker;

(*c*) act as a salesman of or on behalf of a partnership or company in connection with a trade in a security by the partnership or company, unless he is registered as a salesman of a partnership or company which is registered as a broker;

and unless such registrations have been made in accordance with the provisions of this Act and the regulations; and any violation of this section shall constitute an offence.

* * *

(3) Registration shall not be required in respect of any of the following classes or trades or securities:

* * *

(*c*) a trade where one of the parties is a bank, loan company, trust company or insurance company, or is an official or employee, in the performance of his duties as such, of His Majesty in the right of Canada or any province or territory of Canada, or of any municipal corporation or public board or commission in Canada, or is registered as a broker under the provisions of this Act;

* * *

*17a.* (1) No person shall call at any residence and:

(*a*) trade there in any security; or

(*b*) offer to trade there or at any other place in any security;

with the public or any member of the public.

* * *

(4) A violation of this section shall constitute an offence.

* * *

*20.* No action whatever, and no proceedings by way of injunction, mandamus, prohibition or other extraordinary remedy shall lie or be instituted against any person, whether in his public or private capacity, or against any company in respect of any act or omission in connection with the administration or carrying out of the provisions of this Act or the regulations where such person is the Attorney General or his representative or the registrar, or where such person or company was proceeding under the written or verbal direction or consent of any one of them, or under an order of the Court of King's Bench or a judge thereof made under the provisions of this Act. R.S.S. 1930, c. 239, s. 16.

The contention of the appellants is that the negotiation of the minerals lease by Knox, who had not been registered as a salesman, was a breach of subs. (1) of s. 3 and was also a breach of s. 17a of the Act, the consequence of which was that the agreement was rendered void.

The learned trial judge decided that the respondents were protected by the provisions of s. 20, on the ground that the verbal consent by the Registrar of Securities respecting Freeholders' operations resulted in its receiving the protection afforded by that section.

This view of the effect of s. 20 was not adopted in the Court of Appeal. Culliton J. A. reached his conclusions upon the assumption, without so finding, that the transaction in question did come within the provisions of the Act. Both of the judges who dissented were of the opinion that s. 20 did not take Freeholders' operations outside the application of the statute. I agree with their view as to the meaning and effect of that section for the reasons stated in the judgment of Gordon J. A., as follows:

> I am glad to say that I have little doubt as to its meaning. It was passed for the protection of those persons who administer the Act and those who act upon the orders of the attorney-general or his representative when such orders are issued "in connection with the administration or carrying out of the provisions of this Act or the regulations." With every respect I do not think that it empowers the attorney-general or his representative to issue orders violating the express provisions of the Act.
>
> I do not think there could be the slightest doubt as to the meaning of this section if the words "or against any company" had been deleted and that protection would then have been confined to those people administering the Act.
>
> In my view the words, "or against any company" were only added to give protection to those companies that might be ordered to do or not to do certain things by the attorney-general or his representative under the provisions of sec. 15 of the Act.

The respondents further contended that the transaction involved here was not a trading in a security at all, within the meaning of the Act, because, in essence, it was an agreement for the acquisition of mineral rights to which the issuance and allotment of shares of Freeholders to Meyers was only incidental. However, the agreement itself contains, in para. 16, a subscription by Meyers for shares of Freeholders in the following terms:

> 16. Application for Shares:
>
> The Lessor hereby subscribes for and agrees to take up 320 shares with a nominal or par value of One Dollar ($1.00) per share in the capital stock of the Lessee, and tenders in full payment for the said shares the within lease, duly executed and hereby requests that the said shares be allotted to the Lessor and that such shares be issued as fully paid and non-assessable and that a certificate for the said shares be issued in the name of the Lessor as herein set out.

This subscription was obtained by Knox as a result of his negotiations with Meyers and there was, therefore, in my opinion, the "obtaining of a subscription" for a security within the definition of the words "trade" and "trading" in subs. 10 of s. 2 of the Act.

1960

MEYERS *et al.* *v.* FREEHOLDERS OIL CO. LTD. *et al.*

Martland J.

The respondents further rely upon clause (c) of subs (3) of s. 3 of the Act, which has already been quoted. The effect of this clause was not considered in the Courts below, but it is my view that it does have application in this case. Freeholders was registered as a broker under the Act for the purpose of trading in its own securities. A trade in which it was itself a party, as it was here, was, therefore, one in which registration was not required and consequently was not the kind of trade which, under clause (a) or clause (c) of subs. (1) of s. 3, required the registration of Knox as a salesman. In my view, therefore, there was no breach of s. 3(1) of *The Securities Act*.

Section 3(3)(c) does not, however, assist the respondents in connection with the application of s. 17a. That section is not concerned with registration and it applies equally to registered salesmen as well as to those who are not registered. It forbids any person to call at a residence and there to trade in securities and it makes such conduct an offence under the Act. There was, therefore, in my opinion, a breach of this section by Knox. The question then is as to what is the effect of that breach upon the agreement between Freeholders and Meyers. Does it render that contract void, or does it only involve liability on the part of Knox to a penalty in view of the provisions of subs. (4)?

The determination of the effect of the breach of a statutory provision upon a contract is often a difficult one and must, of course, depend upon the terms and the intent of the provision under consideration. In some cases the statute clearly forbids the making of a certain kind of contract. In such a case the contract cannot be valid if it is in breach of the provision. An example of this kind is found in the provisions of the Manitoba *Sale of Shares Act*, which was considered by this Court in *McAskill v. The Northwestern Trust Company*[1]. Section 4 of that Act provided:

> It shall hereafter be unlawful for any person or persons, corporation or company, or any agent acting on his, their or its behalf, to sell or offer to sell, or to directly or indirectly attempt to sell, in the province of Manitoba, any shares, stocks, bonds or other securties of any corporation or company, syndicate or association of persons, incorporated or unincorporated, other than the securities hereinafter excepted, without first obtaining from the Public Utility Commissioner, hereinafter styled "the commissioner," a certificate to the effect hereinafter set forth and a license to such agent in the manner hereinafter provided for.

[1] [1926] S.C.R. 412, 3 D.L.R. 612.

Section 6, in part, read:

> It shall not be lawful for any person or any such company, either as principal or agent, to transact any business, in the form or character similar to that set forth in section 4, until such person or such company shall have filed the papers and documents hereinafter provided for.

The Court held in that case that a sale of shares made by a company which had failed to comply with the statutory provisions was void and not voidable.

Section 16 of *The Securities Act*, itself, contains an express provision whereby, in the circumstances therein defined, a contract by a customer of a broker shall be void, at the option of such customer.

On the other hand, some statutes have been construed as only imposing a penalty, where the Act provides for one, although that is not necessarily the result of a penalty provision being incorporated in the Act. Lord Esher posed the question which must be determined in *Melliss v. Shirley Local Board*[1], as follows:

> Although a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject-matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law.

In the present case I have come to the conclusion that it was not the intention of s. 17a of *The Securities Act* to render completely void a trade in securities because it is made at a residence. The general intent of the statute is to afford protection to the public against trades in securities by persons seeking to trade who have not satisfied the Registrar as to their proper qualification so to do. For that reason the registration provisions of s. 3 are incorporated in the Act. But s. 17a is not a part of this general pattern, because it applies to registered brokers and salesmen as well as to those who are not registered. As I see it, its purpose is not to prevent trading of an unauthorized kind, but is intended to prevent persons in their own residences from being sought out there by stock salesmen. It is the place at which the negotiations occur which is important in this section and not the character of the

[1] (1885), 16 Q.B.D. 446 at 451, 55 L.J.Q.B. 143.

1960

MEYERS *et al.* v. FREEHOLDERS OIL CO. LTD. *et al.*

Martland J.

negotiations themselves. It seeks to deter salemen from attempting to make contracts, which otherwise may be quite proper, at a particular place. This being so, it is my opinion that a breach of s. 17a, in relation to a transaction otherwise lawful, results, not in preventing the contract from being valid, but in the incurring of a penalty by the person who is in breach of it.

I do not think, therefore, that the breach of s. 17a resulted in the agreement in question here being rendered void.

In my opinion the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Solicitor for the plaintiffs, appellants: W. J. Perkins, Estevan, Sask.*

*Solicitors for the defendant, respondent, Freeholders Oil Co. Ltd.: Shumiatcher, Moss & Lavery, Regina.*

*Solicitors for the defendant, respondent, Canada Permanent Trust Co.: MacPherson, Leslie & Tyerman, Regina.*

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1960

*May 23
Oct. 4

LYLE FRANCIS SMITH ..... APPELLANT;

AND

HER MAJESTY THE QUEEN, UPON THE INFORMATION OF A. BRUCE SWAIN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Constitutional law—Criminal law—Offences as to prospectus under provincial securities legislation—Whether conflict with Criminal Code false prospectus provision—The Securities Act, R.S.O. 1950, c. 351, ss. 38(1), (9), 47, 47a, 63(1), 68(1)—Criminal Code, 1953-54 (Can.), c. 51, ss. 343, 406.*

On an appeal from an order prohibiting the magistrate from further proceeding with an information charging the accused with certain offences under *The Securities Act*, R.S.O. 1950, c. 351, the Court of Appeal reversed the judgment of the trial judge and quashed the order of prohibition. The accused appealed to this Court.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

*Held* (Locke, Cartwright and Ritchie JJ. dissenting): The appeal should be dismissed.

*Per* Kerwin C.J. and Taschereau, Fauteux, Abbott and Judson JJ.: Section 63 of *The Securities Act* is not criminal law within head 27 of s. 91 of the *British North America Act*, 1867, as it is not a provision the pith and substance of which is to prohibit an act with penal consequences. It is merely incidental to the main purpose and aim of the enactment, which is to regulate the security business.

There is no repugnancy between s. 63 of the Act and s. 343 of the *Criminal Code*, as the purposes of the two enactments are entirely different. *Lymburn v. Mayland*, [1932] A.C. 318, *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396, *O'Grady v. Sparling*, [1960] S.C.R. 804, *Regina v. Yolles*, [1959] O.R. 206, and *Regina v. Dodd*, [1957] O.R. 5, referred to.

*Per* Abbott, Martland and Judson JJ.: There is no conflict between s. 63(1)(d) and (e) of the Act and s. 343 of the Code. The latter provision makes it an offence to make, circulate or publish a prospectus known to be false in a material particular with intent to induce persons to become shareholders in a company. Section 63(1)(d) and (e), on the other hand, is designed to penalize a person who, required as he is, by the provisions of the Act, to furnish full, detailed information about the company whose securities are sought to be sold, is knowingly responsible for incorporation in that material of information which is false.

The matter of the provincial legislation is not so related in substance to s. 343 of the Code as to be brought within the scope of criminal law in the sense of s. 91 of the *British North America Act*. *The Provincial Secretary of Prince Edward Island v. Egan*, *supra*, and *Lymburn v. Mayland*, *supra*, referred to.

*Per* Locke J., *dissenting*: By s. 343 of the Code Parliament has declared to be criminal and has provided the penalty for the publishing of false statements, whether written or oral, which are known to be false in a material part with the intent to induce others to purchase securities, and by s. 406 has also rendered criminal an attempt to do so.

As the whole purpose of *The Securities Act* is the protection of the public from relying upon false information when purchasing securities, and that of s. 63 to declare criminal the act of making fraudulent misstatements in a prospectus designed for the purpose of inducing such purchases, there is in essence no difference between the offences created and those prohibited by the Code.

Therefore the offences dealt with in s. 63 of the Act trespass upon the exclusive jurisdiction of Parliament in this field and are accordingly *ultra vires*. *Lymburn v. Mayland*, *supra*, and *Tennant v. Union Bank of Canada*, [1894] A.C. 31, referred to.

*Per* Cartwright J., *dissenting*: The difference between s. 38(1) and (9) of the Act and s. 343 of the Code, in that under the latter it would be necessary to establish not only that the accused had been knowingly responsible for the making of a material false statement in the prospectus, but also, that this was done with intent to induce persons, whether ascertained or not, to become shareholders in the company, is apparent rather than real. Having regard to the presumption that a person intends the natural consequences of his acts, proof of the allegations in any of the counts in the information would constitute a *prima facie* case under s. 343(1)(a) of the Code.

1960

SMITH
v.
THE QUEEN

Moreover, there is no realistic distinction between making a statement with intent that it shall be relied upon by persons before they become shareholders, as provided for in s. 68(1), and making a statement "with intent to induce" those persons to become shareholders.

By the combined effect of ss. 38, 47, 47a and 63(1) of the Act the Province has attempted to punish by fine, imprisonment, or both, a course of conduct which is so similar to that condemned by s. 343 of the Code as to create an inconsistency or conflict, with the result that the Dominion legislation must prevail. *Rex. v. Nat. Bell Liquors*, [1922] 2 A.C. 218, and *Lymburn v. Mayland, supra,* referred to.

*Per* Ritchie J., *dissenting*: The impugned provisions of the Act have the combined effect, when read in the context of the statute as a whole, of creating an offence which is substantially the same as that for which provision is made in s. 343 of the Code.

Although the specific "intent to induce persons . . . to become shareholders of the Company" which is required under s. 343 of the Code is not expressly stated to be one of the ingredients of the offences created by the combined effect of s. 63(1)(d) and (e), and s. 38(1) and (9) of the Act, it is nevertheless implicit in the latter provisions that such an intent must form a part of the offences thereby created. *Provincial Secretary of Prince Edward Island v. Egan, supra,* referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing the judgment of Hughes J. Appeal dismissed, Locke, Cartwright and Ritchie JJ. dissenting.

*C. Thomson,* for the appellant;

*H. S. Bray* and *W. A. Macdonald,* for the respondent;

*W. R. Jackett, Q.C.* and *S. Samuels,* for the Attorney General of Canada;

*R. Cleary,* for the Attorney General of Alberta;

*J. Holgate,* for the Attorney General of Saskatchewan;

*L. Tremblay, Q.C.,* for the Attorney General of Quebec.

The judgment of Kerwin C. J. and of Taschereau, Fauteux, Abbott and Judson JJ. was delivered by

THE CHIEF JUSTICE:—By leave of this Court Lyle Francis Smith appeals from the judgment of the Court of Appeal for Ontario[1] reversing the judgment of Hughes J. and quashing the order of prohibition granted by the latter. That order prohibited His Worship Magistrate J. P. Prentice or such other justices as might be in Magistrate's Court in the City of Toronto from further proceeding to hear the charges against the appellant wherein he is charged with

[1] [1959] O.R. 365, 31 C.R. 79, 125 C.C.C. 43.

offences under subss. (1) and (9) of s. 38 of *The Securities Act*, R.S.O. 1950, c. 351, contrary to s. 63 thereof. The learned judge of first instance pointed out that it was not contended that the Act as a whole was invalid and, in fact, any such contention could not hope to succeed in view of the decision of the Judicial Committee in *Lymburn v. Mayland*[1]. If subss. (1) and (9) of s. 38 of the Act are valid, there can be no question that the Provincial Legislature had power by s. 63 to make it an offence to fail to comply with those provisions.

The general aim of the Act is to regulate the security business (there being a wide definition of "security") and this is accomplished by the setting-up of The Ontario Securities Commission, with power to it to supervise the trading in securities by regulation and also power to supervise the trading in securities during a primary distribution by requiring the filing of a prospectus. It is sufficient for the disposition of this appeal to indicate that subs. (1) of s. 38 prohibits a person or company from trading in any security issued by a mining company, where such trade would be in the course of a primary distribution to the public of such security, until there has been filed with the Commission a prospectus containing a full, true and plain disclosure relating to the security. Subsection (9) compels the filing of an amended prospectus where a change occurs during the period of primary distribution to the public in any material fact contained in any prospectus. Section 63 reads:

63. (1) Every person, including any officer, director, official or employee of a company, who is knowingly responsible for,

(*a*) any fictitious or pretended trade in any security;

(*b*) any course of conduct or business which is calculated or put forward with intent to deceive the public or the purchaser or the vendor of any security as to the nature of any transaction or as to the value of such security;

(*c*) the making of any material false statement in any application, information, statement, material or evidence submitted or given to the Commission, its representative, the registrar or any person appointed to make an investigation or audit under this Act, under this Act or the regulations;

(*d*) the furnishing of false information in any report, statement, return, balance sheet or other document required to be filed or furnished under this Act or the regulations;

[1] [1932] A.C. 318, 101 L.J.P.C. 89.

1960

SMITH
v.
THE QUEEN

Kerwin C.J.

(e) the commission of any act or failure to perform any act where such commission or failure constitutes a violation of any provision of this Act or the regulations; or

(f) failure to observe or comply with any order, direction or other requirement made under this Act or the regulations,

shall be guilty of an offence and on summary conviction shall be liable to a penalty of not more than $2,000 or to imprisonment for a term of not more than one year or both.

(2) Subsection 1 shall be deemed to apply, *mutatis mutandis*, to any company save that the money penalties may be increased in the discretion of the magistrate to a sum of not more than $25,000.

(3) Every person or company is a party to and guilty of an offence under this Act,

(a) that actually commits the offence;

(b) that does or omits an act for the purpose of aiding another person or company in the commission of the offence;

(c) that abets another person or company in the commission of the offence; or

(d) that counsels or procures another person or company to commit the offence.

(4) Every person or company that counsels or procures another person or company to be a party to an offence under this Act of which that other person or company is afterwards guilty is a party to that offence, although it may be committed in a way different from that which was counselled or procured.

(5) Every person or company that counsels or procures another person or company to be a party to an offence under this Act is a party to every other offence under this Act which that other person or company commits in consequence of such counselling or procuring and which the person or company counselling or procuring knew, or ought to have known, to be likely to be committed in consequence of such counselling or procuring.

This section is not criminal law within Head 27 of s. 91 of the *British North America Act*, 1867, as it is not a provision the pith and substance of which is to prohibit an act with penal consequences. It is merely incidental to the main purpose and aim of the enactment. The words of Lord Atkin, speaking for the Judicial Committee in *Lymburn v. Mayland*[1], at p. 324, are particularly apt:

> There was no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded.

There is no repugnancy between s. 63 of *The Securities Act* and s. 343 of the Criminal Code. The latter reads:

> 343. (1) Every one who makes, circulates or publishes a prospectus, statement or account, whether written or oral, that he knows is false in a material particular, with intent

[1] [1932] A.C. 318, 101 L.J.P.C. 89

(a) to induce persons, whether ascertained or not, to become shareholders or partners in a company,

(b) to deceive or defraud the members, shareholders or creditors, whether ascertained or not, of a company,

(c) to induce any person to entrust or advance anything to a company, or

(d) to enter into any security for the benefit of a company, is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) In this section, "company" means a syndicate, body corporate or company, whether existing or proposed to be created.

The purposes of the two enactments are entirely different. Counsel for the appellant argued that the word "knowingly" in subs. (1) of s. 63 of the Ontario Act indicated that the Legislature was encroaching upon the field of criminal law in its widest sense. However, it is not the same conduct being dealt with by the two legislative bodies. The word "knowingly" is really in ease of the provisions of *The Securities Act*. I agree with the submission of counsel for the respondent that the main purpose of the provincial enactment is to ensure the registration of persons and companies before they are permitted to trade in securities, coupled with what is essentially the registration of the securities themselves before the latter may be traded in the course of a primary distribution to the public. Parliament undoubtedly had power to enact s. 343 of the Criminal Code, but a prospectus may in one aspect and for one purpose be the subject of valid provincial legislation, while, in another aspect and for another purpose, it may be the subject of valid federal legislation: *Provincial Secretary of Prince Edward Island v. Egan*[1]. Since the Provincial Legislature has power to prescribe certain information to be supplied to the Commission and since the Legislature has power to provide for punishment of infractions, the enactments of the Legislature and of Parliament may coexist. The remarks of Lord Atkin at pp. 326-327 of the report in *Lymburn v. Mayland*[2], mentioned by Hughes J., cannot apply to the problem before us:

> The penal provisions of s. 14 have been subsequently incorporated into the Criminal Code of the Dominion by 20 & 21 Geo. 5, c. 11 (Canada), s. 5, which now presumably occupies the field so far as the criminal law is concerned.

[1] [1941] S.C.R. 396, 3 D.L.R. 305. [2] [1932] A.C. 318, 101 L.J.P.C. 89.

1960

SMITH v. THE QUEEN

Kerwin C.J.

As appears from the reasons for judgment of Judson J. in *O'Grady v. Sparling*[1], with which I agree, the decision of the Court of Appeal for Ontario in *Regina v. Yolles*[2] was approved, while the previous decision of that Court in *Regina v. Dodd*[3] was not.

The appeal should be dismissed with costs, but there should be no costs to or against the Attorney General of Canada or to or against the Attorney General of any of the Provinces.

LOCKE J. (*dissenting*):—The question to be determined in this appeal is as to whether subss. (b), (d) and (e) of s. 63 of *The Securities Act*, R.S.O. 1950, c. 351, trespasses upon a field which is occupied by legislation duly enacted by Parliament under head 27 of s. 91 of the *British North America Act*.

It was not contended before Hughes J., nor was it contended before this Court, that the *Securities Act*, other than in respect of the penal provisions of s. 63, was *ultra vires*. The decision of the Judicial Committee in *Lymburn v. Mayland*[4] need not be considered, therefore, except that portion of the judgment delivered by Lord Atkin dealing with the criminal provisions of the Alberta legislation which are referred to at p. 327 of the report. To the extent that this is relevant to the present matter, it appears to be contrary to the view advanced by the respondents in the present appeal.

It is necessary to determine the real object and purpose of s. 63, considered in its context, and it is of some assistance in arriving at a conclusion to examine the history of the legislation. The section reads in part:

> Every person, including any officer, director, official or employee of a company, who is knowingly responsible for,
>
> * * *
>
> (*b*) any course of conduct or business which is calculated or put forward with intent to deceive the public or the purchaser or the vendor of any security as to the nature of any transaction or as to the value of such security;
>
> * * *
>
> (*d*) the furnishing of false information in any report, statement, return, balance sheet or other document required to be filed or furnished under this Act or the regulations;

[1] [1960] S.C.R. 804.
[2] [1959] O.R. 206, 19 D.L.R. (2d) 19.
[3] [1957] O.R. 5, 7 D.L.R. (2d) 436.
[4] [1932] A.C. 318, 101 L.J.P.C. 89.

(e) the commission of any act or failure to perform any act where such commission or failure constitutes a violation of any provision of this Act or the regulations;

* * *

shall be guilty of an offence and on summary conviction shall be liable to a penalty of not more than $2,000 or to imprisonment for a term of not more than one year or both.

In 1928, by c. 34, the legislature enacted the *Security Frauds Prevention Act*. The purpose of the legislation is indicated by its title; it was the protection of the public against fraud and fraudulent acts by brokers and other persons offering securities for sale of the nature defined in s. 2. Brokers and salesmen were prohibited by s. 3 from trading in securities unless they were registered in accordance with the requirements of the Act and applicants for registration were required to furnish bonds for the protection of persons dealing with them. Fraud was defined as including, *inter alia,* any intentional misrepresentation by word, conduct, or in any manner, of any material fact, either present or past, and any intentional omission to disclose any such fact, and generally any course of conduct or business calculated or put forward with intent to deceive the public or the purchaser of any security as to the value of such security. Section 16 of this Act provided that every person violating any provision of the Act or the regulations designated as an offence, or who does any fraudulent act not punishable under the provisions of the *Criminal Code* should be liable upon conviction under the *Summary Convictions Act* to a money penalty and to imprisonment.

The provisions of this statute and its name were changed and added to by various amendments between the years 1928 and 1950, when it appeared under the name of *The Securities Act* in the Revised Statutes of Ontario. Various amendments made since that date do not affect the present consideration.

Under the Act as it now is, brokers, investment dealers as defined, and persons issuing securities—an expression defined to include bonds, debentures and shares—are prohibited from trading unless they are registered with the Ontario Securities Commission, a body constituted under the provisions of the Act. Trading is defined as including any attempt to deal in, sell or dispose of a security for valuable consideration. Sections 38, 39 and 40 require

1960

SMITH
v.
THE QUEEN

Locke J.

respectively that before the securities of a mining company, an industrial company or an investment company may be offered for sale to the public, a prospectus signed by the directors or promoters of such companies giving the information detailed in these sections must be accepted for filing by the commission. Part XI of the Act, consisting of sections 49 to 62, both inclusive, under the heading "Provisions relating to Trading in Securities Generally", contains further provisions designed for the protection of the public. These are followed by Part XII of the Act which includes s. 63 and it appears under the general heading "Offences and Penalties".

Section 68(1) of the Act reads in part:

> Where a prospectus has been accepted for filing by the Commission under this Act, every purchaser of the securities to which the prospectus relates shall be deemed to have relied upon the representations made in the prospectus whether the purchaser has received the prospectus or not and, if any material false statement is contained in the prospectus, every person who is a director of the company issuing the securities at the time of the issue of the prospectus, and every person who, having authorized such naming of him, is named in the prospectus as a director of the company . . . shall be liable to pay compensation to all persons who have purchased the securities for any loss or damage such persons may have sustained.

The other provisions contained in Part XIII of the Act deal with general matters which are not relevant to the matters to be considered.

It will be seen from the foregoing that, as the original name of the Act implied, the purpose of this legislation is the protection of the public who purchase securities from fraudulent statements or acts which might induce such purchases. Sections 1 to 62 of the Act, both inclusive, to some of which reference has been made, contain provisions designed to ensure that the statements made by brokers and others engaged in the sale and distribution of shares, bonds, debentures or other securities, whether the same be in writing in the form of a prospectus or oral, relating to the security offered for sale shall be the truth and in accordance with the facts and provide the machinery designed to accomplish this purpose.

I agree with my brother Cartwright that if the subject matter of the punishment of persons who induce others to purchase securities by false or fraudulent statements had

not been dealt with in the *Criminal Code*, s. 63 of *The Securities Act* would be *intra vires* the legislature under head 15 of s. 92.

The punishment of directors or other persons who induce others to become members of a company by false or fraudulent statements has long been treated as an offence to be punished by fine or imprisonment. Section 84 of the *Larceny Act*, 24-25 Vict. (Imp.), c. 96, read:

> Whosoever, being a Director, Manager, or Public Officer of any Body Corporate or Public Company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written Statement or Account which he shall know to be false in any material Particular, with Intent to deceive or defraud any Member, Shareholder, or Creditor of such Body Corporate or Public Company, or with Intent to induce any Person to become a Shareholder or Partner therein . . . shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to any of the Punishments which the Court may award as herein-before last mentioned.

In substantially this form these provisions were enacted as s. 85 of the Statutes of Canada for 1869 (c. 21). It appears that s. 343 of the *Criminal Code* replaces these provisions of the earlier legislation. That section reads in part:

> Every one who makes, circulates or publishes a prospectus, statement or account, whether written or oral, that he knows is false in a material particular, with intent
>
> (*a*) to induce persons, whether ascertained or not, to become shareholders or partners in a company,
>
> is guilty of an indictable offence and is liable to imprisonment for ten years.

It will be seen that the offence described in s. 63 (1) (*b*) of *The Securities Act* if made with the intent, *inter alia*, to induce persons to become shareholders of a company is an offence under this section and is punishable as such.

Section 406 of the Criminal Code reads in part:

> Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences, namely,
>
> * * *
>
> (*b*) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to imprisonment for fourteen years or less, is guilty of an indictable offence and is liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable.

1960

SMITH v. THE QUEEN

Locke J.

In my opinion subss. (*b*), (*d*) and (*e*) directly trespass upon the field occupied by s. 343 of the *Criminal Code*. The requirement that the prospectus must be filed with the Commission is not, as has been said, merely to enable that body to determine whether or not the security may be offered for sale to the public—that is of course one of the reasons—but also to place on record a statement of the facts affecting the value of the security upon the faith of which purchasers are by virtue of s. 68 deemed to have purchased, whether or not they have read the prospectus or become aware of its terms. The application to the Commission to file the prospectus is a necessary step on the part of the trader to enable him to offer the security to the public for sale and is made by him for this and for no other purpose.

The section does not purport to deal with innocent misrepresentations; it is only directed against persons who are knowingly responsible for the making of the false statements and this can only refer to fraudulent conduct on the part of the person charged. In the present matter the language of charges 1, 2 and 3 is that Smith was knowingly responsible for the furnishing of false information in a document.

Since the whole purpose of the Act is the protection of the public from relying upon false information when purchasing securities, and that of s. 63 to declare criminal the act of making fraudulent misstatements in a prospectus designed for the purpose of inducing such purchases, there is in essence no difference between the offences created and those prohibited by s. 343 of the *Criminal Code*. The person applying to file a false prospectus must be taken to be aware of the terms of s. 68 of *The Securities Act* and is either publishing or attempting to publish the document within the meaning of s. 343 for the purpose and with the intent of inducing others to purchase the security offered upon the faith of the false statements.

In the present matter, as appears from the information, the prospectus was that of a mining company and was received for filing by the Commission and a receipt issued.

The statements were, therefore, published and were so published with the intent to induce others to purchase the securities. Whether any of the securities were sold on the faith of the prospectus we are not informed.

Accepting the statements in the information as being correct, while the appellant was not charged that he published the prospectus with the intent to induce any person to become a shareholder in the company as must have been done had the charge been laid under s. 343 of the *Criminal Code,* he was charged with the very conduct which that section is designed to prohibit. If the publishing of the false prospectus to the Commission for the purpose and with the intent above mentioned was not in itself sufficient to constitute the offence referred to in s. 343, it was, in my opinion, an attempt to commit that offence within the meaning of s. 406 of the Code which I have mentioned above.

In *Tennant v. Union Bank of Canada*[1], Lord Watson, in discussing an apparent conflict between the *Mercantile Amendment Act of Ontario* and the *Bank Act,* said:

> Statutory regulations with respect to the form and legal effect, in Ontario, of warehouse receipts and other negotiable documents, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that province; and the objection taken by the appellant to the provisions of the Bank Act would be unanswerable if it could be shewn that, by the Act of 1867, the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by sect. 92. But sect. 91 expressly declares that, "notwithstanding anything in this Act", the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority.

Here Parliament, under the powers vested in it by head 27 of s. 91, has declared to be criminal, and provided the penalty for, the publishing of false statements, whether written or oral, which are known to be false in a material part with the intent to induce others to purchase securities, and by s. 406 has also rendered criminal an attempt to do so. The offences dealt with in s. 63 in *The Securities Act,* for the reasons above stated, trespass upon the exclusive jurisdiction of Parliament in this field and are accordingly, in my opinion, *ultra vires.* No one could, of course, suggest

[1] [1894] A.C. 31 at 45, 63 L.J.P.C. 25.

1960

SMITH v. THE QUEEN

Locke J.

that there is any doubt as to the jurisdiction of Parliament in the matter and it is not within the powers of the Legislature to deal with offences of the same nature by penal legislation to supplement or vary the penalties prescribed by the Code.

As the report shows, the main question considered by the Judicial Committee in *Lymburn v. Mayland*[1] was as to whether the *Security Frauds Prevention Act,* apart from its criminal provisions, was *intra vires,* and it is only at the conclusion of the reasons delivered that any mention is made of s. 20 which made it an offence to commit any fraudulent act not punishable under the *Criminal Code.* Considering the Act as a whole, Lord Atkin said that there was no ground for holding that the Act was a colourable attempt to infringe upon the exclusive legislative power of the Dominion as to criminal law. There is, of course, in the present matter no such contention advanced by the appellant. As to s. 20 the judgment reads (p. 327):

> It is said that this encroaches on the exclusive legislative power of the Dominion as to criminal law. Having regard to the wide definition of "fraudulent act" above referred to, it may well be that this argument is well founded. But so far as the section is invalid it appears to be clearly severable.

This appears to indicate, without deciding the point, that the section in question was beyond provincial powers, a conclusion inconsistent with the arguments addressed to us in this matter on behalf of the respondent.

I have had the advantage of reading, and I agree with, the judgment to be delivered by my brother Cartwright in this matter and would allow this appeal, set aside the order of the Court of Appeal and restore the order of Hughes J.

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by this Court, from a unanimous judgment of the Court of Appeal for Ontario[2], quashing an order of prohibition made by Hughes J. directed to His Worship Magistrate Prentice or such other Justices as might be in Magistrate's Court in the City of Toronto prohibiting them from further proceeding with an information charging the appellant with offences under *The Securities Act,* R.S.O. 1950, c. 351, hereinafter referred to as "the Act".

[1] [1932] A.C. 318, 101 L.J.P.C. 89.

[2] [1959] O.R. 365, 31 C.R. 79, 125 C.C.C. 43.

The information in question contained the following four counts:

(1) That Lyle Francis Smith, formerly of the City of Toronto in the County of York, being a director of Canadian All Metals Explorations Limited, between the 13th day of January, 1955, and the 13th day of April, 1955, in the County of York and elsewhere in the Province of Ontario, was knowingly responsible for the furnishing of false information in a document, namely a prospectus for Canadian All Metals Explorations Limited dated the 4th day of March, 1955, submitted to the Ontario Securities Commission by Canadian All Metals Explorations Limited, pursuant to subsection 1 of Section 38 of The Securities Act, and for which a receipt was issued by the Registrar of the Ontario Securities Commission on April 12th, 1955, which prospectus was required to be filed pursuant to subsection 1 of Section 38 of The Securities Act, contrary to the provisions of Section 63 of The Securities Act, R.S.O. 1950, c. 351, and Amendments thereto.

(2) AND FURTHER that the said LYLE FRANCIS SMITH, being a director of Canadian All Metals Explorations Limited, between the 12th day of April, 1955, and the 28th day of September, 1955, in the County of York in the Province of Ontario was knowingly responsible for the furnishing of false information in a document, namely, an Amendment dated the 8th day of September, 1955, to the prospectus of Canadian All Metals Explorations Limited dated the 4th day of March, 1955, submitted to the Ontario Securities Commission pursuant to subsection 9 of Section 38 of The Securities Act, and for which a receipt was issued by the Registrar of the Ontario Securities Commission on the 27th day of September, 1955, which Amendment was required to be filed pursuant to subsection 9 of Section 38 of The Securities Act, contrary to the provisions of Section 63 of The Securities Act, R.S.O. 1950, c. 351, and Amendments thereto.

(3) AND FURTHER that the said LYLE FRANCIS SMITH being a director of Canadian All Metals Explorations Limited, between the 12th day of April, 1955 and the 15th day of October, 1955, in the County of York and elsewhere in the Province of Ontario was knowingly responsible for the furnishing of false information in a document, namely an Amendment dated the 3rd day of October, 1955, to the prospectus of Canadian All Metals Explorations Limited dated the 4th day of March, 1955, submitted to the Ontario Securities Commission, pursuant to subsection 9 of Section 38 of The Securities Act, and for which a receipt was issued by the Registrar of the Ontario Securities Commission on October 14th, 1955, which Amendment was required to be filed pursuant to subsection 9 of Section 38 of The Securities Act, contrary to the provisions of Section 63 of The Securities Act, R.S.O. 1950, c. 351 and Amendments thereto.

(4) AND FURTHER that the said LYLE FRANCIS SMITH, being a director of Canadian All Metals Explorations Limited, between the 13th day of January, 1955, and the 14th day of February, 1956, in the County of York and elsewhere in the Province of Ontario, was knowingly responsible for failure to perform certain acts where such failure constituted a violation of subsection 1 of Section 38 of The Securities Act, R.S.O. 1950, c. 351, and Amendments thereto, in that the said LYLE FRANCIS SMITH, being a director of Canadian All Metals Explorations Limited, between the 13th day of January, 1955, and the 14th day of February, 1956, in the County of York and elsewhere in the Province of Ontario, was knowingly responsible for trading by Canadian All Metals Explorations Limited,

1960

SMITH
v.
THE QUEEN

Cartwright J.

on its own account, in securities issued by a mining company, namely Canadian All Metals Explorations Limited, where such trading was in the course of a primary distribution to the public of such securities, without filing with the Ontario Securities Commission, and without obtaining a receipt therefor from the Registrar of the Ontario Securities Commission, a prospectus containing full, true and plain disclosure relating to the securities issued by the said Canadian All Metals Explorations Limited and setting forth the information required to be given by clauses (i), (j), (o), (q), and (u) of subsection 1 of Section 38 of The Securities Act contrary to Sub-Section 1 of Section 38 and Section 63 of The Securities Act, R.S.O. 1950, chapter 351 and amendments thereto.

Section 38(1) of the Act, which is referred to in counts (1) and (4) of the information, is as follows:

38(1) No person or company shall trade in any security issued by a mining company either on his or its own account or on behalf of any other person or company where such trade would be in the course of a primary distribution to the public of such security until there has been filed with the Commission a prospectus, and a receipt therefor obtained from the registrar, which prospectus shall be dated and signed by every person who is, at the time of filing, a director or promoter of the mining company issuing the security or an underwriter or optionee of such security, and which prospectus shall contain a full, true and plain disclosure relating to the security issued and shall set forth.

(There follow 23 clauses lettered from (a) to (w), several of which contain sub-clauses, setting out in detail the matters required to be disclosed)

Clauses (*i*), (*j*), (*o*), (*q*) and (*u*), which are referred to in count (4) of the information are as follows:

(*i*) the shares sold for cash to date tabulated under each class of shares as follows:
  (i) the number of shares sold, separately listed as to price,
  (ii) the total cash received for the shares sold, and
  (iii) the commissions paid on the sale of the shares;

(*j*) the particulars of securities, other than shares, sold for cash to date as follows:
  (i) the securities sold,
  (ii) the total cash received for the securities sold, and
  (iii) the commissions paid on the sale of the securities;

(*o*) the details of future development and exploration plans of the management showing how it is proposed to expend the proceeds from current sales of securities;

(*q*) the amount and general description of any indebtedness to be created or assumed, which is not shown in a balance sheet filed with the Commission, and also particulars of the security, if any, given or to be given for such indebtedness;

(*u*) any other material facts not disclosed in the foregoing;

Section 38(9) of the Act, which is referred to in counts (2) and (3) of the information, is as follows:

(9) Where a change occurs during the period of primary distribution to the public in any material fact contained in any prospectus, financial statement or report accepted for filing under this section, which is of such a nature as to render such prospectus, financial statement or report misleading, an amended prospectus, financial statement or report shall be filed within twenty days from the date the change occurs but, subject to any direction of the Commission, the amended prospectus shall be required to be signed only by the signatories to the original prospectus and where any change in directors, promoters, underwriters or optionees has occurred since the filing of the original prospectus the decision of the Commission as to who shall be required to sign the amended prospectus or as to any like matter shall be final.

Section 63 of the Act, which is referred to in all of the counts, is set out in the reasons of the Chief Justice.

It is clear that each count charges an offence created by the Act, that in count (1) by the combined effect of s. 38(1) and s. 63(1)(d), those in counts (2) and (3) by the combined effect of s. 38(9) and s. 63(1)(d), and that in count (4) by the combined effect of s. 38(1) and s. 63(1)(e); and the questions are (i) whether, in the absence of conflicting legislation by Parliament, it is within the power of the Legislature to create these offences, and (ii) whether the provisions creating them are so far in conflict with existing provisions of the *Criminal Code* as to be inoperative. The question whether the provisions of the Act other than those mentioned in this paragraph are *intra vires* of the legislature arises only in connection with Mr. Thomson's argument that certain provisions of s. 63 other than those contained in s. 63(1)(d) and (e) are *ultra vires* and that the section is inseverable.

It was decided in *Rex v. Nat Bell Liquors*[1], that where a provincial Act imposes penalties for enforcing a law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in s. 92 of the *British North America Act,* proceedings to enforce such penalties are proceedings in a criminal cause in the sense in which the word "criminal" is used in what is now s. 40 of the *Supreme Court Act,* although the provincial Act

[1] [1922] 2 A.C. 128, 91 L.J.P.C. 146.

1960

SMITH v. THE QUEEN

Cartwright J.

creating the offence is not legislation in relation to "the criminal law" in the sense in which that term is used in head 27 of s. 91 of the *British North America Act*.

The appellant does not contend that the Act as a whole is invalid. Viewed in the constitutional aspect it does not differ essentially from the *Security Frauds Prevention Act*, 1930, of Alberta, the validity of which was asserted by the Judicial Committee in *Lymburn v. Mayland*[1].

In my opinion, it was rightly conceded that the provisions of s. 38 with which we are concerned are *prima facie* within the powers of the legislature. Their effect is (i) to prohibit persons from trading in any security issued by a mining company where such trade would be in the course of a primary distribution to the public until there has been filed with the Commission a prospectus containing full, true and plain disclosure of certain specified information, and a receipt therefor has been obtained from the Registrar, and (ii) to require the filing of an amended prospectus where a material change occurs during the period of primary distribution. These provisions are an integral part of a law providing for the regulation of the sale of securities in the province with a view to protecting the public from being defrauded; one of their purposes and effects is to ensure that the Commission shall receive true factual information of the sort necessary to enable it to perform this function of regulation; but, as is pointed out by Hughes J., by virtue of ss. 47 and 47a of the Act, the prospectus required by s. 38(1) to be filed with the Commission will find its way in the form in which it is filed into the hands of members of the public who have been invited to buy the shares of the mining company involved, and consequently, another of the purposes and effects of s. 38(1) read with ss. 47 and 47a is to require that prospective purchasers shall be given a copy of a true prospectus.

The main arguments of the appellant are (i) that those provisions of the Act the combined effect of which is to create the four offences with which the appellant is charged are inoperative because they are in conflict with the provisions of s. 343 of the *Criminal Code;* and (ii) that provisions of s. 63 other than clauses (d) and (e) of subs. (1)

[1] [1932] A.C. 318, 101 L.J.P.C. 89.

are invalid and, whether or not they are severable, disclose the intention of the Legislature to invade the field of the criminal law reserved to Parliament by head 27 of s. 91.

As to the first of these arguments, it will be observed that the offences with which the appellant is charged may be briefly described as follows:

(1), being knowingly responsible for the furnishing of false information in a prospectus filed with the Commission the filing of which was required by s. 38(1) of the Act;

(2) and (3), being knowingly responsible for furnishing false information in two documents amending the said prospectus filed with the Commission the filing of which was required by s. 38(9) of the Act;

(4), being knowingly responsible for trading by the mining company on behalf of which the prospectus was filed in securities issued by it when such trading was in the course of a primary distribution to the public of such securities without filing with the Commission a true prospectus as required by s. 38(1).

As to count (4) it is obvious from reading the other counts that what is alleged against the appellant is not that no prospectus had been filed when the trading took place but that the prospectus and amendments which were filed contained false information.

It may well be that on an application for prohibition the Court cannot interpret the meaning of an ambiguous count by reference to the other counts in the same information. If what is intended to be charged in count (4) is that the appellant was knowingly responsible for trading in the manner described when no prospectus had been filed at all other considerations would arise and it is my tentative view that it would be *intra vires* of the Legislature to make it an offence to trade under such circumstances. It is also, I think, questionable whether an application for prohibition was the appropriate remedy as the learned Magistrate would seem to have had jurisdiction to decide the question whether the provisions of the Act on which the four counts are based were *ultra vires* of the Legislature. However, these procedural matters were not raised before us and all counsel sought a decision on the constitutional questions which were so fully dealt with in the courts below. I propose therefore

1960

SMITH v. THE QUEEN

Cartwright J.

to deal with the case on the assumption that the meaning of count (4) is that which I have indicated in the preceding paragraph of these reasons.

In approaching the question whether the alleged conflict exists, it is necesary to consider what are the essential matters which the prosecution would have to establish to prove the commission of the offences charged.

As to count (1) these would be:—(i) that a prospectus was filed with the Commission for Canadian All Metals Explorations Limited, hereinafter referred to as "the Company"; (ii) that the company was a mining company; (iii) that the prospectus contained false information; and (iv) that the appellant was knowingly responsible for furnishing the false information.

As to counts (2) and (3) the matters to be proved would be the same as in the case of count (1) *mutatis mutandis* having regard to the fact that the false information was contained not in an original prospectus but in amendments thereto.

As to count (4) the matters to be proved would be:—(i) that the company was a mining company; (ii) that the company had traded on its own account in securities issued by it in the course of the primary distribution to the public of such securities; (iii) that at the time of such trading there had not been filed a prospectus containing full, true and plain disclosure of the matters required to be disclosed by the clauses of s. 38(1) specified in the count; and (iv) that the appellant was knowingly responsible for the matters stated in (ii) and (iii).

The relevant portions of s. 343 of the *Criminal Code* are as follows:

> 343. (1) Every one who makes, circulates or publishes a prospectus, statement or account, whether written or oral, that he knows is false in a material particular, with intent
>
> (*a*) to induce persons, whether ascertained or not, to become shareholders . . . in a company, . . .
>
> is guilty of an indictable offence and is liable to imprisonment for ten years.

To make a case under this section based on the facts which are alleged against the appellant, it would be necessary for the prosecution to allege in the information and to prove not only that the person charged had been knowingly

responsible for the making of a material false statement in the prospectus, but also, that this was done with intent to induce persons, whether ascertained or not, to become shareholders in the company; in the case of none of the four counts with which the appellant is charged would it be necessary for the prosecution to prove the existence of such an intention; the existence of this difference is one of the primary reasons which brought the Court of Appeal to the conclusion that the legislation creating the offences with which the appellant is charged is not in conflict with s. 343 of the *Criminal Code*.

This difference appears to me to be apparent rather than real. Subsections (1) and (9) of s. 38 of the Act are concerned with one activity only, i.e., the trading in securities issued by a mining company where such trade would be in the course of a primary distribution to the public of such securities; the subsections only come into operation when some person or company proposes to endeavour to make such a distribution; they require the person or company so proposing to file a true prospectus as specified; it is difficult to imagine a situation in which any person or company would proceed to file a prospectus under s. 38 unless it intended to attain the end of having members of the public purchase the shares to which the prospectus relates, that is to say, intended to induce persons, probably as yet unascertained, to become shareholders in a company. Having regard to the presumption that a person intends the natural consequences of his acts it would seem that proof of the allegations contained in any of the counts in the information would constitute a *prima facie* case under s. 343(1) (a) of the *Criminal Code*.

Moreover, s. 68(1) of the Act provides in part as follows:

> Where a prospectus has been accepted for filing by the Commission under this Act, every purchaser of the securities to which the prospectus relates shall be deemed to have relied upon the representations made in the prospectus whether the purchaser has received the prospectus or not . . .

There does not appear to me to be any realistic distinction between making a statement with intent that it shall be relied upon by persons before they become shareholders in the company and making a statement "with intent to induce" those persons to become shareholders.

1960

SMITH
v.
THE QUEEN

Cartwright J.

The other primary reason on which the judgment of the Court of Appeal appears to me to be based is expressed as follows by Porter C.J.O.:

> The object of this section (i.e. s. 343 of the *Criminal Code*) is different from that of the sections of The Securities Act in issue here. The objective of this section of the *Criminal Code* is to make a criminal offence of fraud upon shareholders and certain other persons in certain dealings with companies. The provincial sections are confined to information to be supplied to the Securities Commission to carry out in part the general purpose of the Securities Act, viz., to regulate the manner in which the business of selling securities should be conducted, and to prevent frauds upon the public. The pith and substance of these sections of The Securities Act is to assure full disclosure prior to dealings with the public.

With respect, I find myself unable to agree with this view, because as is pointed out by Hughes J., when s. 38 is read in the context of the rest of the Act and particularly ss. 47 and 47a, it is plain that the detailed information which s. 38 requires shall be truthfully given is intended and, indeed, required to be placed before those members of the public to whom the shares are offered. I can find no escape from the conclusion expressed by Hughes J. in the following passage:

> I think it is clear, taking into account the meaning of the word prospectus and the effect of Sections 38(1), 47 and 47a taken together with 63(1) that the Province has attempted to punish by fine, imprisonment or both a course of conduct which is so similar to that condemned by Section 343 of the Criminal Code of Canada as to create an inconsistency or conflict. The Dominion legislation must therefore prevail and, as a result, I find that it is not within the competence of the Legislature of Ontario to create the offences contemplated by the application of Section 63(1) (d) and (e) to the provisions of Section 38(1) and (9) of The Securities Act. . . .

If the judgment of the Court of Appeal stands, it will bring about the result that a person who is alleged to have committed the offence described in s. 343(1) (a) of the Code may, at the option of the Crown, be charged on the same facts not under the Code but under the Act and thereby be deprived of the right to be tried by a jury.

The agreement with the view of Hughes J. which I have expressed above renders it unnecessary for me to deal with the second main argument of Mr. Thomson, as to the provisions of s. 63 of the Act other than clauses (d) and (e) of subs. (1). I think it desirable, however, to say that in my opinion any provisions of s. 63 which may be found to be in conflict with provisions of the *Criminal Code* would be severable from the remainder of the section. I wish also

to make it clear that I share the opinion of Hughes J. and of the Court of Appeal that the impugned provisions of the Act standing alone would be valid. It is only because of my agreement with the view of Hughes J. that they conflict with the provisions of s. 343 of the *Criminal Code* that I reach the conclusion that they are inoperative to create the offences with which the appellant is charged.

In the result, I would allow the appeal, set aside the order of the Court of Appeal and restore the order of Hughes J.; the appellant is entitled to recover his costs in the Court of Appeal and in this Court from the informant; I would make no order as to the costs of the Attorneys General.

The judgment of Abbott, Martland and Judson JJ. was delivered by

MARTLAND J.:—The circumstances which gave rise to this appeal are set forth in the reasons of the Chief Justice and of my brother Cartwright. The question in issue is as to whether or not it was within the competency of the Legislature of Ontario to create the offences contemplated by the application of s. 63(1) (d) and (e) to the provisions of s. 38(1) and (9) of *The Securities Act,* R.S.O. 1950, c. 351. There is no need for me to repeat here those provisions.

There would appear to be unanimity of view that the provisions of s. 38 of that Act are *prima facie* within the powers of the Legislature. The sole issue is as to whether the paragraphs of s. 63 above mentioned are in conflict with the provisions of s. 343 of the *Criminal Code* so as to make them inoperative.

*The Securities Act* exists to regulate the securities business. This is achieved through two main forms of control, the first of which is directed towards the persons or companies selling the securities and the second of which is directed to the securities being sold.

Trading in securities without registration is prohibited by s. 6 of the Act. The duty to grant registration and the power to refuse, suspend or cancel such registration are imposed upon and vested in the Commission by s. 7 and s. 8 of *The Securities Act.*

1960

SMITH
v.
THE QUEEN

Martland J.

Trading in securities in the course of a primary distribution of such securities to the public is prohibited by ss. 38, 39 and 40 of *The Securities Act* unless certain prerequisites, which vary somewhat depending on whether the company whose securities are being offered is a mining, industrial or investment company, are first completed in accordance with the relevant section. Each of the sections requires that a prospectus first be submitted to the Commission making "full, true and plain disclosure" relating to the securities which it is proposed to offer containing the information stipulated in the section. The Commission, under s. 44 of *The Securities Act,* in its discretion, may accept the prospectus submitted to it for filing and direct the Registrar to issue the receipt referred to in ss. 38, 39 and 40, unless it appears that one of the circumstances set out in s. 44 exists. In such a case it is implicit that the Commission is under a duty not to accept the material and forthwith to give the notice provided for by s. 45. The equivalent of s. 8, which provides for suspension or cancellation of existing registrations, is s. 46 which empowers the Commission, where it discovers that any of the circumstances in s. 44 exist following the issuance of a receipt for the prospectus by the Registrar, to order that all trading in the primary distribution to the public of the securities to which the prospectus relates shall cease.

Thus control is exercised through the registration of persons and companies before they are permitted to trade in securities coupled with what is essentially the registration of the securities themselves before the securities may be traded in the course of a primary distribution to the public.

The important feature of ss. 38, 39 and 40 is that, in addition to requiring that a prospectus filed with the Commission shall contain a true, full and plain disclosure relating to the securities proposed to be issued, it is also required that the prospectus shall set forth the specific, detailed information required in each of these sections and shall be accompanied by certain additional material, including financial statements. Unless the material required by these sections is filed with and accepted by the Commission, there can be no lawful trading in the securities in question in the course of a primary distribution.

If the material required to be furnished to the Commission under these sections is accepted by it and a receipt issued, then, and only then, ss. 47 and 47a come into operation and require that a copy of the prospectus and of the financial statements filed with the Commission shall come into the hands of the members of the public who are invited to buy the securities involved. This requirement is not only to compel the furnishing to such persons of a prospectus which is true, but also that it must be one which gives the detailed information regarding the affairs of the company which is required to be furnished to the Commission itself under ss. 38, 39 and 40.

The scheme of these sections of the act is, therefore, to prevent trading in securities in the course of primary distribution until the Commission has received all the information required by the Act and has accepted such material for filing, and then to ensure that persons who are asked to subscribe for such securities shall have all the information which the Commission itself has received.

The purpose of these sections is, of course, defeated if the information is untrue and, in my opinion, the Legislature has the power to require that this information shall be true and to penalize persons who furnish false information, or who fail to comply with the requirements of the Act.

It does not appear to me that there is a conflict between s. 63(1)(d) and (e) and s. 343 of the *Criminal Code*. The latter provision makes it an offence to make, circulate or publish a prospectus known to be false in a material particular with intent to induce persons to become shareholders in a company. This section deals with a false statement in a material particular deliberately made in order to persuade someone to subscribe for shares in a company. The section, of course, has nothing to say as to what the contents of a prospectus must be.

Section 63(1)(d) and (e), on the other hand, is designed to penalize a person who, required as he is, by the provisions of the Act, to furnish full, detailed information about the company whose securities are sought to be sold, is knowingly responsible for the incorporation in that material of information which is false. A good deal of that information might never be incorporated in a prospectus at all unless the Act had required it. Paragraph (d) is not limited

1960

SMITH v. THE QUEEN

Martland J.

to falsity of the prospectus "in a material particular", but applies to any information required to be furnished under the Act. It affects any one who is knowingly responsible for the furnishing of the information, whether he personally is interested in the marketing of the securities or not; for example, the engineer, geologist or prospector who furnishes the report on the property of a mining company under subs. (2) of s. 38, or the auditor who furnishes a report pursuant to subs. (8a) of that section.

The test to be applied in cases of this kind is that which was stated by Duff C. J. in *The Provincial Secretary of the Province of Prince Edward Island v. Egan*[1]:

> In every case where a dispute arises, the precise question must be whether or not the matter of the provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be brought within the scope of criminal law in the sense of section 91. If there is repugnancy between the provincial enactment and the Dominion enactment, the provincial enactment is, of course, inoperative.

For the reasons already given, I do not think that the matter of the provincial legislation in question here is so related in substance to s. 343 of the *Criminal Code* as to be brought within the scope of criminal law in the sense of s. 91 of the *British North America Act*. I do not think there is repugnancy between s. 63(1)(d) and (e) of *The Securities Act* and s. 343 of the *Criminal Code*. The fact that both provisions prohibit certain acts with penal consequences does not constitute a conflict. It may happen that some acts might be punishable under both provisions and in this sense that these provisions overlap. However, even in such cases, there is no conflict in the sense that compliance with one law involves breach of the other. It would appear, therefore, that they can operate concurrently.

I do not think that the views expressed by Lord Atkin in *Lymburn v. Mayland*[2], with reference to s. 20 of *The Security Frauds Prevention Act*, 1930 (Alta.), c. 8, are adverse to the conclusion which I have reached.

Section 20(1) of that Act provided, in part, as follows:

> 20. (1) Every person who violates any provision of this Act or the Regulations designated as an offence, or who does any fraudulent act not punishable under the provisions of *The Criminal Code of Canada*, shall be liable upon summary conviction thereof to a penalty . . .

[1] [1941] S.C.R. 396 at 402, 3 D.L.R. 305.
[2] [1932] A.C. 318, 101 L.J.P.C. 89.

Referring to this section, at p. 327 of the report, Lord Atkin said:

> It is said that this encroaches on the exclusive legislative power of the Dominion as to criminal law. Having regard to the wide definition of "fraudulent act" above referred to, it may well be that this argument is well founded. But so far as the section is invalid it appears to be clearly severable.

It will be noted that the portion of s. 20 to which he directed his attention was not that which imposed a penalty for the violation of the Act, or of the Regulations, but the general provision relating to "any fraudulent act not punishable under the provisions of *The Criminal Code of Canada*". This wide provision might, as he indicated, have gone beyond the imposing of a penalty for enforcing a provincial law. The provisions of s. 63(1)(d) and (e) of the Ontario Act do not offend in that way.

In my opinion, therefore, the appeal should be dismissed with costs, but there should be no costs to or against the Attorney General of Canada nor the Attorneys General of any of the provinces.

RITCHIE J. (*dissenting*):—I agree with Hughes J. and with the views expressed in the reasons for judgment of Locke and Cartwright JJ. which I have had the benefit of reading that although the impugned provisions of the Ontario *Securities Act* would be valid if they stood alone, they have the combined effect when read in the context of the statute as a whole of creating an offence which is substantially the same as that for which provision is made by s. 343 of the *Criminal Code* and to that extent they are inoperative. In this respect this case is, in my opinion, basically different from that of *O'Grady v. Sparling*[1].

I am also of opinion that although the specific "intent to induce persons... to become shareholders of a company" which is required under the provisions of s. 343 of the *Criminal Code* is not expressly stated to be one of the ingredients of the offences created by the combined effect of s. 63(1) (d) and (e), s. 38(1) and s. 38(9) of *The Securities Act*, it is nevertheless implicit in the latter provisions that such an intent must form a part of the offences thereby created. This factor, in my view, distinguishes the present case from that of *Stephens v. The Queen*[2].

[1] [1960] S.C.R. 804.

[2] [1960] S.C.R. 823.

1960

SMITH
v.
THE QUEEN

Ritchie J.

The provisions of ss. 63(1), 38(1), 38(9) and 68(1) of *The Securities Act* and ss. 343 and 406 of the *Criminal Code* are set out in the reasons of other members of this Court.

The first three counts of the information here in question which are fully reproduced in the reasons of Cartwright J. all charge the appellant with being

> . . . knowingly responsible for the furnishing of false information in a document . . . submitted to the Ontario Securities Commission . . . pursuant to

s. 38 of *The Securities Act "and for which a receipt was issued by the Registrar of the Ontario Securities Commission."* (The italics are mine.)

It seems to me that under the provisions of *The Securities Act,* whether the document be a prospectus as charged in the first count or an amendment to a prospectus as charged in the second and third counts, the information furnished to the Commission in such a document takes on a very different character and significance after it has been accepted for filing and a receipt therefor has been issued by the Registrar than it bore before it was so accepted.

Before the prospectus or amendment is accepted for filing by the Commission, although it is true that the information therein contained is being furnished for the purpose and with the intention of qualifying the shares or other securities to which it relates for trading by way of primary distribution to the public, it is nevertheless only being furnished to the Commission and not, at this stage, to the public, and if the Commission becomes aware that any of it is false it can refuse to file the prospectus in which case no trading in the securities can take place and the public will not be exposed to the consequences of being misled by the information (see *Securities Act,* ss. 44 and 45).

After the prospectus has been accepted for filing by the Commission the information therein contained ceases to be simply a matter between the person who supplies it and the Commission and it becomes information which is required to be delivered to, and deemed to be relied upon by, all persons before they become shareholders in the company to which it relates (see ss. 47 and 47(a) referred to in the judgment of Hughes J. and s. 68(1) of *The Securities Act*).

It is to be observed that the document which is required by ss. 47 and 47(a) to be delivered to every purchaser of shares before confirmation of sale is "a copy of the prospectus or amended prospectus, *whichever is the last filed with the Commission*" (the italics are mine) and the opening words of s. 68(1) state clearly that it is only in cases "*where a prospectus has been accepted for filing by the Commission*" (the italics are mine) that "every purchaser of the securities to which the prospectus relates shall be deemed to have relied upon the representations made in the prospectus...".

In considering the true meaning and effect to be attached to the language of s. 38(1) of *The Securities Act* which is reproduced in the decision of Cartwright J., it is worthy of note that the words "trade" or "trading" as used in the statute include "any solicitation for or obtaining of a subscription to... a security for valuable consideration..." (see *Securities Act,* s. 1(t)).

It is to be noted that the "false information" referred to in the present charges is information required to be furnished pursuant to ss. 38(1) and 38(9) of *The Securities Act,* and in my view the particulars required by these sections are material particulars, at least in the sense that no trading can take place in the securities to which they relate unless they are so furnished. The second and third counts lodged against the appellant each relate to "an amendment" submitted pursuant to s. 38(9) and it is pointed out that under the terms of that subsection such an amendment only becomes necessary

> Where a change occurs during the period of primary distribution to the public in any material fact contained in any prospectus, financial statement or report accepted for filing . . . .

The present appellant is not merely charged with being "knowingly responsible for the furnishing of false information submitted to the Ontario Securities Commission" and it is not necessary to express an opinion as to the validity of such a charge.

What the appellant is here charged with is being knowingly responsible for the furnishing of false information in a prospectus and amendments submitted pursuant to s. 38(1) or s. 38(9) *for which a receipt was issued by the Registrar* indicating that it had been accepted for filing

1960

SMITH v. THE QUEEN

Ritchie J.

and, in my opinion, this, in effect, means that he is charged with *being responsible for having knowingly made a material false statement which is to be used for soliciting other persons to become shareholders of the company to which it relates and which is to be relied upon by all purchasers of such shares.*

As this offence seems to me to be in substance the same as that of making

> . . . a statement . . . that he knows is false in a material particular, with intent . . . to induce persons . . . to become shareholders in a company

and as this is the language of s. 343 of the *Crimnal Code,* I am of opinion, as I have indicated, that there is a direct conflict between the impugned provisions of the provincial statute and those of the *Criminal Code* and that it is not within the competence of the Legislature of Ontario to create the offences here in question.

In reaching this conclusion, I am mindful of the language used by Sir Lyman Duff in *Provincial Secretary of Prince Edward Island v. Egan*[1], where he said:

> It is, of course, beyond dispute that where an offence is created by competent Dominion legislation in exercise of the authority under section 91(27), the penalty or penalties attached to that offence, as well as the offence itself, become matters within that paragraph of section 91 which are excluded from provincial jurisdiction.

I would allow the appeal and restore the order of Hughes J.

*Appeal dismissed with costs, Locke, Cartwright and Ritchie JJ. dissenting.*

*Solicitors for the appellant: Langille & Thomson, Toronto.*

*Solicitor for the respondent: H. S. Bray, Toronto.*

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*May 16, 17

Oct. 4

JAMES PATRICK O'GRADY .....APPELLANT;

AND

HARVEY D. SPARLING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Constitutional law—Criminal law—Whether provincial careless driving enactment intra vires—Advertent and inadvertent negligence—The Highway Traffic Act, R.S.M. 1954, c. 112, s. 55(1)—Criminal Code, 1953-54 (Can.), c. 51, ss. 191(1), 221(1).*

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

[1] [1941] S.C.R. 396 at 403, 3 D.L.R. 305.

The accused being charged under s. 55(1) of the Manitoba *Highway Traffic Act* with driving without due care and attention moved for an order of prohibition on the ground that s. 55(1) was *ultra vires* because it was legislation in relation to criminal law, and also, because the subject-matter of the section fell within the paramount jurisdiction of Parliament, which had occupied the field by the enactment of s. 221 of the *Criminal Code*. The motion was dismissed at trial, and this dismissal was affirmed on appeal. Pursuant to the granting of special leave the accused appealed to this Court.

*Held* (Locke and Cartwright JJ. *dissenting*): The appeal should be dismissed.

*Per* Kerwin C.J. and Taschereau, Fauteux, Abbott, Martland, Judson and Ritchie JJ.: A provincial enactment does not become a matter of criminal law merely because it consists of a prohibition and makes it an offence for failure to observe the prohibition. Section 55(1) of *The Highway Traffic Act* has for its true object, purpose, nature or character the regulation of traffic on highways and is valid provincial legislation.

There is no conflict or repugnancy between this section and s. 221 of the *Criminal Code*. The provisions of the two sections deal with different subject-matters and are for different purposes; s. 55(1) is highway legislation dealing with regulation and control of traffic on highways, and s. 221 is criminal law dealing with "advertent negligence". Even though a particular case may be within both provisions that does not mean that there is conflict so as to render s. 55(1) suspended or inoperative.

Parliament has defined "advertent negligence" as a crime under ss. 191(1) and 221(1) of the Code. It has not touched "inadvertent negligence", which is dealt with under the provincial legislation in relation to the regulation of highway traffic.

*Regina v. Yolles*, [1959] O.R. 206, approved; *Lord's Day Alliance of Canada v. Atty.-Gen. of British Columbia et al.*, [1959] S.C.R. 497, applied; *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576; *Provincial Secretary of P.E.I. v. Egan*, [1941] S.C.R. 396; *Quong-Wing v. The King*, (1914) 49 S.C.R. 440; *McColl v. Canadian Pacific Railway Co.*, [1923] A.C. 126; *R. v. Corry* 26 Alta. L.R. 390; *R. v. Dodd*, [1957] O.R. 5, *R. v. Mankow*, (1959) 28 W.W.R. 433; *R. v. Stephens*, (1959-60) 30 W.W.R. 145, referred to.

*Per* Locke and Cartwright JJ., *dissenting*: While the types of negligence dealt with in the two enactments differ, the true nature and character of the legislation contained in s. 55(1) of the Act does not differ in kind from the legislation contained in ss. 191(1) and 221(1) of the Code. Each enactment makes negligence a crime although one deals with inadvertent negligence and the other with advertent negligence. The provisions of s. 55(1), if enacted by Parliament as part of the *Criminal Code*, would clearly be a law in relation to the criminal law within the meaning of head 27 of s. 91 of the *British North America Act*. The impugned sub-section differs generically from those provisions of the Act prescribing detailed rules of conduct.

There is no room for the view that s. 55(1) is *intra vires* because it operates in an otherwise unoccupied field, for the field which the impugned legislation seeks to enter is one reserved exclusively for Parliament by head 27 of s. 91.

1960

O'GRADY v. SPARLING

Assuming that s. 55(1) has a provincial aspect, which in fact it does not have, the view that it would be valid under the "overlapping doctrine" until Parliament occupies the field in which it operates cannot be accepted, for Parliament has by necessary implication fully occupied the field. Parliament has expressed that a certain kind or degree of negligence shall be punishable as a crime, and it follows that it has decided that no less culpable kind or degree of negligence shall be so punishable. The provincial legislature cannot remedy what it regards as defects or omissions in the criminal law as enacted by Parliament.

*Regina v. Yolles, supra; Provincial Secretary of P.E.I. v. Egan, supra,* discussed; *Attorney-General for Ontario v. Winner,* [1954] A.C. 541; *Proprietary Articles Trade Association v. Attorney General for Canada,* [1931] A.C. 310; *Union Colliery Co. of British Columbia v. Bryden* [1899] A.C. 580; *Toronto R. Co. v. The King,* [1917] A.C. 630, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal from the judgment of Williams C.J.K.B. Appeal dismissed, Locke and Cartwright JJ. dissenting.

*H. P. Blackwood, Q.C.,* and *S. Paikin, Q.C.,* for the appellant.

*G. E. Pilkey,* for the respondent.

*W. R. Jackett, Q.C.,* and *S. Samuels,* for the Attorney General of Canada.

*W. J. Wilson, Q.C.,* for the Attorney General for Alberta.

*L. H. McDonald,* for the Attorney General for Saskatchewan.

*W. G. Burke-Robertson, Q.C.,* for the Attorney-General of British Columbia.

*E. Pepper,* for the Attorney-General for Ontario.

The judgment of Kerwin C. J. and of Taschereau, Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The appellant, being charged under s. 55(1) of the Manitoba *Highway Traffic Act* with driving without due care and attention, moved for prohibition on the ground that the section was beyond the powers of the provincial legislature because it was legislation in relation to criminal law, and also, because the subject-matter of the section fell

[1] (1959-60), 30 W.W.R. 156, 22 D.L.R. (2d) 150.

within the paramount jurisdiction of the Parliament of Canada, which had occupied the field by the enactment of s. 221 of the *Criminal Code*.

The motion for prohibition was dismissed by the Chief Justice of the Court of Queen's Bench, who adopted the reasoning of the majority of the Ontario Court of Appeal in *Regina v. Yolles*[1]. This dismissal was affirmed on appeal[2], Adamson C.J.M. dissenting. The appellant now appeals pursuant to special leave granted by this Court.

Section 55(1) of *The Highway Traffic Act*, R.S.M. 1954, c. 112, reads:

> Every person who drives a motor vehicle or a trolley bus on a highway without due care and attention or without reasonable consideration for other persons using the highway is guilty of an offence.

The relevant sections of the *Criminal Code* are ss. 191(1) and 221(1), as follows:

> 191(1) Everyone is criminally negligent who
>
> (*a*) in doing anything, or
>
> (*b*) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.
>
> 221(1) Everyone who is criminally negligent in the operation of a motor vehicle is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for five years, or
>
> (*b*) an offence punishable on summary conviction.

It is at once apparent that the problem is precisely the same as the one under consideration in *Regina v. Yolles*[3]. In the first instance, in *Regina v. Yolles* the corresponding Ontario legislation was held to be *ultra vires*. The Court of Appeal, by a majority judgment, held that it was valid provincial legislation in relation to the administration and control of traffic upon highways within the province and not legislation in relation to criminal law, and further, that it was not repugnant to, nor in conflict with s. 221(1) of the *Criminal Code*.

The central point of this appeal is the appellant's submission that whenever Parliament chooses to attach penal consequences to negligence of whatever degree, then any

[1] [1959] O.R. 206, 19 D.L.R. (2d) 19.
[2] (1959-60), 30 W.W.R. 156, 22 D.L.R. (2d) 150.
[3] [1958] O.R. 786, reversed [1959] O.R. 206.

1960

O'GRADY
v.
SPARLING

Judson J.

provincial legislation relating to negligence with penal consequences attached to it must be legislation in relation to criminal law. This submission assumes a complete identity of subject-matter which in my opinion does not exist. It is also founded, in part at least, upon a theory of the existence of a "general area" or "domain" of criminal law which has been considered and rejected by this Court.

There is a fundamental difference between the subject-matter of these two pieces of legislation which the appellant's argument does not recognize. It is a difference in kind and not merely one of degree. This difference has been recognized and emphasized in the recent writings of Glanville Williams on Criminal Law, para. 28, p. 82, and by J. W. C. Turner in the 17th edition of Kenny's Outlines of Criminal Law. I adopt as part of my reasons Turner's statement of the difference to be found at p. 34 of Kenny:

> But it should now be recognized that at common law there is no *criminal* liability for harm thus caused by inadvertence. This has been laid down authoritatively for manslaughter again and again. There are only two states of mind which constitute *mens rea*, and they are intention and *recklessness*. The difference between recklessness and negligence is the difference between advertence and inadvertence; they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence. The common habit of lawyers to qualify the word "negligence" with some moral epithet such as "wicked", "gross", or "culpable" has been most unfortunate since it has inevitably led to great confusion of thought and of principle. It is equally misleading to speak of criminal negligence since this is merely to use an expression to explain itself.

The appellant argues that negligence of any degree may form the essential element of a criminal offence. As an abstract proposition I would not question this provided the criminal offence, in a federal state, is defined by the proper legislative authority. But it does not follow that the provincial legislature, in dealing with this subject-matter in the exercise of its regulatory power over highway traffic, is enacting criminal law.

The appellant says that the history of the common law shows that inadvertent negligence was sufficient to support a charge of manslaughter and that consequently, when penal consequences are attached to inadvertent negligence under

a provincial highway code, the legislation is necessarily in relation to criminal law. This is the proposition stated by McRuer C.J.H.C. in the *Yolles* case[1] in these terms:

> What the provincial legislature has done is to attempt to revive the old common law offence of causing death by mere negligence by extending it to all cases of careless driving of vehicles on a highway, whether death ensues or not.

I doubt whether the existence of such a common law offence can be deduced from the dicta of early 19th century judges sitting at *nisi prius*, as found in the scanty reports of the time. The question must have been what was meant and what meaning was conveyed by the trial judge when he used an elastic word such as "negligence" in relation to the facts of the case. Most of the cases quoted by McRuer C.J.H.C. are collected in 9 Hals., 1st ed., p. 582, note (l) where they are referred to as cases of manslaughter owing to negligent driving and riding. In the second edition, 9 Hals., 2nd ed., p. 441, note (m), they are referred to as illustrations of manslaughter by reason of "gross" negligence in driving, riding or navigation, and in the third edition, as illustrations of manslaughter occasioned by "criminal" negligence (10 Hals., 3rd ed., 717, note (h)).

I think that the same doubt is expressed in *Andrews v. Director of Public Prosecutions*[2]. In any event, there is no such common law offence now in England and it is not to be found in the criminal law of Canada. The *Criminal Code* confines its definition of crime in ss. 191(1) and 221(1) to a certain kind of conduct. This is not the kind of conduct referred to in the provincial legislation, nor is the provincial legislation dealing with another degree of the same kind of conduct aimed at by the *Criminal Code*.

What the Parliament of Canada has done is to define "advertent negligence" as a crime under ss. 191(1) and 221(1). It has not touched "inadvertent negligence". Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the *Criminal Code* as "crime", it is not crime.

[1] [1958] O.R. 786 at 808.
[2] [1937] A.C. 576 at 581, 106 L.J.K.B. 370.

1960

O'GRADY v. SPARLING

Judson J.

The power of a provincial legislature to enact legislation for the regulation of highway traffic is undoubted. (*Provincial Secretary of the Province of Prince Edward Island v. Egan*[1]). The legislation under attack here is part and parcel of this regulation. Rules of conduct on highways have been established by similar legislation in every province and the careless driving section is no different in character from the specific rules of the road that are laid down.

Much of the argument addressed to us was that there was something about the subject-matter of this legislation, careless driving on highways, which made it inherently criminal law. I do not understand this argument in relation to the subject-matter of negligence on highways. What meaning can one attach to such phrases as "area of criminal law" or "domain of criminal law" in relation to such a subject-matter? A provincial enactment does not become a matter of criminal law merely because it consists of a prohibition and makes it an offence for failure to observe the prohibition; (*Quong-Wing v. The King*[2]). On this subject-matter there can be no such area defined either by the common law or by the statutory treatment of the subject in the United Kingdom and in Canada. In mentioning statute law, I have in mind 1938, c. 44, s. 16, *Statutes of Canada,* which did introduce into the *Criminal Code* as s. 285(6) something resembling the provincial legislation in question here, but it is not now in the *Criminal Code.*

The only approach to the problem, it seems to me, is that stated in the *Lord's Day Alliance* case[3].

> In constitutional matters there is no general area of criminal law and in every case the pith and substance of the legislation in question must be looked at. (per Kerwin C.J. at p. 503)

Rand J., at p. 508, stated:

> Into this branch of his argument Mr. Brewin injected the idea of a "domain" of criminal law which, as I understood it, was in some manner a defined area existing apart from the actual body of offences at a particular moment; and that it was characterized by certain distinguishing qualities. Undoubtedly criminal acts are those forbidden by law, ordinarily at least if not necessarily accompanied by penal sanctions, enacted to serve what is considered a public interest or to interdict what is deemed

[1] [1941] S.C.R. 396, 3 D.L.R. 305.
[2] (1914), 49 S.C.R. 440, 18 D.L.R. 121.
[3] [1959] S.C.R. 497, 19 D.L.R. (2d) 97.

a public harm or evil. In a unitary state the expression would seem appropriate to most if not all such prohibitions; but in a federal system distinctions must be made arising from the true object, purpose, nature or character of each particular enactment. This is exemplified in *Attorney General for Quebec v. Canadian Federation of Agriculture* [1951] A.C. 179, [1950] 4 D.L.R. 689, in which certain prohibitions with penalties enacted by Parliament against certain trade in margarine were held to be *ultra vires* as not being within criminal law.

Beyond or apart from such broad characteristics, of no practical significance here, which describe an area by specifying certain elements inhering in criminal law enactments, no such "domain" is recognized by our law. The language of Lord Blanesburgh in the *Manitoba* case refers to "domain" as the body of present prohibitions, the existing criminal law, and nothing else. The same view expressed in *Proprietary Articles Trade Asociation v. Attorney General for Canada* [1931] A.C. 310 at 324; 55 C.C.C. 241; 2 D.L.R. 1; 1 W.W.R. 552, by Lord Atkin will bear repeating: (per Rand J. at p. 508.)

My conclusion is that s. 55(1) of the Manitoba *Highway Traffic Act* has for its true object, purpose, nature or character the regulation and control of traffic on highways and that, therefore, it is valid provincial legislation.

Nor do I think that it can be said to be inoperative because it is in conflict with s. 221 of the *Criminal Code*. There is no conflict between these provisions in the sense that they are repugnant. The provisions deal with different subject-matters and are for different purposes. Section 55(1) is highway legislation dealing with regulation and control of traffic on highways, and s. 221 is criminal law dealing with negligence of the character defined in the section. Even though the circumstances of a particular case may be within the scope of both provisions (and in that sense there may be an overlapping) that does not mean that there is conflict so that the Court must conclude that the provincial enactment is suspended or inoperative; *McColl v. Canadian Pacific Railway Company*[1], *per* Duff J. There is no conflict or repugnancy between s. 55(1) of the Manitoba *Highway Traffic Act* and s. 221 of the *Criminal Code*. Both provisions can live together and operate concurrently.

The problem here seems to me to be the same in principle as that raised by the side-by-side existence of provincial legislation dealing with the duty to remain at or return to the scene of an accident for certain defined purposes, and s. 221(2) of the *Criminal Code* dealing with

[1] [1923] A.C. 126 at 134, 135.

1960

O'GRADY v. SPARLING

Judson J.

failure to stop at the scene of an accident "with intent to escape civil or criminal liability". The supposed conflict between these two pieces of legislation has been considered in three provinces. The first decision was *R. v. Corry*[1], which held that the provincial legislation was in relation to the regulation of traffic and not the punishment of crime. In Ontario this decision appears to have been overlooked in *Regina v. Dodd*[2], where it was held that the corresponding Ontario legislation was in conflict with and repugnant to the *Criminal Code*. The *Corry* case has, however, been followed in *R. v. Mankow*[3] and in *R. v. Stephens*[4], both Courts being of the opinion, as I am in the present case, that the two pieces of legislation differed both in legislative purpose and legal and practical effect, the provincial Act imposing a duty to serve bona fide provincial ends not otherwise secured and in no way conflicting with s. 221(2) of the *Criminal Code*.

I would dismiss the appeal. There should be no order as to costs.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to special leave granted by this Court, from a judgment of the Court of Appeal for Manitoba[5] dismissing an appeal from the judgment of Williams C.J.K.B. who had dismissed the appellant's application for an order of prohibition; Adamson C.J.M., dissenting, would have allowed the appeal.

The sole question for decision is whether s. 55(1) of *The Highway Traffic Act*, R.S.M. 1954, c. 112, is *intra vires* of the legislature; it reads:

> 55(1) Every person who drives a motor vehicle or a trolley bus on a highway without due care and attention or without reasonable consideration for other persons using the highway is guilty of an offence.

A penalty for the offence created by s. 55(1) is prescribed by s. 124.

[1] [1932] 1 W.W.R. 414, affirmed [1932] 1 W.W.R. 853, 26 Alta. L.R. 390.
[2] [1957] O.R. 5, 7 D.L.R. (2d) 436.
[3] (1959), 28 W.W.R. 433, 30 C.R. 403.
[4] (1959-60), 30 W.W.R. 145, 32 C.R. 72.
[5] (1959-60), 30 W.W.R. 156, 22 D.L.R. (2d) 150.

The judgment of Williams C.J.K.B. was delivered shortly after that of the Court of Appeal for Ontario in *Regina v. Yolles*[1], in which that Court by a majority consisting of Porter C.J.O., Gibson and Lebel JJ.A. had reversed the answer given by McRuer C.J.H.C. to a question submitted in a stated case holding that s. 29(1) of *The Highway Traffic Act,* R.S.O. 1950, c. 167, as amended, was *ultra vires* of the legislature. Roach and Schroeder JJ.A., dissenting, were of opinion that the subsection was *ultra vires* and would have dismissed the appeal.

Williams C.J.K.B., and Schultz and Tritschler JJ.A. who formed the majority in the Court of Appeal for Manitoba in brief reasons adopted and followed the reasoning of the majority of the Court of Appeal for Ontario in *Yolles'* case, except that Tritschler J.A., who wrote the reasons of the majority, noted his disagreement with the earlier judgment of the Court of Appeal for Ontario in *Regina v. Dodd*[2].

Adamson C.J.M. after examining a number of authorities reached the conclusion that the impugned sub-section was *ultra vires* of the legislature as being in pith and substance criminal law and further that it was *in pari materia* with and in conflict with the Criminal Code; he expressed his agreement with the reasoning of McRuer C.J.H.C. and of Roach and Schroeder JJ.A. in *Yolles'* case.

Section 29(1) of *The Highway Traffic Act* of Ontario which was dealt with in *Yolles'* case reads as follows:

> 29(1) Every person is guilty of the offence of driving carelessly who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway and shall be liable to a penalty of not less than $10 and not more than $500 or to imprisonment for a term of not more than three months, and in addition his licence or permit may be suspended for a period of not more than one year.

I agree with Williams C.J.K.B., and indeed it is common ground, that, so far as the question raised on this appeal is concerned, there is no difference in substance between s. 55(1) of the Manitoba Act and s. 29(1) of the Ontario Act; we cannot allow this appeal unless we are prepared to overrule the judgment of the Court of Appeal in *Yolles'* case.

[1] [1959] O.R. 206, 19 D.L.R. (2d) 19.
[2] [1957] O.R. 5, 7 D.L.R. (2d) 436.

1960

O'GRADY v. SPARLING

Cartwright J.

I find the reasons of Adamson C.J.M. in the case at bar and those of Roach J.A. in *Yolles'* case so satisfactory and convincing that I would be content simply to adopt them, but in view of the differences of opinion in the courts of Manitoba and of Ontario and in this Court and in deference to the full and able arguments addressed to us I propose to add some observations of my own.

I trust that it is not an over-simplification to say that the essence of the reasons of the majority in the Court of Appeal in *Yolles'* case may be summarized in the following propositions:

(i) Section 29(1) is legislation in relation to the regulation of highway traffic.

(ii) It has been decided by this Court, notably in *Provincial Secretary of P.E.I. v. Egan*[1] and in *O'Brien v. Allen*[2], that the field of regulation of highway traffic within a province is wholly provincial.

(iii) That consequently s. 29(1) is *prima facie* within the powers of the legislature.

(iv) That s. 29(1) is not in conflict with any existing legislation of Parliament.

It will be convenient to examine first the second of these propositions. The expressions used in the reasons in *Egan's* case, wide though they are, do not assert an unlimited power in the legislatures to control all activities upon the highways. All that the case actually decided was that the legislature had power to require persons driving motor vehicles on highways in the province to obtain a provincial licence and to enact that such licence should be automatically suspended upon the holder being convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs, which was an offence under the *Criminal Code*. The reasons stress the circumstance that the impugned provincial legislation did not create an offence (see pages 415 and 417).

The caution necessary to be observed in applying the *Egan* case in differing circumstances is expressed by Duff C.J. in the following passage at pages 400 and 401:

> A very different question, however, is raised by the contention that the matters legislated upon by the enactments of the Provincial *Highway Traffic Act* in question have, by force of section 285(7) of the *Criminal Code*, been brought exclusively within the scope of the Dominion authority

[1] [1941] S.C.R. 396, 3 D.L.R. 305. [2] (1900), 30 S.C.R. 340.

in relation to criminal law. We are here on rather delicate ground. We have to consider the effect of legislation by the Dominion creating a crime and imposing punishment for it in effecting the suspension of provincial legislative authority in relation to matters *prima facie* within the provincial jurisdiction. I say we are on delicate ground because the subject of criminal law entrusted to the Parliament of Canada is necessarily an expanding field by reason of the authority of Parliament to create crimes, impose punishment for such crimes, and to deal with criminal procedure. If there is a conflict between Dominion legislation and Provincial legislation, then nobody doubts that the Dominion legislation prevails. But even where there is no actual conflict, the question often arises as to the effect of Dominion legislation in excluding matters from provincial jurisdiction which would otherwise fall within it. I doubt if any test can be stated with accuracy in general terms for the resolution of such questions. It is important to remember that matters which, from one point of view and for one purpose, fall exclusively within the Dominion authority, may, nevertheless, be proper subjects for legislation by the Province from a different point of view, although this is a principle that must be "applied only with great caution". (*Attorney-General for Canada v. Attorney General for Alberta* [1916] 1 A.C. 588 at 596.)

The case of *Attorney General for Ontario v. Winner*[1], involved questions different from those in the case at bar but the following statements in the judgment of their Lordships delivered by Lord Porter make it clear that the provincial power over highways is not unlimited; at page 576:

Their Lordships are not concerned to dispute either the provincial control of the roads or that it has the right of regulation, but there nevertheless remains the question of the limit of control in any individual instance and the extent of the powers of regulation.

It would not be desirable, nor do their Lordships think that it would be possible, to lay down the precise limits within which the use of provincial highways may be regulated. Such matters as speed, the side of the road upon which to drive, the weight and lights of vehicles are obvious examples, but in the present case their Lordships are not faced with considerations of this kind, nor are they concerned with the further question which was mooted before them, viz., whether a province had it in its power to plough up its roads and so make inter-provincial connections impossible. So isolationalist a policy is indeed unthinkable.

and at page 579:

Whatever provisions or regulations a province may prescribe with regard to its roads it must not prevent or restrict inter-provincial traffic. As their Lordships have indicated, this does not in any way prevent what is in essence traffic regulation, but the provisions contained in local statutes and regulations must be confined to such matters.

[1] [1954] A.C. 541, 3 All E.R. 177.

1960

O'GRADY v. SPARLING

Cartwright J.

The power of the legislature to make laws in relation to its roads must, of course, be derived from s. 92 of the British North America Act and cannot extend to the making of a law which is in pith and substance in relation to a matter coming within the classes of subjects enumerated in s. 91.

Turning now to the first of the propositions set out above it is necessary to consider what is the true nature and character of the impugned subsection. Is it a law in relation to the regulation of highway traffic, or is it in pith and substance a law in relation to "the criminal law" within the meaning of that phrase as used in head 27 of s. 91 of the British North America Act?

In the course of such an inquiry reference is usually made to the following passage in the judgment of the Judicial Committee delivered by Lord Atkin in *P.A.T.A. v. Attorney General for Canada*[1]:

> "Criminal law" means "the criminal law in its widest sense": *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (1903) A.C. 524. It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

There is nothing in this passage (which occurs in the course of a judgment rejecting the argument that Parliament can exercise exclusive legislative power under s. 91 (27) only where the subject matter of a questioned enactment "by its very nature belongs to the domain of criminal jurisprudence") to suggest that the Court is unable in the case of a piece of actual or proposed legislation to determine whether or not it is in pith and substance

[1] [1931] A.C. 310 at 324, 100 L.J.P.C. 84.

a law in relation to the criminal law within the meaning of that phrase as used in s. 91(27). That is the very task which the Court is called upon to perform.

In the reasons of my brother Judson, which I have had the advantage of reading, he refers with approval to passages in Glanville Williams on Criminal Law (1953) and in the 17th Edition of Kenny's Outlines of Criminal Law in which the distinction is drawn between "inadvertent negligence" and "advertent negligence". At page 82 of his work Glanville Williams says:

> Responsibility for some crimes may be incurred by the mere neglect to exercise due caution, where the mind is not actively but negatively or passively at fault. This is inadvertent negligence. Since advertent negligence has a special name (recklessness), it is convenient to use "negligence" generallly to mean inadvertent negligence. If it is said that such-and-such a crime can be committed negligently, this means that the crime can be committed by inadvertent negligence; and the reader will understand that the crime can *a fortiori* be committed recklessly.
>
> In the law of tort negligence has an objective meaning. It signifies a failure to reach the objective standard of the reasonable man, and does not involve any inquiry into the mentality of the defendant. The same rule prevails in criminal law, in those spheres where negligence is recognised at all.

In my opinion the effect of s. 55(1) is to enact that a person who in driving a vehicle on a highway fails to reach the objective standard of the reasonable man in regard to the use of due care and attention or in regard to having reasonable consideration for other persons using the highway is guilty of an offence and subject to punishment.

In determining whether such a provision falls within s. 91(27) rather than within any of the heads of s. 92 we are entitled to consider its apparent purpose and effect and in doing this we must take into account any general knowledge of which the Court would take judicial notice.

For some years the increasing frequency of accidents on highways resulting in death, personal injury and damage to property has been a matter of grave public concern, and efforts to reduce the number of such accidents have occupied the attention of Parliament and of the provincial legislatures.

By the combined effect of sections 191(1) and 221(1) of the *Criminal Code* Parliament has made it a crime to be negligent in the operation of a motor vehicle provided that, whether the negligence consists of omission or commission,

1960

O'GRADY v. SPARLING

Cartwright J.

the person charged shows wanton or reckless disregard for the lives or safety of other persons; it is not a necessary element of this crime that the negligence charged shall cause injury or damage. To use the terminology of Glanville Williams, Parliament has enacted that "advertent negligence" in the operation of a motor vehicle is a crime. No counsel has questioned the competency of Parliament to enact these sections; it could not be successfully questioned. The application of these sections is not limited to the operation of motor vehicles on highways but it is obvious that in the vast majority of cases in which a charge is laid thereunder it will arise out of a highway accident.

We may, I think, take judicial notice of the fact that while many highway accidents resulting in death or injury are caused by "advertent negligence", very many are caused by "inadvertent negligence". Should Parliament in its wisdom decide that to stem the rising tide of death and injury it was advisable to make inadvertent negligence in the operation of a motor vehicle a crime as well as advertent negligence in such operation it would, in my opinion, clearly be enacting criminal law within the meaning of head 27 of s. 91. I did not understand any counsel to suggest that Parliament lacked the power to enact as part of the *Criminal Code* a provision identical with s. 55(1) should it see fit to do so. I think it clear that Parliament has such power and that if it saw fit to enact the provision contained in s. 55(1) that provision would in no sense be legislation merely ancillary or necessarily incidental to the exercise of the powers conferred upon Parliament by s. 91 (27); it would be an integral part of the criminal law.

In my opinion, while the types of negligence dealt with differ, the true nature and character of the legislation contained in s. 55(1) of the Manitoba Act does not differ in kind from that of the legislation contained in sections 191(1) and 221(1) of the *Criminal Code*. Each seeks to suppress in the public interest and with penal consequences negligence in the operation of vehicles, each is designed for the promotion of public safety, each seeks to prevent substantially the same public evil, each belongs to the subject of public wrongs rather than to that of civil rights, each makes negligence a crime although one deals with inadvertent negligence and the other with advertent negligence.

In my view the impugned sub-section differs generically from those provisions of *The Highway Traffic Act* prescribing detailed rules of conduct such as rates of speed, rules of the road, traffic signals, lights, equipment and so on; on this branch of the matter I have nothing to add to what has been said by Roach J.A.

If I am right in my conclusion that the provisions of the impugned sub-section if enacted by Parliament as part of the *Criminal Code* would clearly be a law in relation to the criminal law within the meaning of head 27 of s. 91, that would seem to be an end of the matter; the true nature and character of an enactment is to be discerned by a consideration of its meaning, purpose and effect, and does not depend upon whether it is enacted by Parliament or by a provincial legislature. The statement of Lord Watson in *Union Colliery Company of British Columbia v. Bryden*[1] has been repeatedly followed:

> The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

It may well be that a growing public danger makes it desirable that inadvertent negligence in driving a motor vehicle should be made a crime. I do not express any opinion on this question which is one of public policy to be decided by Parliament. I think it clear that Parliament alone has the constitutional authority to so enact.

In my opinion there is no room in this case for the view that s. 55(1) is *intra vires* because it operates in an otherwise unoccupied field, for the field which the impugned legislation seeks to enter is one reserved exclusively for Parliament by head 27 of s. 91. This is a field which the provincial legislature is forbidden to enter whether or not Parliament has occupied any part of it.

There are two further matters which I wish to mention.

In the penultimate paragraph of his reasons Tritschler J.A. expresses the view that it is now easier to declare s. 55(1) *intra vires* of the legislature than it would have been

[1] [1899] A.C. 580 at 588, 68 L.J.P.C. 118.

1960

O'GRADY v. SPARLING

Cartwright J.

had the provision formerly contained in s. 285(6) of the old *Criminal Code* still been in force. That sub-section read as follows:

> (6) Every one who drives a motor vehicle on a street, road, highway or other public place recklessly, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway or place, shall be guilty of an offence. . . .

The validity of this view depends on the "overlapping doctrine", which is accurately defined in Varcoe on The Distribution of Legislative Power in Canada, 1954, at p. 47, as follows:

> There can be a domain in which provincial and Dominion legislative powers may overlap, in which case, a statute enacted pursuant to either power will be *intra vires* if the field is clear, but if the field is not clear and two statutes meet, the Dominion statute must prevail.

Assuming, contrary to the opinion that I have already expressed, that s. 55(1) has a provincial aspect and so would be valid until Parliament occupies the field in which it operates, it is necessary to consider whether Parliament has done so. In my opinion Parliament has fully occupied the field.

For the purpose of reducing the number of automobile accidents occuring on the highways throughout Canada, Parliament has decided to attach penal consequences to negligence in the course of a particular specified activity, i.e., the operation of a motor vehicle. The provisions of the *Criminal Code* now in force attach those consequences to advertent negligence in such operation; when s. 285(6) of the old Code was in force it was arguable that the words therein contained, "or in a manner which is dangerous to the public having regard to all the circumstances of the case" had the effect of attaching penal consequences to inadvertent negligence; be this as it may, it is clear that Parliament has the power to attach penal consequences to inadvertent negligence and to enact as a part of the *Criminal Code* the very provisions contained in s. 55(1).

In my opinion when Parliament has expressed in an Act its decision that a certain kind or degree of negligence in the operation of a motor vehicle shall be punishable as a

crime against the state it follows that it has decided that no less culpable kind or degree of negligence in such operation shall be so punishable. By necessary implication the Act says not only what kinds or degrees of negligence shall be punishable but also what kinds or degrees shall not.

The matter may be tested in this way: suppose that Parliament in the new Code had enacted the provisions of s. 55(1) of *The Highway Traffic Act* as sub-section (2) of s. 221; in such circumstances the field which s. 55(1) seeks to enter would clearly be fully occupied by valid Dominion legislation; suppose then that a few years later Parliament repealed the said sub-section thereby indicating its view that the inadvertent negligence described in the repealed sub-section should cease to be punishable as an offence against the State; could it be said that upon such repeal a provincial legislature could enact the repealed sub-section as part of its *Highway Traffic Act?* In my opinion it could not, and it appears to me that the result of holding otherwise would be to defeat the intention of the framers of the *British North America Act* that power to legislate as to the criminal law should be committed exclusively to Parliament. It is not within the power of the provincial legislature to remedy what it regards as defects or to supply what it regards as unwise omissions in the criminal law as enacted by Parliament.

It appears to me to be self-evident that the exclusive legislative authority in relation to the criminal law given to Parliament by s. 91(27) must include the power to decide what conduct shall not be punishable as a crime against the state as well as to decide what conduct shall be so punishable, and this may be the reason that there is little authority precisely on the point; it has however been touched on by the Judicial Committee in the case of *Toronto Railway v. The King*[1]. The members of the Board were Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Parmoor, Lord Wrenbury and Sir Arthur Channell; Viscount Haldane who delivered the judgment said at page 639:

> Their Lordships think that it was competent to the Parliament of Canada under s. 91, sub-s. 27, of the British North America Act, 1867, which enables it exclusively to legislate as to criminal law, including

[1] [1917] A.C. 630, 86 L.J.P.C. 195.

1960

O'GRADY v. SPARLING

Cartwright J.

procedure in criminal matters, to declare that what might previously have constituted a criminal offence should no longer do so, although a procedure in form criminal was kept alive.

The other matter to which I wish to refer is a submission in the argument of counsel for the Attorney General of Canada to the effect that had s. 55(1) read as follows:

> (1) Every person who drives a motor vehicle or a trolley bus on a highway shall do so with due care and attention and with reasonable consideration for other persons using the highway.
>
> (2) Every person who fails to comply with subsection (1) is guilty of an offence.

there would be no question of its validity. As to this argument it is my view that the validity of an impugned enactment depends not on the precise verbal form in which it is expressed but on the meaning of the words the legislature has used and the purpose and effect of the enactment. The question is one of substance. Had the impugned sub-section been enacted in the form suggested I would have been equally of opinion that it was invalid. Were it otherwise a law in relation to the crime of theft could, by careful draftsmanship, be made to read as a law dealing with the civil right to the possession of personal property and a law in relation to highway robbery could be framed as a regulation of highway traffic.

For the above reasons and for those given by Adamson C.J.M. in the case at bar and by Roach J.A. in *Yolles'* case with which I have already expressed my full agreement I am of opinion that s. 55(1) of *The Highway Traffic Act*, R.S.M. 1954, c. 112, is *ultra vires* of the Legislature of the Province of Manitoba.

I would allow the appeal with costs throughout, set aside the judgments below and direct that an order of prohibition issue. I would make no order as to the costs of the Attorneys-General who intervened.

RITCHIE J.:—I agree with Judson J. that s. 55(1) of the Manitoba *Highway Traffic Act* is valid provincial legislation enacted for the regulation and control of traffic on the highways of that province and that there is a fundamental difference between the subject-matter dealt with in that section and any behaviour which is proscribed as criminal by the provisions of the *Criminal Code*.

I would, accordingly, dismiss this appeal.

1960

O'GRADY v. SPARLING

Ritchie J.

*Appeal dismissed without costs,* LOCKE *and* CARTWRIGHT JJ. *dissenting.*

*Solicitor for the applicant, appellant: H. P. Blackwood, Winnipeg.*

*Solicitor for the respondent: The Attorney-General of Manitoba.*

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WILLIAM E. STEPHENS .....APPELLANT;

1960

*May 16, 17
Oct. 4

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

*Constitutional law—Provincial legislation respecting duties of drivers involved in accidents—Whether matter so related to substance of s. 221(2) of the Criminal Code as to be brought within scope of the criminal law—Whether ultra vires—The Highway Traffic Act, R.S.M. 1954, c. 112, s. 147(1)—Criminal Code, 1953-54 (Can.), c. 51, s. 221(2).*

*Criminal law—Power to grant leave to appeal to the Supreme Court of Canada.*

The accused was convicted in magistrate's court for having failed to remain at or return to the scene of an accident for certain defined purposes, contrary to s. 147(1) of *The Highway Traffic Act* of Manitoba, and he then appealed to the County Court, which held that s. 147(1) of the Act was *ultra vires* the Provincial Legislature. On appeal it was decided, by a majority, that the section was *intra vires*. The Court of Appeal granted the accused leave to appeal to this Court, where it was determined that the Court of Appeal lacked jurisdiction so to do. A constitutional question being involved, leave to appeal was granted by this Court.

*Held* (Locke and Cartwright JJ. *dissenting*): The appeal should be dismissed.

*Per* Kerwin C.J. and Taschereau, Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The two pieces of legislation (s. 147(1) of the Act and s. 221(2) of the Code) differ in legislative purpose and in legal and practical effect. The section in the Act was enacted for provincial purposes by creating a duty to stop, render assistance and give information, whereas the section of the Code creates an offence to omit certain acts if done with a specified intent. *Regina v. Dodd,* [1957] O.R. 5, overruled; *Regina v. Yolles,* [1959] O.R. 206, approved; *O'Grady v. Sparling,* [1960] S.C.R. 804; *Rex v. Corry,* 26 Alta. L.R. 390; *Regina v. Mankov,* 28 W.W.R. 433, referred to.

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

1960

STEPHENS v. THE QUEEN

*Per* Locke and Cartwright JJ., *dissenting*: Where Parliament has, in the valid exercise of its exclusive power under head 27 of s. 91 of the *British North America Act* to make laws in relation to the criminal law, enacted that a certain course of conduct shall be punishable as an offence against the state provided it is accompanied by a specified intent, it is not within the power of the Legislature to enact that the very same course of conduct shall be punishable as an offence whether or not that specified intent exists.

The whole subject-matter of the charge against the appellant has been drawn by Parliament within the ambit of the criminal law with the effect of suspending the provincial legislative authority in relation to that subject-matter.

*Provincial Secretary of P.E.I. v. Egan*, [1941] S.C.R. 396: *Regina v. Dodd, supra*, referred to.

APPEAL from the judgment of the Court of Appeal for Manitoba[1], reversing the judgment of Philp Sr. Co. Ct. J. Appeal dismissed, Locke and Cartwright JJ. dissenting.

No oral argument was presented, as this case was to be decided at the same time and in the same way as the case of O'Grady v. Sparling, [1960] S.C.R. 804.

The judgment of Kerwin C.J. and of Taschereau, Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

THE CHIEF JUSTICE:—The appellant, William E. Stephens, was convicted in magistrate's court in the City of Winnipeg, in the Province of Manitoba, on the 4th day of September 1958, for that he at the City of Winnipeg, on the 7th day of August, A.D., 1958,

did unlawfully operate a motor vehicle on Furby St., and being involved in an accident fail to remain at the scene of the accident, fail to render all reasonable assistance and fail to give in writing to the parties sustaining loss or injury his name and address and the number of his driver's licence contrary to the provisions of the Highway Traffic Act 147-1 in such case made and provided.

He appealed to the County Court of Winnipeg and His Honour Judge Philp without hearing any evidence decided on a motion by counsel for Stephens that s. 147(1) was *ultra vires* the Provincial Legislature and set aside the conviction. On an appeal against this order to the Court of Appeal[1] for Manitoba, Tritschler J.A., with whom Schultz J.A. agreed, decided (Chief Justice Adamson dissenting) that the section was *intra vires*. The order of the Court was

[1] (1959-60), 30 W.W.R. 145, 32 C.R. 72.

that the appeal should be allowed and the matter remitted to the Senior County Court Judge for the County Court of Winnipeg to hear the evidence and dispose of the charge.

The Court of Appeal granted Stephens leave to appeal to this Court. After notice to the parties we determined that that Court had no jurisdiction so to do. Stephens was prosecuted in accordance with *The Summary Convictions Act*, R.S.M. 1954, c. 254, s. 7 of which provides for the application of certain named sections of the *Criminal Code* of Canada. The 1954 Revised Statutes of Manitoba and the new *Criminal Code* of Canada came into force on the same day but whether one refers to the sections of the old Code or of the new Code the result is the same. No power is given to a provincial Court of Appeal to grant leave to appeal to the Supreme Court of Canada from its judgment setting aside a conviction of a non-indictable offence. That power is conferred upon this Court and then only in respect of a question of law or jurisdiction. A constitutional question is involved in the present case and although, as will appear later, the point is now determined by what the majority of this Court holds in *O'Grady v. Sparling*[1], we granted leave so that the matter might be disposed of at the same time as the last mentioned case and *Smith v. The Queen*[2].

Section 147(1) of the Manitoba *Highway Traffic Act*, under which the charge against Stephens was laid, reads:

> 147. (1) Where an accident occurs on a highway, the driver, owner, or other person in charge of a vehicle, street car or trolley bus that is in any manner, directly or indirectly, involved in the accident shall
>
> (*a*) remain at or immediately return to the scene of the accident; and
>
> (*b*) render all reasonable assistance; and
>
> (*c*) give in writing to any one sustaining loss or injury or to any peace officer or to a witness his name and address, and also the name and address of the registered owner of the vehicle and the number of the driver's licence, and the registration number of the motor vehicle or such of the information as is requested.

We were advised that this provision originated in an amendment to the Act in 1930 by s. 61(1) of c. 19 of the Statutes of that year. Subsection (2) of s. 221 of the new *Criminal Code* requires consideration:

> 221. .....
>
> (2) Every one who, having the care, charge or control of a vehicle that is involved in an accident with a person, vehicle or cattle in charge

[1] [1960] S.C.R. 804.

[2] [1960] S.C.R. 776.

1960

STEPHENS v. THE QUEEN

Kerwin C.J.

of a person, with intent to escape civil or criminal liability fails to stop his vehicle, give his name and address and, where any person has been injured, offer assistance, is guilty of

(a) an indictable offence and is liable to imprisonment for two years, or

(b) an offence punishable on summary conviction.

This subsection originated in an amendment to the *Criminal Code* by s. 2 of c. 13 of the Statutes of 1910.

Judge Philp, with whom Chief Justice Adamson agreed, considered that s. 147(1) of the Manitoba *Highway Traffic Act* and s. 221(2) of the new *Criminal Code* were in *pari materia* and that, therefore, the former could not stand. As indicated earlier the point is really determined by the judgment of this Court in *O'Grady v. Sparling*[1], as the reasons of Judson J., which are those of the majority, referred to *Regina v. Dodd*[2], a decision of the Court of Appeal for Ontario relied upon by the County Court Judge in this case. It is pointed out in *O'Grady v. Sparling* that the problem there in question was the same "as that raised by the side-by-side existence of provincial legislation dealing with the duty to remain at or return to the scene of an accident for certain defined purposes, and s. 221(2) of the *Criminal Code* dealing with failure to stop at the scene of an accident 'with intent to escape civil or criminal liability' ". Judson J. continues by considering the *Dodd* case, *Rex v. Corry*[3], *Regina v. Mankow*[4], a decision of the Alberta Court of Appeal, and the decision of the Court of Appeal for Manitoba in the present case. It suffices to reiterate that the two pieces of legislation differ in legislative purpose and in legal and practical effect. The County Judge in this case considered that (a), (b), (c) of s. 147(1) of the Manitoba *Highway Traffic Act* referred to something that had happened after an accident and that all infractions against the rules of driving, for negligence, and other provisions for prevention of accidents and injuries to persons and property, were over and completed prior to the time of the alleged offences as charged. He states further that there was no degree of care such as in *Regina v. Yolles*[5], a decision of the Court of Appeal for Ontario. While we had refused leave to appeal

[1] [1960] S.C.R. 804.
[2] [1957] O.R. 5, 7 D.L.R. (2d) 436.
[3] [1932] 1 W.W.R. 414, affirmed 26 Alta. L.R. 390.
[4] (1959), 28 W.W.R. 433, 30 C.R. 403.
[5] [1959] O.R. 206, 19 D.L.R. (2d) 19.

to this Court because Yolles had been found not guilty on another ground, his counsel took part in the argument of the present appeal.

Here the County Judge considered that what was in question in s. 147(1) of the Manitoba *Highway Traffic Act* was one act (a) "remain at . . . the scene of the accident"; (b) "render . . . assistance"; (c) "give in writing . . . information". However, I agree with Tritschler J.A. that the section of the Manitoba Act was enacted for provincial purposes by creating a duty to stop, render assistance and give information, while the section of the Code creates an offence to omit certain acts if done with a specified intent. The result is that the decision of the Ontario Court of Appeal in *Regina v. Dodd*[1] is overruled and that of the same Court in *Regina v. Yolles*[2] approved.

The appeal should be dismissed.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The charge against the appellant and the proceedings in the courts below are set out in the reasons of the Chief Justice.

The question to be decided is stated in the written argument of the Attorney-General for the Province of Manitoba as follows:

> The issue on this appeal is whether or not the matter of Section 147(1) of The Highway Traffic Act R.S.M. 1954 Cap. 112 is so related to the substance of Section 221(2) of the Criminal Code as to be brought within the scope of the criminal law and so rendered *ultra vires* or inoperative.

I think it clear that s. 147(1) would be *intra vires* of the legislature if there were no legislation of Parliament dealing with similar subject matter and I do not understand the appellant to argue the contrary. The question before us is that stated by Duff C.J. in *Provincial Secretary of P.E.I. v. Egan*[3]:

> We have to consider the effect of legislation by the Dominion creating a crime and imposing punishment for it in effecting the suspension of provincial legislative authority in relation to matters *prima facie* within the provincial jurisdiction.

[1] [1957] O.R. 5, 7 D.L.R. (2d) 436.
[2] [1959] O.R. 206, 19 D.L.R. (2d) 19.
[3] [1941] S.C.R. 396 at 401, 3 D.L.R. 305.

1960

STEPHENS v. THE QUEEN

Cartwright J.

The inquiry in the case at bar is directed to the specific charge brought against the appellant. It will be observed that to substantiate the charge the prosecution would have to prove (i) that the appellant was operating a motor vehicle that was involved in an accident on Furby Street causing loss or injury, (ii) that he failed to remain at the scene of the accident, (iii) that he failed to render all reasonable assistance, and (iv) that he failed to give in writing to the parties sustaining loss or injury his name, address and driver's licence number.

If the charge against the appellant had been laid under s. 221(2) of the *Criminal Code* instead of under s. 147(1) of *The Highway Traffic Act,* it would have been necessary for the prosecution to prove not only the matters set out above but also that the failure of the accused was accompanied by the intent to escape civil or criminal liability. This is a substantial difference which is somewhat lessened in practice by the terms of subsection (3) of section 221 of the *Code* making proof of the objective fact of the failures mentioned *prima facie* evidence of the existence of the guilty intent.

It is not, and could not successfully be, argued that the enactment of s. 221(2) and (3) is not a valid exercise of the exclusive power conferred on Parliament by head 27 of s. 91 of the *British North America Act.* The question before us may therefore be stated in the following terms. Where Parliament has, in the valid exercise of its exclusive power under head 27 of section 91 to make laws in relation to the criminal law, enacted that a certain course of conduct shall be punishable as an offence against the state provided it is accompanied by a specified intent, is it within the power of the Legislature to enact that the very same course of conduct shall be punishable as an offence whether or not that specified intent exists? With the greatest respect for all those who have, in this and other cases, expressed a different view I am of opinion that so long as section 221(2) of the *Code* continues in force, the Legislature has no such

power, and I am in agreement with the conclusion reached in the case at bar by the learned Chief Justice of Manitoba and by the learned County Court Judge and also with the conclusion reached by Laidlaw J.A. in delivering the unanimous judgment of the Court of Appeal for Ontario in *Regina v. Dodd*[1].

The whole subject-matter of the charge against the appellant has, in my opinion, been drawn by Parliament within the ambit of the criminal law with the effect of suspending the provincial legislative authority in relation to that subject-matter.

I would allow the appeal, set aside the order of the Court of Appeal and restore the order of the learned County Court Judge setting aside the conviction and directing the return of the fine, costs and security paid by the appellant.

RITCHIE J.:—I agree with the Chief Justice that s. 147(1) of the Manitoba *Highway Traffic Act* is valid legislation enacted for provincial purposes and that the subject-matter with which it deals is substantially different from the offence defined in s. 221 of the *Criminal Code* in that the specific intent required under the latter section forms no part of the offence created by the provincial statute.

I would accordingly dismiss this appeal.

*Appeal dismissed without costs,* LOCKE *and* CARTWRIGHT JJ. *dissenting.*

*Solicitors for the appellant: Yanofsky & Pollock, Winnipeg.*

*Solicitor for the respondent: Gordon E. Pilkey, Winnipeg.*

[1] [1957] O.R. 5, 7 D.L.R. (2d) 436.

1960

*May 26, 27
Oct. 4

BOB MILINKOVICH (*Plaintiff*) .....APPELLANT;

AND

CANADIAN MERCANTILE INSURANCE COMPANY (*Defendant*) .... } RESPONDENT.

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

*Insurance—Fire—Insured building and contents destroyed by fire—Proofs of loss—What constitutes delivery—Proofs sent by mail but not received—Mandate of agent—Waiver—Whether action premature—Civil Code, art. 2478—The Quebec Insurance Act, R.S.Q. 1941, c. 299, s. 240 (13), (17).*

When the plaintiff's building and contents, which were insured against fire by the defendant company, were completely destroyed by fire, the plaintiff notified the defendant. C, an adjuster, inspected the site and had the plaintiff sign an unsworn statement. Later on, having had no word from the defendant, the plaintiff consulted a lawyer who wrote to the defendant. The lawyer received from C a letter in which C disclosed that he had a mandate and complete discretion to deal with the matter, and asked the lawyer to have the plaintiff fill out the enclosed form of proof of loss and to return it to him. The form was duly filled out by the plaintiff and mailed by the lawyer himself. The defendant denied having received it. The plaintiff sued and the action was maintained by the trial judge. This judgment was reversed by a majority judgment of the Court of Appeal. The plaintiff appealed to this Court.

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

By virtue of the law governing this insurance contract, the insurer had the right to require delivery of the proofs of loss, but he also had the right to modify this requirement. In the present case, this is exactly what happened when C, the insurer's adjuster, informed the insured's lawyer that he had a mandate and complete discretion in the matter and elected to use the postal service for the return of the proofs of loss. The lawyer's obligation ended when he complied with that invitation. *Magann v. Auger,* 31 S.C.R. 186, applied.

As to the procedural reason put forward by one of the judges of the Court of Appeal that no waiver had been alleged, the defendant had all the required information in the statement of claim.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Casgrain J. Appeal allowed.

*A. J. McNally,* for the plaintiff, appellant.

*P. Pothier, Q.C.,* for the defendant, respondent.

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.

[1] [1959] Que. Q.B. 186.

The judgment of the Court was delivered by

FAUTEUX J.:—Par suite d'un incendie déclaré vers 6 heures a.m. le 2 février 1952, à Arntfield, province de Québec, l'immeuble en lequel se trouvait l'appelant, ainsi que les meubles y contenus, furent complètement détruits. En l'occurrence, l'appelant échappa de justesse et dut, après avoir sauté d'un étage supérieur au sol, être, semi-conscient et à peine vêtu, recueilli par des voisins.

Tous ces biens, propriété de l'appelant et valant, l'immeuble $40,000 et les meubles $3,220.45, étaient alors et depuis 1950, assurés par l'intimée contre le risque d'incendie pour les sommes de $8,000 et $2,000 respectivement.

Le fait de la totalité de cette perte fut rapporté à la compagnie et constaté sur place, quelques jours plus tard, par l'enquêteur Francis S. Callaghan, qu'elle délégua sur les lieux. Ce dernier questionna l'assuré sur les causes possibles du sinistre, rédigea et lui fit signer une déclaration. Ceci fait, l'appelant, qui paraît peu instruit et était, de toutes façons, ignorant de la procédure à suivre aux fins de sa réclamation, demanda à Callaghan ce qui lui restait à faire. Ce à quoi celui-ci répondit: "Just wait, the company will let you know."

L'appelant et sa famille quittèrent Arntfield pour aller prendre résidence dans Ontario, dans la région de Niagara Falls. Il eut, le mois suivant celui de l'incendie, la visite d'un autre enquêteur, un certain Wilson, venant soi-disant de Toronto et ce, sur les instructions de supérieurs dont l'identité ne paraît pas avoir été révélée à l'appelant. Wilson, comme l'avait fait Callaghan, questionna l'appelant et lui fit signer une déclaration.

Au début d'avril, l'appelant eut à consulter un avocat au sujet d'une réclamation de taxes scolaires. A Me Wilfred C. LaMarsh, de Niagara Falls, auquel il s'adressa, il apprit le fait de l'incendie, la perte subie, la notification de la compagnie, les enquêtes conduites par Callaghan et Wilson, ainsi que les déclarations qu'on lui avait fait signer. Des informations alors reçues, Me LaMarsh ne put former l'assurance qu'à l'occasion de la première ou de la seconde visite

1960

MILINKOVICH v. CDN. MERCANTILE INS. CO.

Fauteux J.

d'enquêteurs, une preuve formelle de perte avait été produite par l'appelant. C'est alors qu'il adressa la lettre qui suit à la compagnie intimée:

LaMARSH & LaMARSH

Barristers, Solicitors, Notaries Public, etc.
Telephone 124
1881 Ferry Street, Niagara Falls,
ONTARIO.

Avril 3, 1952.

The Canadian Mercantile Insurance Co.
St. Hyacinthe,
Quebec.

Dear Sirs:

By your Policy No. 19935 expiring November 19th, 1955, you insured Bob Milhinkovich of Arntfield, Quebec, for $8,000 on building and $2,000 on contents in connection with a Hotel, Restaurant and Bowling Alley in Arntfield.

There was a loss by fire of these premises early in February. Milhinkovich, who now lives outside Niagara Falls, Ontario, was in Arntfield at the time of the fire and is uncertain whether or not the investigation of the fire at that time and, subsequently, by a man who came to their home here from Toronto, whose name they believe to be Mr. Wilson, constitutes a claim under the policy.

Will you kindly advise me whether you have received Proof of Loss with respect to this claim and, if not, will you send papers forward so that a proper claim may be made. If the Proofs of Loss have been made, kindly advise me when and what the disposition of the claim by your Company is.

Yours truly,
LaMarsh & LaMarsh
(sgd) W. C. LaMarsh

WCL/vr

Pour toute réponse à cette lettre adressée par lui directement à la compagnie intimée, Me LaMarsh recevait, quelque quinze jours plus tard, une lettre de l'enquêteur Callaghan dont le texte, ci-après reproduit, dénonce en termes non équivoques, le mandat non qualifié et l'entière discrétion que lui donne l'intimée pour prendre charge de l'affaire et comporte, en outre, les instructions de Callaghan relativement au retour des formules de preuve de perte qu'il annexa à sa lettre:

ROUYN, QUE.
April 14th, 1952.

1960

MILINKOVICH
v.
CDN. MERCANTILE INS. CO.

Fauteux J.

LaMarsh & LaMarsh,
Barristers & Solicitors,
1881 Ferry Street,
Niagara Falls, Ont.
*Attn Mr. W. C. LaMarsh*
Dear Sir:—

Re:— *Bob Milhinkovich*
*Fire Loss Feb. 2/52*
*Our File No. 52-2-1*

Copy of your letter of April 3rd, to the Canadian Mercantile Ins. Co., has been forwarded to us, requesting us to handle this matter.

There has been no formal claim made and Mr. Milinkovich has not filed a Proof of Loss. We are therefore enclosing blank form Proof of Loss for his use.

Kindly have Mr. Milinkovich complete and sign this form and return to us and we will forward it to his insurers for their consideration.

Yours very truly,
(SGD) F. S. CALLAGHAN

FSC/md
Encl.

Sur réception de cet envoi, Me LaMarsh invita l'appelant à son bureau où ce dernier et son épouse se rendirent après leurs heures de travail et l'heure de fermeture du bureau de leur avocat. Les formules envoyées ayant été complétées par l'appelant, avec l'assistance de son épouse et son avocat, furent signées et assermentées par lui, puis conformément aux instructions de Callaghan, placées dans une enveloppe adressée à ce dernier et dûment affranchie, et le soir même, mise à la poste par Me LaMarsh personnellement.

Par la suite, l'appelant et son épouse communiquèrent périodiquement avec leur avocat pour s'enquérir du règlement de la réclamation et apprendre de lui qu'il était sans nouvelles. De son côté, l'intimée écrivait, le 17 septembre, à Callaghan pour se plaindre de n'avoir reçu, en l'affaire, aucune communication de son bureau depuis le 31 mai, et lui demander de l'informer, par retour du courrier, des développements. Ce à quoi Callaghan répondit qu'il avait envoyé les formules de preuve de perte à l'avocat LaMarsh en lui demandant de les compléter et les lui retourner, mais qu'il n'avait depuis entendu parler de rien. Ni la compagnie intimée ni son enquêteur ne jugèrent qu'il était à propos de communiquer avec l'avocat LaMarsh pour s'assurer si, en réponse à la lettre qu'il avait adressée, le 3 avril, à la

1960

MILINKOVICH v. CDN. MERCANTILE INS. CO.

Fauteux J.

compagnie intimée, il avait reçu la lettre du 14 avril et les formules y incluses que Callaghan lui avait adressées par la poste. On préféra garder le silence. Eventuellement, deux jours avant que ne soit écoulée l'année durant laquelle s'était produit l'incendie, un avocat de Montréal, saisi du soin des intérêts de l'assuré, prit action contre la compagnie intimée, pour lui réclamer $10,000.

L'intimée admit au début de l'audition en Cour supérieure, comme d'ailleurs devant cette Cour, le contrat et le montant de l'assurance, la totalité de la perte subie, le caractère accidentel du sinistre, la perte de $40,000 en résultant, et le droit de l'appelant de lui réclamer les sommes de $8,000 et $2,000, pour la perte de l'immeuble et des meubles, respectivement. Pour seule et unique défense, l'intimée plaida que l'action était prématurée, alléguant au soutien de ce moyen, dans un amendement fait à l'issue de l'enquête, qu'elle n'avait pas reçu les formules de preuve de perte.

La Cour supérieure, acceptant le témoignage de Me LaMarsh, considéra que ces formules, dont copie était déposée en preuve, avaient été complétées, signées et assermentées, puis remises au service des postes dans une enveloppe affranchie, à l'adresse de Callaghan. L'intimée fut donc condamnée à payer à l'appelant la somme de $10,000.

Par une décision majoritaire, la Cour d'Appel[1] cassa ce jugement. En substance et s'appuyant sur les clauses 13 et 17 de l'art. 240 du c. 299, S.R.Q. 1941 et sur l'art. 2478 C.C., on jugea que l'assuré ne pouvait—sauf renonciation expresse ou tacite de la part de la compagnie intimée—poursuivre cette dernière sans lui avoir remis ces preuves de perte; que l'affirmation de Me LaMarsh quant à la mise à la poste de la lettre adressée au représentant autorisé de la compagnie ne pouvait faire preuve *"de la remise (delivery)"* des formules de preuve de perte à l'intimée ou à son représentant si, en effet, ceux-ci, comme ils en ont témoigné, ne les ont jamais reçues. On considéra également que l'assuré ne pouvait invoquer une renonciation expresse ou tacite de la part de la compagnie sans l'avoir alléguée dans ses procédures.

[1] [1959] Que. Q.B. 186.

Suivant la loi régissant le contrat d'assurance intervenu entre les parties, l'assureur avait droit d'exiger la *remise* (delivery) des preuves de perte. Cette position, il pouvait la modifier ou autoriser un agent nommé par lui à ce faire. Et voilà bien, à mon avis, ce qui s'est produit en l'espèce. Me LaMarsh n'avait pas à questionner le mandat et l'entière discrétion qu'en sa lettre du 3 avril, Callaghan lui dénonçait avoir reçus de la compagnie. Dans l'exécution de ce mandat et l'exercice de cette discrétion, Callaghan invitait virtuellement, par sa lettre, Me LaMarsh à lui retourner les formules par le service des postes, intermédiaire dont lui-même s'était servi pour les lui envoyer. A cela s'arrêtait l'obligation de Me LaMarsh et, à cette obligation, il s'est conformé.

Dans *Magann v. Auger*[1], cette Cour, pour résoudre une question de juridiction territoriale, eut à déterminer l'endroit où s'était formé un contrat, entièrement négocié par correspondance, par la précision du moment où s'était fait l'accord des volontés. Après examen de la doctrine en France, M. le Juge Taschereau, rendant le jugement pour la Cour, vint à la conclusion que la loi du Québec, sur la question, était la même qu'en Angleterre, qu'il n'était pas nécessaire pour la perfection du contrat que l'acceptation de l'offre soit parvenue à la connaissance de celui qui l'avait faite, et que le contrat s'était formé au moment et au lieu où l'acceptation, de l'offre faite par la poste, avait elle-même été mise à la poste. On considéra, ainsi que s'en exprime subséquemment M. le Juge en chef Anglin dans *Charlebois v. Baril*[2], que celui qui fait une offre en utilisant le service des postes constitue ce service comme son agent pour recevoir l'acceptation et la lui transmettre. C'est là le principe sur lequel se fonde juridiquement la décision. La livraison tardive ou la perte subséquente de la lettre manifestant l'accord des volontés n'affecte en rien la validité du principe et de son jeu. Ceci on l'affirme et en donne la raison dans *Household Fire Insurance Co. v. Grant*[3], dans les termes suivants:

As soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if

[1] (1901), 31 S.C.R. 186.
[2] [1928] S.C.R. 88, [1927] 3 D.L.R. 762.
[3] (1879), 4 Ex. D. 216 at 221.

1960

MILINKOVICH v. CDN. MERCANTILE INS. CO.

Fauteux J.

the acceptor himself had put his letter into the hands of a messenger sent by the offerer himself as his *agent* to deliver the offer and receive the acceptance.

Dans *Henthorn v. Fraser*[1], Lord Herschell formule la règle comme suit:

> Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.

Et on trouve, sur la question, le commentaire ci-après dans Anson's Law of Contract, 21e éd., à la page 47:

> One of the more obvious consequences of this rule is that the offeror must bear the risk of the letter of acceptance going astray. Indeed, it is sometimes said that there is a general rule that where the offeror either expressly or impliedly indicates the mode of acceptance, and this, as a means of communication, proves to be nugatory or insufficient, he does so at his own risk.

Sans doute il ne s'agit pas ici de la formation d'un contrat mais d'une modification, suggérée et acceptée, aux conditions de son exécution. Appréciée dans l'arrière-plan de toutes les circonstances particulières à cette cause, la lettre de Callaghan à Me LaMarsh permettait raisonnablement à ce dernier de considérer que l'assureur était satisfait que les preuves de perte soient confiées au service des postes, auquel il s'en remettait entièrement pour en obtenir livraison. Le silence et l'inaction de la compagnie intimée et de son mandataire, tous deux notoirement notifiés par avocat de la volonté de l'assuré d'exiger l'exécution du contrat, aussi bien que la nature de l'unique moyen plaidé en défense à l'action, sont, dans le cas qui nous occupe, incompatibles avec la bonne foi qui doit présider à l'exécution de ce contrat d'assurance.

Comme M. le Juge St-Jacques, dissident en Cour d'Appel, je suis d'avis que le dispositif du jugement de première instance est bien fondé.

Quant au motif de procédure invoqué, comme déjà mentionné, par l'un des Juges de la majorité, je ne crois pas, en toute déférence, qu'il y ait lieu de le retenir. Au para. 8 de la déclaration, le demandeur a suffisamment

[1] [1892] 2 Ch. 27.

indiqué à la compagnie défenderesse les faits dont il entendait se prévaloir pour inférer en droit la renonciation de la compagnie à s'en tenir rigidement à la loi régissant le contrat en ce qui concerne la production des preuves de perte. Ces faits, l'intimée en connaissait tous les détails; c'était les siens ou, et à son entière connaissance, ceux de son agent. L'intimée n'a fait d'ailleurs aucune objection à la preuve de ces faits.

Je maintiendrais l'appel, rétablirais le jugement de première instance, avec dépens, tant en cette Cour qu'en Cour d'Appel.

*Appeal allowed with costs.*

*Attorneys for the plaintiff, appellant: Garmaise & McNally, Rouyn-Noranda.*

*Attorney for the defendant, respondent: Philippe Pothier, St. Hyacinthe.*

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BRITISH COLUMBIA ELECTRIC RAILWAY CO. LTD. ..... APPELLANT;

AND

THE PUBLIC UTILITIES COMMISSION OF BRITISH COLUMBIA, BRITISH COLUMBIA LUMBER MANUFACTURERS' ASSOCIATION, THE CORPORATION OF THE CITY OF VICTORIA, THE CORPORATION OF THE DISTRICT OF OAK BAY, THE CORPORATION OF THE DISTRICT OF SAANICH, CORPORATION OF THE TOWNSHIP OF ESQUIMALT AND CITY OF VANCOUVER ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Public utilities—Case stated by Public Utilities Commission—Matters to be considered by Commission in changing rates—Order of priority to be given to factors considered—The Public Utilities Act, R.S.B.C. 1948, c. 277, s. 16(1)(a) and (b).*

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Ritchie JJ.

1960

B.C. ELECTRIC RAILWAY CO. LTD. v. PUBLIC UTILITIES COMMISSION OF B.C. et al.

The first of a series of questions submitted for the consideration of the Court of Appeal for British Columbia, in a case stated for the opinion of the Court, asked if the Public Utilities Commission of that Province was right in deciding "that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion."

The question was answered in the affirmative. The appellant appealed from that portion of the judgment of the Court of Appeal which comprised this answer.

*Held* (Kerwin C.J. *dissenting*): The appeal should be allowed.

*Per* Locke J.: There is an absolute obligation on the part of the Commission on the application of the utility to approve rates which will produce the fair return to which the utility has been found entitled, and the obligation to have due regard to the protection of the public is also to be discharged. It is not a question of considering priorities between "the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of s. 16", but consideration of these matters is to be given by the Commission in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

*Per* Cartwright, Martland and Ritchie JJ.: The combined effect of the two clauses referred to is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but it must when actually setting the rate, meet the requirements specifically mentioned in clause (*b*), i.e., the rate to be imposed should be neither excessive for the service nor insufficient to provide a fair return on the rate base. These two factors should be given priority over any other matters which the Commission may consider.

Although there is no priority directed by the Act as between these two matters, there is a duty imposed on the Commission to have due regard to both of them, and accordingly there must be a balancing of the interests concerned.

*Per* Kerwin C.J., *dissenting*: The statute does not require that any weight be given to the matters and things referred to in the two clauses after they have been considered, and therefore the weight to be assigned is a question of fact for the Commission to decide in each instance.

APPEAL from a portion of a judgment of the Court of Appeal for British Columbia[1], comprising the answer to the first of five questions submitted to it by the Public Utilities Commission. Appeal allowed, Kerwin C.J. dissenting.

*J. W. de B. Farris, Q.C., A. Bruce Robertson, Q.C.,* and *R. R. Dodd,* for the appellant;

[1] (1959), 29 W.W.R. 533.

*J. A. Clark, Q.C.*, for The Public Utilities Commission of British Columbia, respondent;

*T. P. O'Grady*, for The Corporation of The City of Victoria, The Corporation of The District of Oak Bay, The Corporation of the District of Saanich and Corporation of The Township of Esquimalt, respondents;

*R. K. Baker*, for City of Vancouver, respondent.

THE CHIEF JUSTICE (*dissenting*):—Pursuant to s. 107 of the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, the Public Utilities Commission stated a case for the opinion of the Court of Appeal for that Province. The case was stated in respect of five questions but we are concerned only with Question 1 as, by order of this Court, British Columbia Electric Railway Company, Limited was granted leave to appeal only from that portion of the judgment of the Court of Appeal comprising the answer given thereto. That question is as follows:

1. (*a*) Was the Commission right in deciding as appears in the said Reasons for Decision of 14th July, 1958, that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion?

(*b*) If the answer to question (1) (*a*) is "No", what decision should the Commission have reached on the point?

The Court's answer to Question 1 reads:

The Commission was right in deciding as appears in its Reasons for Decision of 14th July, 1958 that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the Public Utilities Act R.S.B.C. 1948, chapter 277 should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion.

At the conclusion of the argument the judgment of the Court of Appeal appeared to me to be correct and further consideration has confirmed me in that view. Reasons were given by Sheppard J.A. on behalf of himself and the other four members of the Court who heard the argument on the

1960

B.C. ELECTRIC RAILWAY CO. LTD. v. PUBLIC UTILITIES COMMISSION OF B.C. et al.

Kerwin C.J.

stated case. I adopt all that he said and would have nothing to add were it not for an argument presented on behalf of the appellant. Section 16(1)(*a*) and (*b*) read as follows:

16. (1) In fixing any rate:—

(*a*) The Commission shall consider all matters which it deems proper as affecting the rate:

(*b*) The Commission shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:

Mr. Farris submitted that the Court of Appeal had not taken into consideration the words in (1)(*b*) "The Commission shall have due regard.....and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:". However, I am satisfied upon a review of the reasons of Sheppard J.A., relevant to Question 1, and particularly of the extract transcribed below, which is the substance of his reasoning upon the matter, that he did consider and apply these words. The extract reads:

A further inquiry is what weight should be given to the matters required to be considered by Sec. 16 (1) (*b*) and particularly to the "fair and reasonable return". Under Sec. 16 (1) (*b*), the Commission is required to consider "the protection of the public" and the "giving to the public utility a fair and reasonable return". Although clauses (*a*) and (*b*) of Sec. 16 (1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16 (1) (*a*), namely, "all matters which it deems proper as affecting the rate" and those falling within Sec. 16 (1) (*b*), namely, "the protection of the public" and "a fair and reasonable return" to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance.

Furthermore, as Mr. Clark pointed out, the Commission when dealing with the electric rates applications, had, under heading "III.—A Fair Return", discussed that subject; and that in their reasons for decision with reference to the transit fares applications the Commission speaks "of the misunderstanding which arose from the recent decision on

electric rates"; and that later, in the same paragraph, they said: "The 6.5% rate remains the standard of the fair and reasonable return to which the Commission has due regard".

The appeal should be dismissed but there should be no costs.

LOCKE J.:—The sections of the *Public Utilities Act,* R.S.B.C. 1948, c. 277, which must be considered in deciding the first question are quoted in the reasons of my brother Martland which I have had the advantage of reading.

The real question might have been stated more clearly had it asked whether as a matter of law a duty rested upon the Commission to approve rates which would produce for the appellant a fair and reasonable return upon the appraised value of the property used or prudently and reasonably acquired by it to enable it to furnish the service described in the Act when the fact as to what constituted a fair return had previously been determined by the Commission. This is the matter to be determined.

Some assistance in interpreting the sections of the Act is to be obtained by an examination of the earlier legislation dealing with the control of rates charged for electrical power in British Columbia.

The first statutory provision dealing with the matter appears in the *Water Act Amendment Act* of 1929 which appeared as c. 67 of the statutes of that year. This Act provided for the control of such rates and imposed upon a power company producing electrical energy by water power the duty of supplying electrical energy to the public in the manner defined. Power companies were required to file schedules of their tolls with the Water Board constituted under the *Water Act,* R.S.B.C. 1924, c. 271.

"Unjust and unreasonable" as applied to tolls was declared to include injustice and unreasonableness, whether arising from the fact that the tolls were insufficient to yield fair compensation for the service rendered or from the fact that they were excessive as being more than a fair and reasonable charge for service of the nature and quality furnished.

Section 141B authorized the Board upon the complaint of any person interested that a toll charge was unjust, unreasonable or unduly discriminatory to enquire into the matter,

1960

B.C. ELECTRIC RAILWAY CO. LTD. v. PUBLIC UTILITIES COMMISSION OF B.C. et al.

Locke J.

to disallow any rate found to be excessive, and to fix the tolls to be charged by the power company for its service or respecting the improvement of the service in such manner as the Board considered just and reasonable.

Section 141C read:

> Every power company shall be entitled to a fair return on the value of all property acquired by it and used in providing service to the public of the nature and kind furnished by such power company or reasonably held by such power company for use in such service and the Board in determining any toll shall have due regard to that principle.

Section 141D read in part:

> In considering any complaint and making any order respecting the tolls to be charged by any power company the Board shall have due regard, among other things, to allowing the company a fair return upon the value of the property of the company referred to in Clause 141C and to the protection of the public from tolls that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the company.

These amendments to the *Water Act* appeared as ss. 138 to 157 in the Revision of the Statutes of 1936 and these sections were repealed when the first *Public Utilities Act* was passed by the Legislature, c. 47 of the statutes of 1938.

It will be seen by an examination of the *Public Utilities Act* that in large measure the language of the amendments to the *Water Act* made in 1929 was adopted. The definition of the terms "unjust" and "unreasonable", which appeared in the 1929 amendment as part of s. 2, was reproduced in s. 2 of the Act of 1938. The prohibition against levying any unjust and unreasonable, unduly discriminatory or unduly preferential rate appearing as s. 8 of the *Public Utilities Act* merely expresses in slightly different terms the prohibition contained in s. 141B. The expression "shall have due regard" which appears in s. 16(1)(*b*) of the *Public Utilities Act* was apparently taken from ss. 141C and D.

The *Public Utilities Act,* however, did not, when first enacted, and does not now contain any section which declares in express terms, as did s. 141C of the *Water Act Amendment Act,* that the power company shall be entitled to a fair return on the value of its property. Had the present Act contained such a provision it appears to me to be perfectly clear that the answer to be made to the first question should differ from that given by the Court of Appeal.

Whether its omission affects the matter is to be determined.

As it has been pointed out, the utility in the present matter is required by the Act to maintain its property in such condition as to enable it to supply an adequate service to the public and to furnish that service to all persons who may be reasonably entitled thereto without discrimination and without delay. It may not discontinue its operations without the permission of the Public Utilities Commission. The utility has, so far as we are informed, a monopoly on the sale of electrical energy in the Cities of Vancouver and Victoria and in my opinion at common law the duty thus cast upon it by statute would have entitled it to be paid fair and reasonable charges for the services rendered in the absence of any statutory provision for such payment.

I consider that, in this respect, the position of such a utility would be similar to that of a common carrier upon whom is imposed as a matter of law the duty of transporting goods tendered to him for transport at fair and reasonable rates. This has been so from very early times. In *Bastard v. Bastard*[1], in an action against a common carrier in the Court of King's Bench for the loss of a box delivered to him for carriage, in delivering judgment for the plaintiff it was said that, while there was no particular agreement as to the amount to be paid for the carriage, "then the carrier might have a *quantum meruit* for his hire".

In *Great Western Railway v. Sutton*[2], Blackburn J. said in part:

> The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a reasonable compensation for so doing.

The result of the authorities appears to me to be correctly summarized in Browne's Law of Carriers, at p. 42, where it is said:

> We have already seen that the law imposes very onerous duties, and very considerable risks, upon a person who is designated a common carrier. As to his duty, he is bound by law to undertake the carriage of goods. Another man is free from any such duty until he has entered into a special agreement; but the law holds that the common carrier, by the very fact of his trade and business, has, on his side, entered into an agreement with the public to carry goods, which becomes at once a complete and binding contract when any person brings him the goods,

[1] (1679), 2 Show. 81, 89 E.R. 807.
[2] (1869), L.R. 4 H.L. 226 at 237, 38 L.J Ex. 177.

1960

B.C. ELECTRIC RAILWAY CO. LTD. v. PUBLIC UTILITIES COMMISSION OF B.C. et al.

Locke J.

and makes the request that he should carry them to a certain person or place. To make such a contract binding upon him as a common carrier, it is not necessary that a specific sum of money should be promised or agreed upon; but where that is not the case, there is an implied undertaking upon the part of the bailor that the remuneration shall be reasonable.

The *Water Act Amendment Act* of 1929 appears to have followed closely the form of public utilities legislation in certain of the United States. There had been statutes of this nature in force in various parts of the Union for a considerable time prior to the year 1929.

I do not find that the American statutes generally declared in terms as did s. 141C of the *Water Act Amendment Act* that a power company providing service to the public should be entitled to a fair return on the value of all property acquired by it and used in providing service to the public. This method, however, of establishing a fair and reasonable rate would appear to have been followed universally.

The authorities in the American cases are to be found summarized in Nichols—Ruling Principles of Utility Regulation, at p. 49—where a passage from the judgment of the Supreme Court of the United States in *Bluefield Water Works & Improvement Co. v. West Virginia Public Service Commission*[1] is quoted reading:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this court that citation of the cases is scarcely necessary.

In *New Jersey Public Utility Commissioners v. New York Telephone Company*[2], Butler J. said:

> The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for public service. And rates not sufficient to yield that return are confiscatory.

While without the provision made in s. 141C of the *Water Act Amendment Act* a power company compelled by the amendment to furnish electrical service on demand

[1] (1923), 262 U.S. 679. [2] (1925), 271 U.S. 23 at 31.

upon the conditions prescribed would in my opinion have been entitled to a fair and reasonable payment for such service, the Legislature, by s. 141C, defined the manner in which fair and reasonable rates should be established.

As I have said, the *Public Utilities Act* does not contain any provision which in terms declares the right of the utility to a fair return on the value of its property. It does, however, by the definition of the terms "unjust" and "unreasonable" adopted from the *Water Act Amendment Act* declare that these expressions include rates that are insufficient to yield fair compensation for the service rendered, and the Public Utilities Commission in the present matter have interpreted this in its context as indicating the yardstick to be used in determining the fair and reasonable return to which the appellant was entitled.

Under the powers given to the Commission by s. 45 of the Act the value of the property of the appellant used, or prudently or reasonably acquired to enable the company to furnish its services was determined as at December 31st, 1942, and since then has been kept up to date. On September 11th, 1952, the Commission, after public hearings, decided that until some change in the financial and market circumstances convinced the Commission that a different rate should be applied, the Commission would apply the rate of 6.5 per cent. on the rate base as a fair and reasonable rate of return for the company.

That decision remains unchanged and is not questioned by anyone in these proceedings.

In interpreting the statute, the position at common law of the utility after the repeal of the sections of the *Water Act* must be considered. Had the statute imposed upon the appellant the obligation to furnish service of the natures defined upon demand, without more, it would have been entitled as a matter of law to recover from a person demanding service reasonable and fair compensation. It will not in my opinion be presumed that it was the intention of the Legislature to deprive a utility of that common law right.

1960

B.C. ELECTRIC RAILWAY CO. LTD. v. PUBLIC UTILITIES COMMISSION OF B.C. et al.

Locke J.

In *Colonial Sugar Refining Company v. Melbourne Harbour Trust Commissioners*[1], the Judicial Committee said:

> In considering the construction and effect of this Act the Board is guided by the well known principle that a statute should not be held to take away private rights of property without compensation, unless the intention to do so is expressed in clear and unambiguous terms.

In Maxwell on Statutes, 10th ed., at p. 286, the authorities are thus summarized:

> Proprietary rights should not be held to be taken away by Parliament without provision for compensation unless the legislature has so provided in clear terms. It is presumed, where the objects of the Act do not obviously imply such an intention, that the legislature does not desire to confiscate the property or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words at least by clear implication and beyond reasonable doubt.

Subsection 6 of s. 23 of the *Interpretation Act*, R.S.B.C. 1948, c. 1, directs that every Act shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act. In my opinion the true meaning of the relevant sections of the *Public Utilities Act* is that a utility is given a statutory right to the approval of rates which will afford to it fair compensation for the services rendered and that the quantum of that compensation is to be a fair and reasonable rate of return upon the appraised value of the property of the company referred to in s. 16(1)(*b*).

The appellant in addition to the sale of electrical energy operates a public transportation system and sells gas and by an Order-in-Council made under the provisions of s. 15(1)(*c*) of the Statutes of 1938 it was directed that these three categories of service should be considered as one unit in fixing the rates. In the reasons delivered by the Commission upon the application to increase the rates for electricity, it is said that the appellant has never earned the approved rate of return and that the rates proposed by it, and which were not approved, would not enable it to do so even in respect of the electrical system alone.

[1] [1927] A.C. 343 at 359, 96 L.J.P.C. 74.

Rates that fail to yield fair compensation for the service rendered are declared by s. 2 to be unjust and unreasonable as they were by s. 2 of the *Water Act Amendment Act* of 1929. The Commission is directed by s. 16(1)(*b*) to have due regard to fixing a rate which will give to the utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable it to furnish the service. It is the inclusion of the expression "shall have due regard" which has led the Commission and the Court of Appeal to conclude that this means that allowing a fair return upon the appraised value is simply one of the matters to be considered by the Commission in fixing the rate. Clearly no such interpretation could have been placed upon this expression under the provisions of the *Water Act* in view of the express provisions of s. 141C, and with great respect I think no such interpretation should be given to it in the present statute.

The fair compensation referred to in s. 2 of the *Water Act Amendment Act* of 1929 referred, and could only refer, to an aggregate produced by tolls sufficient to yield to the power company the fair return on the value of its property to which s. 141C declared it was entitled. The fair compensation referred to in s. 2 of the *Public Utilities Act* is in its context, in my opinion, to be construed in the same manner. The Order of the Commission of September 11th, 1952, determined what that compensation should be. The rates to be put into force to yield such fair compensation, which, at least in the case of electricity, vary in accordance with the use to which it is put and the quantities purchased, are matters to be determined by the Commission. The direction to the Commission in s. 16(1)(*b*) to have due regard to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for the services requires it, in my opinion, to approve rates which are in its judgment fair and reasonable having in mind the purpose for which the electricity is used, the quantities purchased and such other matters as it considers justify the approval of rates which differ for different users.

I can find nothing in this legislation indicating an intention on the part of the Legislature to empower the Commission to deprive the utility of its common law right to be paid fair compensation for the varying services rendered or

1960

B.C. ELECTRIC RAILWAY CO. LTD. v. PUBLIC UTILITIES COMMISSION OF B.C. et al.

Locke J.

to depart from the declared intention of the Legislature in the *Water Act Amendment Act* that such companies upon whom these obligations are imposed are entitled to have the quantum of such fair compensation determined as a fair return upon the appraised value of the properties required.

I do not think it is possible to define what constitutes a fair return upon the property of utilities in a manner applicable to all cases or that it is expedient to attempt to do so. It is a continuing obligation that rests upon such a utility to provide what the Commission regards as adequate service in supplying not only electricity but transportation and gas, to maintain its properties in a satisfactory state to render adequate service and to provide extensions to these services when, in the opinion of the Commission, such are necessary. In coming to its conclusion as to what constituted a fair return to be allowed to the appellant these matters as well as the undoubted fact that the earnings must be sufficient, if the company was to discharge these statutory duties, to enable it to pay reasonable dividends and attract capital, either by the sale of shares or securities, were of necessity considered. Once that decision was made it was, in my opinion, the duty of the Commission imposed by the statute to approve rates which would enable the company to earn such a return or such lesser return as it might decide to ask. As the reasons delivered by the Commission show, the present appellant did not ask the approval of rates which would yield a return of 6.5 per cent. to which it was entitled under the Order of the Board.

I do not consider that Question (1) can be answered by a simple affirmative or negative. The obligation to approve rates which will produce the fair return to which the utility has been found entitled is, in my opinion, absolute, which does not mean that the obligation of the Commission to have due regard to the protection of the public, as required by s. 16(1)(*b*), is not to be discharged. It is not a question of considering priorities between "the matters and things referred to in Clauses (*a*) and (*b*) of subsection (1) of s. 16". The Commission is directed by s. 16(1)(*a*) to consider all matters which it deems proper as affecting the rate but that consideration is to be given in the light of the fact that the obligation to approve rates which will give a fair and reasonable return is absolute.

In my opinion the answer to be made to Question (1)(*a*) is that the Commission was wrong in deciding that it was not required to approve rates which in the aggregate would produce for the utility the fair return which by its order of September 11, 1952, the Commission found it to be entitled or such lower rates as the utility might submit for approval. The duty of the Commission to have due regard to the protection of the public from excessive rates referred to in the first four lines of s. 16(1)(*b*) refers to the approval of rates according to the use to be made by and the quantities supplied to those to whom the service is rendered.

The second part of Question (1) reads:

> If the answer to (1)(*a*) is "No", what decision should the Commission have reached on the point?

As to this I agree with the answer proposed by my brother Martland.

I would allow this appeal but make no order as to costs.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—Pursuant to the provisions of subs. (1) of s. 107 of the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, the Public Utilities Commission of that Province stated a case for the opinion of the Court of Appeal of British Columbia. Five questions were submitted for the consideration of the Court, of which the first was as follows:

> (1) (*a*) Was the Commission right in deciding as appears in the said Reasons for Decision of 14th July, 1958, that no one of the matters and things referred to in clauses (*a*) and (*b*) of subsection (1) of Section 16 of the "Public Utilities Act" should as a matter of law be given priority over any other of those matters or things and that, if a conflict arises among these matters or things, it is the Commission's duty to act to the best of its discretion?
>
> (*b*) If the answer to question (1) (*a*) is "No", what decision should the Commission have reached on the point?

Question (1)(*a*) was answered in the affirmative. The appellant, by special leave of this Court, has appealed from that portion of the judgment of the Court of Appeal which comprises the answer given by it to question (1). The other four questions and the answers given to them are not in issue in this appeal.

1960

B.C. ELECTRIC RAILWAY CO. LTD. v. PUBLIC UTILITIES COMMISSION OF B.C. et al.

Martland J.

The relevant circumstances involved are contained in the case stated by the Public Utilities Commission and are as follows:

The appellant and British Columbia Electric Company Limited (together called "the Company") are related companies and between them own and operate equipment and facilities for the transportation of persons and property by railway, trolley coach and motor buses and for the production, generation and furnishing of gas and electricity, all for the public for compensation.

The Company is regulated by the Public Utilities Commission of British Columbia (called "the Commission") pursuant to the provisions of the *Public Utilities Act*.

By appraisal the Commission ascertained the value of the property of the Company used, or prudently and reasonably acquired, to enable the Company to furnish its services. The appraisal was made as of December 31, 1942, and since then has been kept up to date. The appraised value is referred to as "the rate base".

By Order-in-Council No. 1627, approved on July 16, 1948, the Commission was directed to consider the classes or categories of the regulated services of the Company as one unit in fixing the rates.

On September 11, 1952, the Commission after public hearing made "Findings as to Rate of Return" and decided that, "until changed financial and market circumstances convince the Commission that a different rate should be applied, the Commission will in its continuing examination of the Company's operations apply the rate of 6.5%" on the rate base as a fair and reasonable rate of return for the Company. This decision remains unchanged.

The Company from time to time amended its rate schedules with the consent of the Commission and filed with the Commission schedules showing the rates so established. On April 23, 1958, it applied for the consent of the Commission, under s. 17 of the *Public Utilities Act*, to file amended schedules containing increased rates for its electric service on the Mainland and on Vancouver Island. On July 28, 1958, it also applied for the consent of the Commission to file amended schedules containing increased transit fares for its transit systems in Vancouver and other Mainland areas and in Victoria and surrounding areas.

Public hearings were held by the Commission and it handed down its decision with respect to the electric applications on July 14, 1958, and with respect to the transit applications on October 30, 1958.

Briefly, the decisions of the Commission accepted the proposed rate schedules submitted by the Company, except that it refused to approve the proposed increases in the principal residential electric rates on the Mainland and on Vancouver Island. It directed that those rates be scaled down by approximately 25%. In its decision with respect to electric rates the Commission stated:

> The Commission has therefore consented to the filing to be effective July 15th, 1958, of all the rate schedules submitted by the Company for the Mainland and Vancouver Island, as modified and supplemented by the Company during the course of the hearings on its application, except the residential rate schedules and Mainland Rate 3035 for industrial users.
>
> The Commission has decided that the principal residential rate on the Mainland (Schedule 1109) and the principal residential rate on the Island (Schedule 1110 under which the principal divisions are Billing Codes 1110 and 1112) should be adjusted to yield not more than three-quarters of the additional revenue proposed. The adjustment must be applied primarily to reduce sharp changes in impact and lessen disproportionately large percentage increases in the consumption range of 60 KWH to 280 KWH per month. Comparable adjustments must also be made in some of the related special residential rates of lesser importance. Most of the relief would be given to the small residential user.

At the same time the Commission decided that further increases in the commercial and industrial rates to compensate for this reduction in the proposed residential rates would not be justified.

During the hearings it was contended by counsel for the Company that, the Commission, having determined on a fair and reasonable return to the Company, namely, 6.5%, the Commission should authorize rates which would yield that return, or whatever lesser return the Company's application requested for the time being. The Commission did not accept this contention and the rates which were approved by the Commission would yield approximately $750,000 less per annum than those applied for by the Company would yield. The rates for which the Company sought approval themselves would not have yielded to the Company the full allowed rate of return of 6.5%.

The relevant portions of s. 16(1) of the *Public Utilities Act* provide as follows:

> 16. (1) In fixing any rate:—

1960

B.C. ELECTRIC RAILWAY CO. LTD. v. PUBLIC UTILITIES COMMISSION OF B.C. et al.

Martland J.

(a) The Commission shall consider all matters which it deems proper as affecting the rate:

(b) The Commission shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service:

(c) Where the public utility furnishes more than one class of service, the Commission shall segregate the various kinds of service into distinct classes or categories of service; and for the purpose of fixing the rate to be charged for the service rendered, each distinct class or category of service shall be considered as a self-contained unit, and the rates fixed for each unit shall be such as are considered just and reasonable for that unit without regard to the rates fixed for any other unit. If it is considered by the Lieutenant-Governor in Council that the rates as so determined might be inequitable or contrary to the general public interest, the Lieutenant-Governor in Council may direct that two or more classes or categories of service shall be considered as one unit in fixing the rate:

In the reasons given for its decision the Commission deals with the effect of clauses (*a*) and (*b*) of s. 16(1) and says:

With great respect, the Commission considers that although for this purpose the statutory duty of the Commission to have due regard to all matters which the Commission deems proper as affecting the rate might without any significant inaccuracy be described as the right of the Commission, and its statutory duty to *have due regard to giving* the utility a fair and reasonable return might without significant inaccuracy be described as the Commission's *responsibility for giving* the utility a fair and reasonable return, there is nothing in the Act to relieve the Commission in the case now before it from complying with the language of the Act and giving due regard to all those matters to which the legislature has directed the Commission to give due regard in fixing a rate. No one of those matters should, in the opinion of the Commission, be given as a matter of law priority over any other of those matters and if, as the legislature appears to have thought possible, a conflict arises among those matters, the Commission considers that it is its duty to act to the best of its discretion.

The Court of Appeal concurred in this view. The judgment of the Court[1], delivered by Sheppard J.A., refers to this question in the following words:

A further inquiry is what weight should be given to the matters required to be considered by Sec. 16(1)(*b*) and particularly to the "fair and reasonable return". Under Sec. 16(1)(*b*), the Commission is required

[1] (1959), 29 W.W.R. 533 at 538.

to consider "the protection of the public" and the "giving to the public utility a fair and reasonable return". Although clauses (*a*) and (*b*) of Sec. 16(1) require certain matters to be considered, they do not state what weight is to be assigned by the Commission. Consequently, the Statute requires only that the Commission consider the matters falling within Sec. 16(1)(*a*), namely, "all matters which it deems proper as affecting the rate" and those falling within Sec. 16(1)(*b*), namely, "the protection of the public" and "a fair and reasonable return" to the Utility. But the Statute does not require more, and does not require any weight to be given to these matters after they have been considered. Hence the weight to be assigned is outside any statutory requirement and must be a question of fact for the Commission in each instance.

From this decision the present appeal is brought.

To determine the intent and meaning of clauses (*a*) and (*b*) of s. 16(1) of the Act it is necessary to consider them in relation to the other provisions of the Act, with which they must be read.

Section 5 imposes upon a public utility the duty to maintain its property and equipment in such condition as to enable it to furnish, and to furnish, service to the public in all respects adequate, safe, efficient, just and reasonable. Section 7 prevents a public utility which has been granted a certificate of public convenience and necessity or a franchise from ceasing its operations or any part of them without first obtaining the permission of the Commission.

Section 6 requires every public utility, upon reasonable notice, to furnish to all persons who may apply therefor, and be reasonably entitled thereto, suitable service without discrimination and without delay.

Sections 38, 42 and 43 contain provisions whereby, in the circumstances therein defined, a public utility may be ordered by the Commission to extend its existing services.

These four sections last mentioned involve a statutory obligation on the part of a public utility to make capital outlays for extensions of its service. A public utility which operates in a rapidly expanding community may be required to make substantial expenditures of that nature in order to keep pace with increasing demands. It must, if it is to fulfil those obligations, be able to obtain the necessary

1960

B.C. ELECTRIC RAILWAY CO. LTD. v. PUBLIC UTILITIES COMMISSION OF B.C. et al.

Martland J.

capital which is required, which it can only do if it is obtaining a fair rate of return upon its rate base. The meaning of a fair return was defined by Lamont J. in *Northwestern Utilities, Limited v. City of Edmonton*[1]:

> By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise.

The necessity for giving a public utility fair compensation for the service which it renders appears in the definition of the words "unjust" and "unreasonable" in s. 2(1), which is as follows:

> "Unjust" and "unreasonable" as applied to rates shall be construed to include respectively injustice and unreasonableness, whether arising from the fact that rates are excessive as being more than a fair and reasonable charge for service of the nature and quality furnished by the public utility, or from the fact that rates are insufficient to yield fair compensation for the service rendered, or arising in any other manner:

The word "service", which appears in this definition, is defined in the Act to include:

> the use and accommodation afforded consumers or patrons, and any product or commodity furnished by a public utility; and also includes, unless the context otherwise requires, the plant, equipment, apparatus, appliances, property, and facilities employed by or in connection with any public utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which the public utility is engaged and to the use and accommodation of the public:

These defined words appear in two sections of the Act which relate to the rates to be charged by a public utility.

Section 8, which is among a group of sections dealing with the duties and restrictions imposed on public utilities, provides:

> 8. (1) No public utility shall make demand or receive any unjust, unreasonable, unduly discriminatory, or unduly preferential rate for any service furnished by it within the Province, or any rate otherwise in violation of law; and no public utility shall, as to rates or service, subject any person or locality, or any particular descripiton of traffic, to any undue prejudice or disadvantage, or extend to any person any form of agreement, or any rule or regulation, or any facility or privilege, except such as are regularly and uniformly extended to all persons under substantially similar circumstances and conditions in respect of service of the same description, and the Commission may by regulations declare what constitute substantially similar circumstances and conditions.

[1] [1929] S.C.R. 186 at 193, 2 D.L.R. 4.

(2) It shall be a question of fact, of which the Commission shall be the sole judge, whether any rate is unjust or unreasonable, or whether in any case there is undue discrimination, preference, prejudice, or disadvantage in respect of any rate or service, or whether service is offered or furnished under substantially similar circumstances and conditions. 1938, c. 47, s. 8; 1939, c 46, s. 5.

Section 20, which empowers the Commission to determine rates, reads as follows:

20. The Commission may upon its own motion or upon complaint that the existing rates in effect and collected or any rates charged or attempted to be charged by any public utility for any service are unjust, unreasonable, insufficient, or discriminatory, or in anywise in violation of law, after a hearing, determine the just, reasonable, and sufficient rates to be thereafter observed and in force, and shall fix the same by order. The public utility affected shall thereupon amend its schedules in conformity with the order and file amended schedules with the Commission.

It will be noted that this section, in addition to the use of the words "unjust" and "unreasonable", also uses the terms "insufficient" and "sufficient" in relation to rates.

Both of these sections contemplate a system of rates which would be fair to the consumer on the one hand and which will yield fair compensation to the public utility on the other hand.

Section 16, the section with which we are concerned in this appeal, also deals with this matter of fairness of rates. In addition, it spells out the method by which a public utility is to obtain fair compensation for its service; i.e., by a fair and reasonable return upon its rate base, which rate base, pursuant to s. 45, the Commission can determine by appraisal.

Section 16 deals with the duties of the Commission in fixing rates. Clause (*a*) of subs. (1) states that the Commission shall consider all matters which it deems proper as affecting the rate. It confers on the Commission a discretion to determine the matters which it deems proper for consideration and it requires the Commission to consider such matters.

Clause (*b*) of subs. (1) does not use the word "consider", which is used in clause (*a*), but directs that the Commission "shall have due regard", among other things, to two specific matters. These are:

(i) The protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and

1960

B.C. ELECTRIC RAILWAY CO. LTD. v. PUBLIC UTILITIES COMMISSION OF B.C. et al.

Martland J.

(ii) To giving to the public utility a fair and reasonable return upon the appraised value of its property used or prudently and reasonably acquired to enable the public utility to furnish the service.

As I read them, the combined effect of the two clauses is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*). It would appear, reading ss. 8, 16 and 20 together, that the Act contemplates these two matters to be of primary importance in the fixing of rates.

In my opinion, therefore, these two factors should be given priority over any other matters which the Commission may consider under clause (*a*), or any other things to which it shall have due regard under clause (*b*), when it is fixing any rate.

The second portion of question (1)(*a*) was as to whether, in case of conflict among the matters and things referred to in clauses (*a*) and (*b*) of s. 16(1), it was the Commission's duty to act to the best of its discretion. I have already expressed my view regarding the priority as between those things specifically mentioned in clause (*b*) and the other matters or things referred to in clauses (*a*) and (*b*). This leaves the question as to possible conflict as between the two matters specifically mentioned in clause (*b*).

Clearly, as between these two matters there is no priority directed by the Act, but there is a duty imposed upon the Commission to have due regard to both of them. The rate to be imposed shall be neither excessive for the service nor insufficient to provide a fair return on the rate base. There must be a balancing of interests. In my view, however, if a public utility is providing an adequate and efficient service (as it is required to do by s. 5 of the Act), without incurring unnecessary, unreasonable or excessive costs in so doing, I cannot see how a schedule of rates, which, overall, yields less revenue than would be required to provide that rate of return on its rate base which the Commission has determined to be fair and reasonable, can be considered, overall, as being excessive. It may be that within the schedule certain rates may operate unfairly, relatively, as

between different classes of service or different classes of consumers. If so, the Commission has the duty to prevent such discrimination. But this can be accomplished by adjustments of the relative impact of the various rates in the schedule without having to reduce the total revenues which the whole schedule of rates is designed to produce.

Accordingly, it is my opinion that the answer to question (1)(*a*) should be "No". My answer to question (1)(*b*) would be that the Commission, in priority to any other matters which it may deem proper to consider under clause (*a*) and any of the other things referred to in clause (*b*) of s. 16(1), should have due regard to the two matters specifically mentioned in clause (*b*). In the present case, having decided that certain of the rates proposed by the appellant would impose an unreasonable burden upon certain classes of consumers, the Commission should permit the Company to submit alternative schedules of rates, which, while yielding approximately the same overall revenues, would eliminate the comparatively excessive impact of those classes of rates to which the Commission objected, until a rate schedule is devised which meets the requirements of clause (*b*) of s. 16(1).

In my view the appeal should be allowed, but no costs should be payable.

*Appeal allowed,* Kerwin C.J. *dissenting.*

*Solicitor for the appellant: A. Bruce Robertson, Vancouver.*

*Solicitors for The Public Utilities Commission of British Columbia, respondent: Clark, Wilson, Clark, White & Maguire, Vancouver.*

*Solicitors for The Corporation of The City of Victoria, The Corporation of The District of Oak Bay, The Corporation of The District of Saanich and Corporation of The Township of Esquimalt, respondents: Straith, O'Grady, Buchan, Smith & Whitley, Victoria.*

*Solicitor for City of Vancouver, respondent: R. K. Baker, Vancouver.*

1960

*Mar. 23, 24, 25 Oct. 4

JOHN D. CRIGHTON (*Plaintiff*) ..... APPELLANT;

AND

STEPHEN BOLESLAV ROMAN (*Defendant*) ..... RESPONDENT.

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STEPHEN BOLESLAV ROMAN (*Defendant*) ..... APPELLANT;

AND

THE TORONTO GENERAL TRUSTS CORPORATION, AS EXECUTORS OF THE ESTATE OF WILLIAM RAEY FEATHERSTONE, DECEASED, (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Trusts and Trustees—Mining claims—Sale of partnership asset—Failure to account for partial consideration by managing partner—Validity of release of beneficial interest.*

R purchased certain mining claims. C, who accepted an offer to join in the purchase, claimed that it was agreed that R should have a 50 per cent interest and that C and an associate F should each have a 25 per cent interest.

Title was taken in the name of a trustee P, who later, upon instructions from R, sold the claims to North Denison Mines Limited for a price which was eventually set at $15,000 plus 100,000 fully paid shares of North Denison.

P, upon further instructions from R, and upon receiving a release from C, transferred the North Denison shares to another company which was controlled by R. In consideration of C signing the release, R waived payment of some money owed to him by C. The proceeds of these shares came into the hands of R in the form of 100,000 shares of New Denison Mines Limited, all of which were free from the terms of an escrow agreement to which 90,000 of the North Denison shares had been subject. The "free" shares were later exchanged for shares of Consolidated Denison Mines Limited.

The $15,000 was duly accounted for; one-half being paid to R and his nominee and one-half to C, who gave his own cheque to F for one-half the amount received by him. However, R did not account to F or his estate for any part of the shares.

In an action taken by the plaintiff trust company, on behalf of F's estate, and C, judgment was given for the trust company against R. C was unsuccessful. The Court of Appeal dismissed appeals by R and C and a cross-appeal by the trust company. R and C appealed to this Court.

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*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Martland and Ritchie JJ.

*Held* (Kerwin C.J. dissenting as to C's appeal): R's appeal should be dismissed. C's appeal should be allowed.

*Per* Kerwin C.J. and Taschereau, Cartwright, Martland and Ritchie JJ.: The partnership asset or that which it had become through R's dealings was vested in R as trustee and he must account for it. Before he dealt with the shares in a manner inconsistent with the duties attaching to his fiduciary position he had knowledge of F's beneficial ownership.

*Per* Taschereau, Cartwright, Martland and Ritchie JJ.: R stood in a fiduciary relationship to C as well as to F, and when he received the shares which he placed in P's name he was a constructive trustee of those shares to the extent of C's beneficial interest therein.

R did not obtain a valid release or transfer of C's beneficial interest. He was in the position of a trustee purchasing from his *cestui que trust* the latter's beneficial interest in the trust property. In failing to make full disclosure to C of all the material circumstances he failed to satisfy the onus, which lay upon him, of supporting the transaction. *Williams v. Scott,* [1900] A.C. 499, *Brickenden v. London Loan and Savings Co.,* [1934] 3 D.L.R. 465, referred to.

C was entitled to the same relief as that awarded by the courts below to F's estate, subject only to R's entitlement to the amount of which he waived payment in consideration of C signing the release.

*Per* Kerwin C.J. *dissenting*: C owed money to R and his release under seal to P, acting for R, cannot be set aside.

APPEALS from a judgment of the Court of Appeal for Ontario, affirming a judgment of Judson J. Appeal of John D. Crighton allowed, Kerwin C.J. dissenting. Appeal of Stephen Boleslav Roman dismissed.

*C. R. Archibald, Q.C.,* for the plaintiff, appellant.

*J. Sedgwick, Q.C., and J. D. Arnup, Q.C.,* for the defendant, respondent.

*T. Sheard, Q.C.,* for the plaintiff, respondent.

THE CHIEF JUSTICE (*dissenting as to Crighton's appeal*): I have had the advantage of reading the reasons for judgment of Cartwright J. I agree that Roman's appeal fails and should be dismissed with costs. However, I am unable to concur that Crighton's appeal should succeed as I find it impossible to dissent from the views of the trial judge and the Court of Appeal that Crighton owed money to Roman and that the release under seal by Crighton to Peacock, acting for Roman, cannot be set aside. I would, therefore, dismiss Crighton's appeal with costs.

1960

CRIGHTON v. ROMAN

ROMAN v. TORONTO GEN. TRUSTS CORP. et al.

The judgment of Taschereau, Cartwright, Martland and Ritchie JJ. was delivered by

CARTWRIGHT J.:—These two appeals arise out of an action brought by The Toronto General Trusts Corporation as Executor of the estate of William Raey Featherstone, hereinafter referred to as "Featherstone", and John D. Crighton, hereinafter referred to as "Crighton", as plaintiffs, against Stephen Boleslav Roman, hereinafter referred to as "Roman", and four other individuals as defendants.

The plaintiffs asked for numerous items of relief but we are now concerned only with the first two of these which are as follows:

(*a*) The immediate transfer and delivery to the Plaintiff The Toronto General Trusts Corporation as executor of the estate of the late William Raey Featherstone, of 25,000 shares of the capital stock of North Denison Mines Limited.

(*b*) The immediate transfer and delivery to the Plaintiff Crighton of 25,000 shares of the capital stock of North Denison Mines Limited.

The action was tried before Judson J. and judgment was given in favour of the plaintiff trust company against Roman, the terms of the formal judgment being as follows:

1. THIS COURT DOTH ORDER AND ADJUDGE that the Defendant Stephen Boleslav Roman, do forthwith deliver to the Plaintiff, the Toronto General Trusts Corporation as Executor of the Estate of William Raey Featherstone, deceased, 25,000 fully paid shares of North Denison Mines Limited, or, in the alternative, the equivalent thereof being 7,143 fully paid shares of Consolidated Denison Mines Limited.

The claims of the Trust Company against all the defendants other than Roman were dismissed.

The claims of Crighton against all the defendants were dismissed.

Roman appealed to the Court of Appeal for Ontario, asking that the claim of the plaintiff trust company be dismissed or, in the alternative, that the judgment be varied by awarding the said plaintiff damages in a sum not exceeding $2,500.

The trust company cross-appealed and Crighton appealed, asking that Roman be ordered to deliver to each of them the equivalent of 50,000 shares of North Denison Mines Limited. We are not now concerned with this increased claim.

Roman's appeal, Crighton's appeal, and the cross-appeal of the trust company were dismissed.

Roman appeals to this Court against the judgment in favour of the plaintiff trust company asking for the same relief as that for which he asked in the Court of Appeal.

Crighton appeals to this Court asking for judgment directing Roman to transfer to him 25,000 fully paid shares of the capital stock of North Denison Mines Limited or the equivalent thereof being 7,143 fully paid shares of Consolidated Denison Mines Limited.

Much of the voluminous evidence introduced at the trial relates to claims with which we are no longer concerned.

Some of the facts relevant to the questions which we have to decide are undisputed but as to several there is conflict between the evidence of Crighton and that of Roman.

Early in the year 1953, Crighton and Featherstone had embarked on a venture described as "the Glencair Deal". They invited Roman to participate in this. He did so and in the course of a few weeks the matter was brought to a successful conclusion resulting in the distribution of a profit of some $300,000.

At or shortly after the date of the completion of "the Glencair Deal" Roman purchased from a prospector, named McCarthy, five unpatented mining claims in Northern Saskatchewan, known as the Skibbereen claims; the price was $10,000 in cash plus, at the option of the vendor, a further $10,000, or 25,000 fully paid shares of the capital stock of a company to be designated by Roman.

There is a conflict of evidence as to what happened at this point. Roman says that he talked to Crighton about the matter, that "to the best of his recollection" no one else was present, that he told Crighton about his deal with McCarthy and asked him whether he wanted any part of it and that Crighton agreed to take a 50% interest. Crighton, on the other hand, says that Featherstone also was present and that it was agreed that Roman should have a 50% interest and that Featherstone and Crighton should each have a 25% interest. It is common ground that Roman gave his cheque for $5,000 to the Royal Bank, which was to hold the $10,000 until the necessary documents were delivered, that Crighton gave two cheques drawn on his own account, each for $2,500, and that Featherstone in turn gave his cheque to Crighton for $2,500.

1960

CRIGHTON v. ROMAN

ROMAN v. TORONTO GEN. TRUSTS CORP. et al.

Cartwright J.

Title to the five claims was taken in the name of E. R. Peacock, a solicitor, who executed a declaration of trust stating that he held them in trust for Roman. It is clear that throughout its existence Roman was the manager or person in control of the venture. Roman, in cross-examination, testified as follows:

Q. You were really the manager of the operations in respect of these things—you were the one in the drivers seat?

A. Yes, it was the understanding from the start, that I was to have full power to deal with the claims.

Q. You wouldn't have gone into it on any other understanding?

A. No.

Q. You wouldn't have let Mr. Crighton make deals for you?

A. I wouldn't have gone into it in any other way.

On June 30, 1953, Peacock, on the instructions of Roman, entered into an agreement with North Denison Mines Limited, whereby that company purchased the five Skibbereen claims for $25,000 and the allotment of 100,000 fully paid shares of its capital stock of which 90,000 were to be deposited in escrow with a trust company. The cash consideration was to be paid $15,000 upon the recording of the transfers of the claims and the balance of $10,000 in 90 days. The $15,000 was paid and certificates for the shares were issued in the name of Peacock. The share certificates were numbered 5756 and 5757.

In July word was received from a geologist in the field that the Skibbereen claims were of a less area than had been represented. In consequence of this an action was commenced against McCarthy. This was settled by McCarthy agreeing to accept the $10,000 he had already received as payment in full for the claims and in turn the price payable by North Denison Mines Limited was reduced from $25,000 to $15,000 plus the 100,000 fully paid shares.

On September 22, 1953, Peacock, on instructions from Roman, distributed the $15,000 received from North Denison Mines Limited. One-half was paid to Roman and his nominee and one-half to Crighton. Crighton immediately gave his own cheque to Featherstone for one-half of the amount received by him. Featherstone died a few days later on September 29, 1953.

Peacock still held the 100,000 shares of North Denison Mines Limited. In November 1953 he received instructions from Roman to transfer them to a company, New Concord Development Corporation Limited, which was then controlled by Roman. Peacock, who had heard that Crighton had an interest in the 100,000 shares but had not heard of the interest of Featherstone, said he would require a release from Crighton before making the transfer. Peacock prepared a release which was later returned to him signed by Crighton and which is dated November 23, 1953. There is a conflict in the evidence as to where and under what circumstances this document was signed by Crighton. It reads as follows:

To: Evan R. Peacock,
Barrister etc.,
305 Royal Bank Building,
Toronto, Ontario.

FOR VALUE RECEIVED, I hereby release my interest, if any, in certificate number 5757, North Denison Mines Limited for ninety thousand (90,000) shares of its capital stock and in certificate number 5756, North Denison Mines Limited for ten thousand (10,000) shares.

DATED at the City of Toronto, in the County of York, this 23rd day of November, A.D. 1953.

WITNESS:
"L. Gardon"

"John Crighton" (seal)

Following receipt of this release Peacock transferred the 100,000 shares to New Concord. I do not find it necessary to trace the course of the dealings between Roman and New Concord in regard to these shares for I agree with the finding, made expressly or implicitly by all of the learned judges in the courts below, that their proceeds came into the hands of Roman in the form of 100,000 fully paid shares of New Denison Mines Limited all of which were free from the terms of the escrow agreement to which 90,000 of those held in the name of Peacock had been subject.

These 100,000 "free" shares were later exchanged for fully paid shares of Consolidated Denison Mines Limited on the basis of one share of the stock of that company for every three and a half shares of the stock of New Denison Mines Limited.

The end result of Roman's dealings with the Skibbereen claims, the asset of the joint venture of which he was the manager, was that he had received $15,000 and the 100,000

1960

CRIGHTON v. ROMAN

ROMAN v. TORONTO GEN. TRUSTS CORP. et al.

Cartwright J.

shares now represented by 28,571 fully paid shares of Consolidated Denison Mines Limited. He duly accounted for the $15,000 but at no time did he account to Featherstone or his estate for any part of the shares which at the date of the trial remained in his hands.

Dealing first with Roman's appeal against the judgment in favour of Featherstone's executor, I do not find it necessary to reach a final conclusion as to whether, as Crighton says, Featherstone's interest was agreed upon by Roman at the inception of the venture on March 19, 1953, when the cheques totalling $10,000 were handed to the Royal Bank, although on a consideration of all the evidence bearing on the question I think it probable that Crighton's version is the correct one, for it is clear that before he dealt with the 100,000 shares in a manner inconsistent with the duties attaching to his fiduciary position Roman had knowledge of Featherstone's beneficial ownership.

The situation as between Roman and Featherstone's estate is accurately and succinctly stated in the following passage in the reasons of Aylesworth J.A.:

> This much is clear: Roman was made aware that the Featherstone estate had an interest before the Peacock shares were transferred (at Roman's direction) to New Concord. New Concord at the time of the transfer was controlled by Roman. That transfer was not made in the course of the partnership business or in the process of liquidation of the partnership or with the consent of the Featherstone estate and I respectfully agree with Judson J. that so far as the estate's claim regarding the Peacock shares is concerned "there is no answer to it". Roman as managing partner dealt with the partnership asset for his own purposes. It or that which it has become through his dealings, is vested in him as trustee and he must account for it.

I would dismiss Roman's appeal.

Turning now to Crighton's appeal, it is obvious that Roman stood in a fiduciary relationship to Crighton as well as to Featherstone and that when Roman received the 100,000 shares which he placed in Peacock's name he was a constructive trustee of those shares to the extent of Crighton's beneficial interest therein.

The reason that the courts below, while upholding the claim of Featherstone's estate, have rejected that of Crighton is that they reached the conclusion that Crighton had released or transferred his beneficial interest to Roman for good consideration. The ascertainment of the facts as to

the dealings between Roman and Crighton which involved the execution by Crighton of the release of November 23, 1953, hereinafter referred to as "the release" and the determination of the effect of those dealings and of that document appear to me to be the most difficult matters arising in these appeals.

In the statement of claim no reference is made to the release but in paragraph 14 there is the following sentence:

> Neither the Plaintiff Crighton nor the Plaintiff Executor ever received any consideration or payment for his or its interests in all or any of the said shares, nor did they ever consent to the sale or disposition of their beneficial title or interests therein, and they hold the Defendants responsible for return to each of them of 25,000 shares of North Denison.

Paragraph 8 of Roman's statement of defence reads as follows:

> Owing to illness, the Defendant, Roman, was unable to complete the purchase of the control of Denison pursuant to the agreement with Richmond as planned and in or about the month of June, 1953, he arranged for the sale to New Concord Development Corporation Limited (hereinafter referred to as "New Concord") of 744,900 shares of Denison, in part free and in part escrowed, and including in such sale the 100,000 shares of Denison covered by certificates Numbers 5756 and 5757 hereinbefore mentioned as well as the shares being purchased from Richmond. The Plaintiff, Crighton, orally informed the said Roman that he was no longer interested in the transaction and therefore acquiesced in such sale and under his hand and seal executed and delivered a release to Evan R. Peacock, the Defendant Roman's Trustee, of all his interest in and to the said 100,000 shares covered by certificates Numbers 5756 and 5757. In due course the transaction with New Concord was completed and part of the consideration due from New Concord was paid dircetly to the said Richmond and/or his nominees.

It will be observed that nowhere in the statement of defence is there any allegation that Crighton received any consideration for executing the release.

No reply was delivered.

Crighton's evidence in chief as to the signing of the release may be summarized as follows. Roman told him that he had to transfer the 100,000 shares held by Peacock to New Concord as a step in clearing up an indebtedness to one Richmond, that he required Crighton to sign "a waiver or permission", that Roman wrote out a "slip" in longhand and Crighton signed it, that later Roman told him he required a more formal document, and he signed the release. The slip in longhand was not produced. In cross-examination Crighton agreed with the suggestion of Roman's counsel

1960

CRIGHTON v. ROMAN

ROMAN v. TORONTO GEN. TRUSTS CORP. et al.

Cartwright J.

that he understood the release was required for Peacock's protection and stated that his understanding with Roman was that "sometime later if we got a suitable property we would be able to take North Denison out of New Concord". He agreed with counsel that the alleged understanding was "nebulous".

Roman's evidence on the point commences at the time of the dispute with McCarthy. Roman says he wanted "to reverse the deal", that is to sue McCarthy for return of the $10,000 and to return the $15,000 and 100,000 shares to North Denison Mines Limited, that Crighton wanted the deal with North Denison Mines Limited carried through, that Crighton wanted his share of the money and "made a suggestion" that he was not interested in the 100,000 shares that all he wanted was his share of the cash. Roman's evidence as to this conversation, even if accepted, falls short of establishing any agreement by Crighton to transfer his beneficial interest in the shares to Roman or any consideration for such an agreement.

Peacock's evidence, which was accepted by the learned trial judge, makes it clear that it was Peacock and not Roman who initiated the request that Crighton sign the release. Roman's account of the signing is that he took the position with Crighton that the latter had agreed to give up his interest in the shares at the time of the discussion about "reversing the deal" and that having made an agreement he ought to stick to it, that Crighton said "Yes, I agreed but I think I should get something for it", that Crighton went on to suggest that Roman should cancel Crighton's indebtedness to him and in return for this he would sign the release. Crighton denies this and expressly denies that he owed Roman any money. According to Roman's evidence it was at this meeting that Crighton telephoned the trust company to see if it would release Featherstone's interest and in the course of the telephone conversation Crighton said to the officer of the trust company to whom he was speaking: "Well, it isn't worth very much anyway . . . It's escrowed stock most of it."

Roman's evidence as to Crighton's alleged indebtedness to him is not satisfactory. I have already pointed out that it was not mentioned in the pleadings. Roman says that on

his examination for discovery he had estimated the indebtedness at $700 but believes it would be well over $1,000, that it consisted of loans made by him to Crighton in cash from time to time, that he had no receipts, records or acknowledgments of these advances.

If I had to decide the question from the written record I would incline to the view that Roman had failed to prove that Crighton owed him anything at the time the release was signed; but the learned trial judge who had the advantage of seeing and hearing the witnesses says on this point:

> I think it quite probable that he (Crighton) had been borrowing money from Roman.
>
> * * *
>
> The release is operative as far as Crighton is concerned but does not deprive the Featherstone estate of its interest in these shares.

I regard this as a finding of fact, based on the balance of probabilities, that Crighton did owe Roman a sum of money, the exact amount of which the learned trial judge did not find it necessary to determine, and that the release of that indebtedness formed the consideration for the signing of the release; and it is implicit in the reasons of the learned trial judge that in signing the release Crighton intended to release to Roman his beneficial interest in the shares. The Court of Appeal took a similar view of the evidence. Aylesworth J.A., with whom Morden J.A. agreed, says in part:

> Crighton's own position is very different. In my view of the evidence, his execution of the release was actually for valuable, adequate consideration, namely Roman's agreement to forego the moneys Crighton owed him. The release is under seal and recites that Crighton is releasing his interest in what was the sole partnership asset "for value received". The Peacock shares had little or no realizable value and no foreseeable potential future value when the release was signed. Crighton knew that; he was "familiar with Bay Street" as he put it and he, of course, knew that the marketing operation to create some saleability for the shares had been a failure. In discussing the release with Roman he was in a position to rely upon himself and his own knowledge of the situation as I think in fact he did. What apparently he did not know was that all of the Richmond shares were not being turned over by Roman to New Concord but that on the contrary, Roman was retaining 100,000 of them. Assuming he had known it and assuming, without at the moment deciding, that Roman had a duty to disclose to him the retention by Roman of the 100,000 shares, would Crighton upon such disclosure have refused to execute the release? In my opinion that knowledge would have had no effect whatsoever upon the question of his signing or refusing to sign. He knew that

1960

CRIGHTON v. ROMAN

ROMAN v. TORONTO GEN. TRUSTS CORP. et al.

Cartwright J.

there was no peculiar value to any single block of 100,000 shares; New Concord would have a very substantial control of New Denison with or without those shares and Crighton knew quite enough about Roman's deal with Richmond and about the fact that Roman was causing New Concord to complete that deal to appreciate that control of New Denison was passing to New Concord. With or without the transfer to New Concord of the 100,000 shares retained by Richmond (sic), the bargain struck by Crighton as his price for the release, was to Crighton's advantage and must at the time literally have appealed to him as the equivalent of cash in the hand for something of very doubtful and unrealizable value. It is not to be overlooked that Crighton was aware of the source of the New Denison shares (Richmond) to be utilized in the ill-fated "marketing operation" and that it was Roman solely upon his own responsibility who had first procured and then dealt in those shares—that is directed the marketing operation. Crighton did not disapprove of these activities; he was wholeheartedly behind them. In all the circumstances I do not consider that Roman was under any duty to disclose the precise terms of his contract with New Concord or that the fact that he was retaining 100,000 of the Richmond shares was a material fact which would in any way affect Crighton's action. I would affirm the dismissal of Crighton's claim to any interest in the Peacock shares.

With the greatest respect I am unable to agree with this conclusion. On the view of the evidence most favourable to Roman he was in the position of a trustee purchasing from his *cestui que trust* the latter's beneficial interest in the trust property. The conditions which must, as a general rule, exist to enable the courts to uphold such a transaction are well settled and are conveniently stated in Halsbury's Laws of England, 2nd ed., vol. 33, pages 284 and 285, as follows:

> A trustee for other purposes than for sale cannot purchase the property, where the purchase would conflict with his duties respecting it or his position in regard to it. There is, however, no absolute rule against his purchasing the trust property from his *cestui que trust,* and if he purchases the whole of it the relation between them is terminated. Such a transaction is always regarded by courts of equity with the utmost jealousy, and in order that it may stand, if it is impeached within a reasonable time by the *cestui que trust* or a person claiming through him, the trustee must show (1) that there has been no fraud or concealment or advantage taken by him of information acquired by him in the character of trustee; (2) that the *cestui que trust* had independent advice, and every kind of protection, and the fullest information with respect to the property; and (3) that the consideration was adequate.

At the lowest the duty which lay upon Roman was to make full disclosure to Crighton that as the result of the transaction in which he proposed to use the 100,000 shares referred to in the release he was to obtain in exchange for these shares, 90,000 of which were in escrow, 100,000 free

shares. Far from making this disclosure he gave Crighton to believe that he was parting with the shares altogether as a step in the fulfilment of his commitments to Richmond. He knew that Crighton considered that the fact of 90% of the shares being in escrow rendered them of less value than free shares. It seems to me impossible to say that these were not material circumstances.

The onus of supporting the transaction was upon Roman and, in my opinion, he has failed to satisfy it.

The following passage in the judgment of the Judicial Committee in *Williams v. Scott*[1], appears to me to be applicable to the facts of the case at bar:

> A trustee for sale of trust property cannot sell to himself. If, notwithstanding the form of the conveyance, the trustee (or any person claiming under him) seeks to justify the transaction as being really a purchase from the *cestui que trusts*, it is important to remember upon whom the onus of proof falls. It ought not to be assumed, in the absence of evidence to the contrary, that the transaction was a proper one, and that the *cestui que trusts* were informed of all necessary matters. The burthen of proof that the transaction was a righteous one rests upon the trustee, who is bound to produce clear affirmative proof that the parties were at arm's length; that the *cestui que trusts* had the fullest information upon all material facts; and that, having this information, they agreed to and adopted what was done.

as does also the following in the judgment of the Judicial Committee delivered by Lord Thankerton in *Brickenden v. London Loan and Savings Co.*[2]:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.

In the result, it is my opinion that Roman did not obtain a valid release or transfer of Crighton's beneficial interest in the shares and that Crighton is entitled to the same relief as that awarded by the courts below to Featherstone's estate, subject only to this that as the learned trial judge has found that Crighton owed some money to Roman, payment of which Roman waived in consideration of the signing of the

[1] [1900] A.C. 499 at 508, 69 L.J.P.C. 77.
[2] [1934] 3 D.L.R. 465 at 469, [1934] 2 W.W.R. 545.

1960

CRIGHTON v. ROMAN

ROMAN v. TORONTO GEN. TRUSTS CORP. et al.

Cartwright J.

release, Roman is entitled to payment of the amount of which he waived payment. The only evidence as to the amount of Crighton's indebtedness is that of Roman referred to above that while on his examination for discovery he had stated that he thought it was $700 he now believed that it would be well over $1,000. Based on this evidence, and in the hope of avoiding the necessity of further proceedings, I would fix the amount of Crighton's indebtedness at the sum of $1,000, but with the right to either Crighton or Roman if dissatisfied with this amount, to have it referred to the Master of the Supreme Court of Ontario to determine the exact amount of which payment was waived.

For the above reasons, I would dismiss the appeal of Roman with costs; I would allow the appeal of Crighton, with costs as against Roman in the Court of Appeal and in this Court, set aside the judgments below in so far as they relate to the claim of Crighton and direct judgment to be entered ordering that upon Crighton paying to Roman the sum of $1,000, or such other sum, if any, as may be determined if a reference be had as above provided, Roman do deliver to Crighton 25,000 fully paid shares of North Denison Mines Limited or, in the alternative, the equivalent thereof being 7,143 fully paid shares of Consolidated Denison Mines Limited.

*Appeal of John D. Crighton allowed,* KERWIN C.J. *dissenting.*

*Appeal of Stephen Boleslav Roman dismissed.*

*Solicitors for the plaintiff, appellant, and for the plaintiff, respondent: Roberts, Archibald, Seagram & Cole, Toronto.*

*Solicitors for the defendant, respondent: Mungovan & Mungovan, Toronto.*

EDITOR'S NOTE: At the time of the argument of this appeal the Court was not aware of the fact that dividends had been received by Roman. Upon application made on behalf of the appellant Crighton, the Court amended the reasons already delivered so as to award the said dividends to the said appellant.

HER MAJESTY THE QUEEN .....APPELLANT;

1960

*June 7
Nov. 21

AND

BAPTISTE ROOSEVELT WILLIAM GEORGE ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Criminal law—Robbery with violence—Acquittal on ground of drunkenness rendering accused incapable of forming specific intent to commit robbery—Omission of Crown to raise issue of included offence of common assault at trial—Drunkenness as a defence to a charge of common assault—Mens rea—Criminal Code, 1953-54 (Can.), c. 51, ss. 288, 569(1)(a).*

Respondent was charged under s. 288 of the *Criminal Code* with robbery with violence, and was acquitted by the trial judge on the ground that he was so intoxicated as to be incapable of forming the specific intent to commit robbery. In appealing this decision the Crown contended that the trial judge did not consider the included offence of common assault and, in the result, failed to direct himself with respect to the divisibility of the charge laid and to the incidence of drunkenness as a defence to a charge of common assault, as distinguished from a charge of robbery with violence. The appeal was dismissed by the Court of Appeal, and the Crown then sought and obtained the leave of this Court to appeal from that judgment.

*Held* (Locke J. *dissenting*): The appeal should be allowed, the verdict of acquittal with respect to common assault set aside, and a verdict of guilty of that offence entered.

*Per* Taschereau and Fauteux JJ.: As provided by s. 569(1)(*a*) of the Code, when the commission of the offence charged, as described in the enactment creating it or as charged, includes the commission of another offence, the charge is divisible, and the accused may be convicted of the offence so included, if proved, notwithstanding that the whole offence that is charged is not proved. *The King v. Wong On* (No. 3), 8 C.C.C. 423; *Rex v. Stewart*, 71 C.C.C. 206, referred to.

In a like situation, the offence included is part of the case which the accused has to meet under the law. The mere omission of the Crown to raise the issue cannot *per se* and without more relieve the trial judge from the duty imposed upon him under the section. The words *"may convict"* give an authority which must be exercised when the circumstances described in the section are present. *Rex v. Bishop of Oxford*, (1879) 4 Q.B.D. 245, applied; *Wexler v. His Majesty The King*, [1939] S.C.R. 350, distinguished.

Contrary to what is the case in the crime of robbery, where, with respect to theft, a specific intent must be proved, there is no specific intent necessary to constitute the offence of common assault. Here the manner in which force was applied by the respondent to his victim was not accidental or unintentional. *Re Beard*, [1920] A.C. 479, referred to.

*PRESENT: Taschereau, Locke, Fauteux, Martland and Ritchie JJ.

1960

THE QUEEN
v.
GEORGE

The finding of the trial judge that the accused had not the capacity to form the specific intent to commit robbery did not justify the conclusion reached in appeal that he could not then have committed the offence of common assault.

*Per* Martland and Ritchie JJ.: Pursuant to s. 569 of the Code the trial judge was under a duty to consider the included offence of assault, and the fact that his report to the Court of Appeal contained a statement "that common assault was not raised by Crown counsel at the trial" is not sufficient ground for concluding that he did not consider this offence.

The duty which rests upon the trial judge to consider all included offences of which there is evidence can, in no way, be affected by the fact that the Crown has omitted to make reference to such offences, and it follows that where the trial judge has wrongly applied the law applicable to an included offence the Crown is not deprived of its statutory right of appeal because of its omission at trial to address the Court on the matter.

The offence of robbery requires the presence of the kind of intent and purpose specified in ss. 269 and 288 of the Code, but the use of the word "intentionally" in defining "common assault" in s. 230(*a*) is exclusively referable to the physical act of applying force to the person of another.

*Per* Locke J., *dissenting*: The Crown's contention that where a trial judge hearing a criminal charge fails not to deal with, but to consider independently, an offence included in the offence specifically charged, and this is done with the approval of counsel for the Crown, the provisions of s. 584 of the Code may be invoked to again place the accused in jeopardy, should be rejected.

The right of the Crown to appeal, while given in clear terms, may not be exercised in all circumstances, as was decided in *Wexler v. R.*, *supra*. To construe the section differently would mean that accused persons could be subjected to a succession of trials for the same offence on grounds that were not advanced at the first and succeeding previous trials, and which the accused person had not accordingly attempted to meet. *The King v. Miles*, (1890) 24 Q.B.D. 423, referred to.

Although s. 569 imposes a duty upon the judge to consider the included offence of assault, his failure to do so does not render the proceeding defective and a new trial necessary. *The King v. Wong On*, *supra*, applied; *The Queen v. Bishop of Oxford*, *supra*, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Morrow C.C.J. Appeal allowed, Locke J. dissenting.

*J. Urie*, for the appellant.

*E. P. Newcombe* and *R. Cleary*, for the respondent.

The judgment of Taschereau and Fauteux JJ. was delivered by

[1] 126 C.C.C. 127.

FAUTEUX J.:—Respondent was charged with robbery with violence and tried by Morrow C.C.J., in the County Court of Cariboo holden at Prince George in the Province of British Columbia. In answer to the charge, the accused raised, amongst others, the issues of identification and drunkenness. At the end of a lengthy hearing, the trial Judge acquitted him and, in doing so, said in part:

(i) *as to identification.*

I have reached the conclusion, therefore, without any doubt, that it was the accused who committed the offence on the night in question.

(ii) *as to drunkenness.*

The law seems to be that in the case of intoxication an accused person can claim that drunkenness need not result in absolute incapacity rendering the accused incapable of awareness of the nature of his physical act, but it is sufficient if there is a degree of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime.

I will be frank and say that this defence of drunkenness in this instance is one that caused me much concern. To me it is very much a border line case. That being so it is my duty to give the accused the benefit of the doubt on the defence of drunkenness that has been set up in my mind.

Having announced the acquittal, the trial Judge then addressed these remarks to the accused:

You are being acquitted not because you didn't do it—there is no doubt in my mind that you did do it—you are being acquitted because I have found that you were so drunk on the night in question that you were unable to form an intent to do it. In that respect, you have been very fortunate, and perhaps fortunate in another respect in that you were not up on a charge of murder, because anyone that tackles a man as you did and the man survives after an attack of double pneumonia, you can only put it down to good luck. Perhaps this will be a warning to you. The next time, you see, you may not be so fortunate. This defence of drunkenness does not excuse a crime, it merely is a defence under the circumstances that we have had during this rather lengthy trial.

In the reasons for judgment, there is nothing expressed or implied with reference to common assault, an offence included in the major offence of robbery with violence.

The Crown appealed this decision to the Court of Appeal for the Province, on grounds stated as follows in the notice of appeal:

(i) The learned trial Judge erred in holding that drunkenness was a defence to said charge at all;

(ii) In the alternative, the learned trial Judge erred in not convicting the respondent of common assault;

(iii) The learned trial Judge misdirected himself on the defence of drunkenness and its effect on question of intent.

1960

THE QUEEN v. GEORGE

Fauteux J.

In clear reference to the second ground, the trial Judge, in his report to the Court of Appeal, stated that common assault had not been raised by Crown counsel at the trial. From this statement, the Crown contended in the Court below, one must infer that common assault was not considered by the trial Judge who, in the result, failed to direct himself with respect to the divisibility of the charge laid and to the incidence of drunkenness as a defence to a charge of common assault, as distinguished from a charge of robbery with violence.

In dismissing the appeal[1], O'Halloran J.A., with the concurrence of Bird J.A., rejected as ill-founded the inference drawn by the Crown from the report of the trial Judge and further expressed the view that "if the respondent could not, through the effect of liquor, have the intent to rob, then he could not, because of liquor's effect upon him, have the intent to assault and steal, where as here these two essential ingredients of robbery occurred concurrently and integrated in the robbery as charged."

Sheppard J.A. declared that if, as suggested, the trial Judge omitted to consider the included offence of common assault, such an omission was entirely due to the failure of Crown counsel to raise that issue as part of the case to be met by the accused. Assimilating such a situation to the one considered in *Wexler v. His Majesty the King*[2], he concurred in the dismissal of the appeal.

The Crown then sought and obtained leave of this Court to appeal from this judgment. As stated in appellant's factum, the questions submitted for determination are:

1. Whether or not evidence of drunkenness falling short of insanity can be used as a defence not only to negative the capacity of the accused to form a specific or special intent, but also to negative the ordinary mens rea which is a constituent of all crime.

2. Whether or not the Court of Appeal should substitute a conviction for the included offence of common assault, or order a new trial with respect thereto, when Crown counsel at the trial of the accused did not raise the issue of the accused's capacity to commit the included offence of common assault.

That the trial Judge did not consider the included offence of common assault is, in my view, the reasonable inference flowing from his statement in the report to the Court of Appeal. This is specially so when this statement, made in

[1] 126 C.C.C. 127. [2] [1939] S.C.R. 350, [1939] 2 D.L.R. 673.

reference to the second ground raised by the Crown in its notice of appeal, is considered in the light of the reasons given by the trial Judge in support of the acquittal.

In the circumstances of this case, it was the duty of the trial Judge to consider common assault. For when, as in the present case, the commission of the offence charged, as described in the enactment creating it or as charged, includes the commission of another offence, the charge is divisible, and the accused may be convicted of the offence so included, if proved, notwithstanding that the whole offence that is charged is not proved. The law and the jurisprudence in this respect are clear. Section 569(1)(*a*) Cr. C. reads as follows:

> 569. (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted
>
> (*a*) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved, or

See *The King v. Wong On (No. 3)*[1]; *Rex v. Stewart*[2].

In a like situation, the offence included is part of the case which the accused has to meet under the law. The mere omission of counsel for the Crown to have raised the issue cannot *per se* and without more relieve the trial Judge from the cardinal duty imposed upon him under the section. This is not a civil but a criminal case. The words *"may convict"*, appearing in the opening phrase thereof, give an authority which must be exercised when, as in this case, the circumstances described in the section are present. In *Reg. v. Bishop of Oxford*[3] it was held that

> so long ago as the year 1693 it was decided in the case of *R. v. Barlow*, that when a statute authorizes the doing of a thing for the sake of justice or the public good, the word "may" means "shall" and that rule has been acted upon to the present time . . . .

This proposition was relied on in *Welch v. The King*[4] where, at page 426, this Court said:

> For new and extraordinary would be a rule of construction stating that, being empowered to make an order required by justice, a Court of justice would be free to refrain from making it when the occasion to do so arises.

[1] (1904), 8 C.C.C. 423 at 437, 10 B.C.R. 555.
[2] 71 C.C.C. 206, [1938] 3 W.W.R. 631.
[3] (1879), 4 Q.B.D. 245 at 258.
[4] [1950] S.C.R. 412, [1950] 3 D.L.R. 641.

1960

THE QUEEN v. GEORGE

Fauteux J.

With deference, the decision of this Court in *Wexler v. His Majesty the King, supra,* has no application in the matter. The question of divisibility did not arise in that case. What the Court decided was simply that subsection 4 of section 1013 Cr.C. was not intended to confer jurisdiction upon an appellate court to set aside a verdict of acquittal and so entitle the Crown to an order for a new trial for the purpose of presenting an entirely new case against the accused. Furthermore, the circumstances which gave rise to that decision are entirely different from those present in this case. As stated by Sir Lyman Duff, C.J., at pp. 351 and 352:

> The case presented by the Crown was that the appellant had intentionally shot the deceased Germaine Rochon with the intention of killing her. The defence relied upon the testimony given by the appellant himself. It was agreed by both counsel for the Crown and for the defence, and the learned trial Judge so instructed the jury, that if they believed the account given by the accused he was entitled to be acquitted. I quote the words of the learned judge in which he summed up the whole matter at the request of counsel for the defence after the jury had retired and had been recalled:
>
> > The COURT: Gentlemen, I have been asked by the defence attorneys, to give a further explanation on a certain point. I have told you that, if you are satisfied with the explanation given by the accused, that the shooting was an accident, that he was entitled to an acquittal, but I must add—and I think I did—I must add, even on that evidence, he is entitled to the benefit of the doubt; that is, if you are not reasonably sure that his explanations are not true, that you must give him the benefit of the doubt and acquit him.
> >
> > That is, the accused is entitled to the benefit of the doubt on the entire evidence. You must be reasonably sure that he has committed the offence before finding him guilty.
>
> We are left in no doubt that this instruction by the learned trial judge was accepted as satisfactory by counsel both for the Crown and for the accused and that it correctly formulated the single issue of fact which both counsel put before the jury as the sole issue upon which it was their duty to pass.

In the present case, the record does not indicate any agreement between counsel, or any suggestion that robbery was the only issue or that common assault which, under the law, was part of the case that the accused had to meet, was excluded. Nor was there any occasion for counsel to approve or disapprove the manner in which the trial Judge directed himself. The *Wexler* case, *supra,* is no authority for the proposition that the mere omission of the Crown to raise the issue of common assault amounted to an approval of

the trial Judge's failure to direct himself in the matter or to a circumstance relieving him of the duty he had under s. 569(1)(*a*).

It must then be held that the failure of the trial Judge to consider common assault amounted to non-direction.

It follows that the appeal of the Crown should have been allowed, unless it be shown by respondent that, but for this error, the verdict would necessarily have been the same.

This indeed is the view which appears to have been reached by O'Halloran and Bird JJ.A., who, as above indicated, said in substance that if, as found by the trial Judge, the accused did not, owing to drunkenness, have the capacity to form the specific intent required as a constituent element of the crime of robbery, he could no more, for the same reason, have had the intent to assault and steal.

With deference, I do not think that this conclusion legally follows from the premises upon which it rests.

In considering the question of *mens rea,* a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.

Contrary to what is the case in the crime of robbery, where, with respect to theft, a specific intent must be proved by the Crown as one of the constituent elements of the offence, there is no specific intent necessary to constitute the offence of common assault, which is defined as follows in s. 230 Cr.C.:

> A person commits an assault when, without the consent of another person or with consent, where it is obtained by fraud,
>
> (*a*) he applies force intentionally to the person of the other, directly or indirectly, or
>
> (*b*) he attempts or threatens, by an act or gesture, to apply force to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has present ability to effect his purpose.

1960

THE QUEEN v. GEORGE

Fauteux J.

The word "intentionally" appearing in s. 230(*a*) is exclusively related to the application of force or to the manner in which force is applied. This, indeed, is also made clear in the French version, reading:

> 230. Commet des voies de fait, ou se livre à une attaque, quiconque, sans le consentement d'autrui, ou avec son consentement, s'il est obtenu par fraude,
>
> *a*) *d'une manière intentionnelle*, applique, directement ou indirectement, la force ou la violence contre la personne d'autrui, ou
>
> *b*) tente ou menace, par un acte ou un geste, d'appliquer la force ou la violence contre la personne d'autrui, s'il est en mesure actuelle, ou s'il porte cette personne à croire, pour des motifs raisonnables, qu'il est en mesure actuelle d'accomplir son dessein.

(The italics are mine).

There can be no pretence, in this case, that the manner in which force was applied by respondent to his victim was accidental or—excluding at the moment, from the consideration, the defence of drunkenness—unintentional.

On this finding of fact, the accused was guilty of common assault unless there was evidence indicating a degree of drunkenness affording, under the law, a valid defence.

The rules for determining the validity of a defence of drunkenness have been stated by the House of Lords in the well known case of *Beard*[1]:

> (i) Insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged.
>
> (ii) Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.
>
> (iii) Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

The first rule has no relevancy here for there is no pretence that, owing to drunkenness, respondent was insane, even temporarily, at the time of the assault.

The second rule was relevant and indeed properly applied by the trial Judge who entertained a doubt on the question whether the Crown had proved, as part of its case, that the

[1] [1920] A.C. 479 at 500 et seq., 89 L.J.K.B. 437.

accused had, owing to drunkenness, the capacity to form the *specific intent* required in the offence of robbery, i.e., the intent to steal.

However, and consequential to the applicability of the rule of divisibility, the included offence of common assault is to be considered independently of the major offence of robbery, and the law as to the validity of a defence of drunkenness has to be related to that particular included offence.

Hence, the question is whether, owing to drunkenness, respondent's condition was such that he was incapable of applying force intentionally. I do not know that, short of a degree of drunkenness creating a condition tantamount to insanity, such a situation could be metaphysically conceived in an assault of the kind here involved. It is certain that, on the facts found by the trial Judge, this situation did not exist in this case.

The accused was acquitted of the offence of robbery, not on the ground that he could not have applied force intentionally, but because of the doubt entertained by the trial Judge on the question whether he had the capacity to form the specific intent required as a constituent element for the offence of theft.

In these views, the finding of the trial Judge that the accused had not the capacity to form the specific intent to commit robbery did not justify the conclusion reached in appeal that he could not then have committed the offence of common assault; nor is it shown that, had the trial Judge considered common assault, the verdict would necessarily have been the same.

In these circumstances, the Court of Appeal should have allowed the appeal from the acquittal and should have proceeded to make an order pursuant to its authority under s. 592(4)(*b*), to wit, either enter a verdict of guilty with respect to the offence of which, in its opinion, formed in the light of the law applicable in the matter, the accused should have been found guilty but for the error in law, and pass a sentence warranted in law, or order a new trial.

Under section 600 Cr. C., this Court is given the authority to make any order that the Court of Appeal might have made. At the hearing before this Court, it was intimated

1960

THE QUEEN v. GEORGE

Fauteux J.

that should the appeal of the Crown be maintained, this case should be finally disposed of, if possible, and that in such event, respondent could appropriately be given a suspended sentence.

Being of opinion that the accused should have been found guilty of common assault, had that offence been considered in the light of the law applicable to the facts of this case, I would maintain the appeal, set aside the verdict of acquittal with respect to common assault and enter a verdict of guilty of that offence. Prior to his acquittal in the Court below, respondent has been incarcerated during a number of weeks. It would appear more consonant with the representations made with respect to sentence, to sentence respondent to the time already spent by him in jail; and this is the sentence that I would pass.

LOCKE J. (*dissenting*):—This is an appeal by the Crown pursuant to leave granted by this Court from a judgment of the Court of Appeal for British Columbia, which dismissed an appeal from the acquittal of the respondent by His Honour Judge Morrow, Judge of the County Court Judges' Criminal Court for the County of Cariboo, on a charge that:

> He did on the 8th day of February, 1959, at the City of Prince George, in the County of Cariboo, Province of British Columbia, unlawfully and by violence steal from the person of Nicholas Avgeris the sum of Twenty-two dollars, contrary to the form of Statute in such case made and provided.

The charge appears to have been laid under the provisions of s. 288 of the *Criminal Code*. The evidence disclosed that the respondent, an Indian, had gone on the afternoon of the day in question to the home of Avgeris, a man 84 years of age who apparently purchased furs, and was informed that the latter would not purchase a fisher skin which the respondent offered for sale. Later that night, or early the next morning, the respondent returned to the home of Avgeris demanding money, beating him severely with his fists, breaking his nose and causing other grievous bodily injuries and obtaining a sum of $22. According to Avgeris, the respondent, in addition to beating him, threatened to kill him unless he gave him money and wrenched the telephone in the house from the wall.

The defence advanced on behalf of the respondent was that he had been drinking heavily during the day, apparently following the first occasion that he went to the house of Avgeris, and that this reduced him to such a state that he was unable to form the intent of committing the offence charged against him. At the conclusion of the hearing the learned trial judge acquitted the accused, saying that while he was satisfied that he had committed the offence he was being acquitted because:

> I have found that you were so drunk on the night in question that you were unable to form an intent to do it.

While two questions of law were raised in the factum filed on behalf of the Crown, only the second of these was argued before us. This was expressed in the following terms:

> Whether or not the Court of Appeal should substitute a conviction for the included offence of common assault, or order a new trial with respect thereto, when Crown counsel at the trial of the accused did not raise the issue of the accused's capacity to commit the included offence of common assault.

While the question, therefore, as to whether the learned County Court judge was right in acquitting the respondent of the offence charged on the ground above stated is not questioned, some reference should be made to the evidence. The only account of what had occurred was that given by Avgeris who described the severe beating he had received before he gave his attacker the sum of $22. He was, however, unable to identify the respondent. The latter, however, after his arrest gave two statements to the Royal Canadian Mounted Police. In the first of these, which appears to have been expressed in the language employed by the respondent, he said that he had been drinking heavily and did not remember where he had gone but that he had gone to a house and remembered hitting a man. In the second statement he described in more detail his movements on the day in question, saying that he had brought a fisher fur from Summitt Lake and had gone to a fur buyer and tried to sell the fur to an old man who came to the door and who said he did not want to buy it. After describing the drinking he had done after this, he then said:

> Then I blacked out and the next thing I remember I was in a house. It was the house I was at in the afternoon where the fur buyer lived. I remember hitting a man in this house. I was hitting him with my fists.

1960

THE QUEEN
v.
GEORGE

Locke J.

I had mitts on. The person I was hitting was old and I think he was wearing a kimona. I think it was the fur buyer I had talked to in the afternoon. I remember seeing the same furniture in the house then as I had seen in the afternoon. Then I don't remember anything.

The constables by whom these statements were taken swore that they were made voluntarily, that the respondent had been duly warned and that no promises or threats had been made to induce him to make the statements, and the learned County Court judge admitted both of them in evidence. They had both been signed by the respondent.

While the first statement had been couched in the language of the respondent, the second was in the language of the police officer who took the statement, being his interpretation of what the respondent had said. The respondent did not deny having signed the statements but denied having said that he remembered hitting the man and said that the police had told him to sign the statement. The learned judge apparently did not believe this but, while holding the second statement admissible in evidence, said that he considered that, as it was not in the language of the prisoner but of that of the police officer, he should not attach any weight to it.

Section 569 of the *Criminal Code* reads in part:

> A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted
>
> (*a*) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved,

Section 288 of the *Criminal Code,* so far as relevant, reads:

> Every one commits robbery who
>
> (*a*) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property,
>
> (*b*) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person.

That violence was used for the purpose of extorting and stealing money from Avgeris was proved and this upon the evidence involved an assault within the meaning of that term in s. 230 of the *Criminal Code,* and an assault occasioning bodily harm within s. 231(2).

In the reasons for judgment delivered by O'Halloran J.A., with whom Bird J.A. agreed, that learned judge said that it followed rationally in the circumstances that the judge must also be deemed to have found that the respondent was equally incapable, for the same reason, of having an intent to commit an assault and that if he could not have the intent to commit robbery he could not have the intent either to assault or to steal, and did not say that he disagreed with this conclusion.

The offences described in subss. (*a*) and (*b*) of s. 288 of the Code include the offence of assault described in s. 230 and it was, in my opinion, the duty of the learned trial judge to consider this offence upon the hearing of the charge of robbery with violence. In view of the severity of the injuries inflicted upon Avgeris by the brutal beating to which he was subjected, it is clear that George might properly have been charged with assault occasioning bodily harm under s. 231. That had not been done and that offence is not an included offence within the meaning of s. 569. In respect of the offence charged and the offence of assault, it was necessary to prove that force was applied intentionally and in the case of the charge under s. 288 that it was done with intent to steal, and the case of the Crown has been argued on the footing that it is only the latter question that was considered by the learned judge in arriving at the conclusion that the prisoner should be acquitted.

It is not made clear in the reasons for judgment delivered at the trial that the learned judge had not considered the included offence and O'Halloran and Bird JJ.A. were of the opinion that it was to be assumed that he had done so. They do not, however, mention the judge's report referred to by Sheppard J.A. This is required by s. 588(1) of the Code. The report is not in the case and the only information we have relating to it is in the reasons of Sheppard J.A. who says that it "states that common assault was not raised by Crown counsel at the trial." In my opinion, the proper inference to be drawn from this is that the trial judge did not consider the question of common assault and we should deal with the appeal on that footing.

1960

THE QUEEN v. GEORGE

Locke J.

The effect of the acquittal extended to both offences and the basis of the appeal taken by the Attorney-General to the Court of Appeal of British Columbia under the provisions of s. 584 of the Code, in so far as the included offence of common assault was concerned, was that the learned judge had not considered whether or not the accused was intoxicated to such an extent that he was incapable of forming the intent to assault Avgeris. The appeal proceeded, of necessity, on the footing that the accused had been acquitted of the charge.

The decision to be made in these circumstances is of general importance in dealing with the Crown's right of appeal under s. 584 of the Code. That right was first given by the amendment of s. 1013 of the *Criminal Code* effected by s. 28 of c. 11 of the Statutes of 1930. The long-standing principle of the common law that was affected by this enactment was stated by Hawkins J. in *The King v. Miles*[1] in the following terms:

> Where a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence.

In Hawkins' Pleas of the Crown, vol. 2, p. 515, it is stated:

> The plea of autrefoits acquit is grounded on this maxim that a man should not be brought into danger of his life for one and the same offence more than once.

The right of appeal thus given to the Attorney-General is a departure from this long-established principle of the common law. The appeal is on a question of law alone. The question of whether George was at the time of the commission of the offence capable of forming the intent to assault Avgeris was a question of fact and not of law. The trial judge did not consider it and this was obviously due to the fact that he was not asked to do so by counsel for the Crown and, apparently, overlooked the fact that the offence of common assault was included in the charge laid under s. 288.

[1] (1890), 24 Q.B.D. 423 at 431, 59 L.J.M.C. 56.

Had the matter been tried before a jury, it would clearly have been the judge's duty to have instructed them that they were to consider not merely the offence of robbery with violence, but also that of common assault. The question, and indeed the only question, that arises on this appeal is whether in these circumstances the Crown may ask that the accused be again placed in jeopardy.

Sheppard J.A. considered that the question as to whether a new trial should be ordered was affected by the decision of this Court in *Wexler v. R.*[1]. In *Wexler's* case the charge was murder. The defence was that the shooting was the result of an accident. The evidence of the accused was that at the time in question he had intended to commit suicide and informed Rochon, the woman who was killed, of his intention to do so: that she had seized hold of the revolver to prevent this and that while they were struggling it had accidentally discharged, killing her. The case for the Crown was that the killing of the woman had been intentional and the jury were not charged by the trial judge on manslaughter or upon an issue suggested on appeal that, as upon his own admission the accused was in the course of committing the unlawful act of suicide, the killing of the woman was murder. The jury acquitted the accused but this verdict was set aside on appeal to the Court of King's Bench and a new trial ordered. On the appeal to this Court the judgment at the trial was restored.

In that case the trial judge had, with the consent of both counsel, charged the jury that if they accepted Wexler's account of what had occurred, they should acquit him. As a matter of law, the jury should also have been charged upon both of the issues suggested in this Court. These were not, of course, included offences within the meaning of that expression in the present section 569, but were offences of which the accused might have been found guilty if the jury reached certain conclusions on the evidence. As all of the judgments delivered show, it was by reason of the course of the trial that the order for a new trial was held to be error.

In the present case, the learned judge dealt only with the charge of robbery with violence with the apparent consent and approval of counsel for the Crown, overlooking

[1] [1939] S.C.R. 350, [1939] 2 D.L.R. 673.

1960

THE QUEEN v. GEORGE

Locke J.

the fact that it was his duty to deal with the included offence. In this respect, *Wexler's* case touches the matter and must be considered.

Stated bluntly, the contention of the Crown is that where a trial judge hearing a criminal charge fails not to deal with, but to consider independently, an offence included in the offence specifically charged, and this is done with the approval of counsel for the Crown, the provisions of s. 584 may be invoked to again place the accused in jeopardy. I do not think that it was ever contemplated when the legislation was enacted that it might be exercised in circumstances such as these.

The principle of law referred to by Hawkins J. in *Miles'* case was, prior to 1930, as firmly imbedded in the criminal law of this country as the principle that a man is to be presumed innocent until the contrary is proven in a court of competent jurisdiction. The right to appeal, while given in clear terms, may not be exercised in all circumstances, as was decided by this Court in *Wexler's* case. To construe the section differently would mean that accused persons could be subjected to a succession of trials for the same offence on grounds that were not advanced at the first trial and succeeding previous trials, and which the accused person had not accordingly attempted to meet. The section should not be construed as permitting in criminal prosecutions a course so contrary to this long-established principle and, in my opinion, to the public interest.

In my opinion, the decision in *The Queen v. Bishop of Oxford*[1], does not affect the question. In that case a section of the *Church Discipline Act* (3 & 4 Vict. (Imp.), c. 86) reading that "it shall be lawful" in defined circumstances for the Bishop of a diocese to issue a commission of enquiry, was held to be imperative rather than permissive. The proceedings were instituted by a parishioner for a *mandamus* to the Bishop to compel the issue of a commission to enquire into a charge made against the rector. From this it may be suggested that the word "may" in s. 569 should be construed as meaning "shall" and that, accordingly, the failure of the judge to consider the included offence renders the proceedings defective and a new trial necessary. I agree that the section imposes such a duty

[1] (1879), 4 Q.B.D. 245.

upon the judge but I do not agree that his failure to do so has the suggested consequences. It was also the duty of the judge who presided at the trial in *Wexler's* case to charge the jury that upon the evidence they might return a verdict of manslaughter or a verdict of murder if they were of the opinion that it was while endeavouring to commit suicide that Wexler had fired the shot that killed Rochon. The law is as stated by Hunter C.J. in *The King v. Wong On*[1], in these terms:

> The cardinal duty of the judge in his address to the jury is to define the crime charged and to explain the difference between it and any other offence of which it is open to the jury to convict the accused.

a statement concurred in by Drake and Duff JJ. The trial judge was not relieved of that duty by the views asserted by the counsel at the trial. The duty was not discharged but it was held by this Court that, in the circumstances, an appeal did not lie.

As to the question of fact as to whether the respondent was at the time capable of forming the intent necessary to constitute the crime of assault, I express no opinion in view of my conclusion upon the point of law.

I would dismiss this appeal.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia[2] affirming the acquittal of the respondent by Morrow C.C.J. of the charge that he did "unlawfully and by violence steal from the person of Nicholas Avgeris the sum of Twenty-two Dollars".

The learned trial judge has found that:

> . . . a man of 84, was violently manhandled by an Indian on the date noted in the Indictment . . . as a result of which he was in hospital for a month. During this scuffle he was badly injured, dumped into a bathtub and pulled out again when he agreed to give the Indian what money he had, $22.

and he has also

> . . . reached the conclusion . . . without any doubt that it was the accused who committed the offence on the night in question.

[1] (1904), 8 C.C.C. 423 at 437, 10 B.C.R. 555.
[2] 126 C.C.C. 127.

1960

THE QUEEN
v.
GEORGE

Ritchie J.

The learned trial judge continued:

> The first statement perhaps should be considered. It was obviously written in the words of someone who has not had too much education. In his second paragraph after recalling the drinking period, he said: "Then I came to and I was in house and I remember hitting man and I don't remember where I went after."

Notwithstanding these findings, the learned trial judge acquitted the respondent, saying:

> To me it is very much a border line case. That being so it is my duty to give the accused the benefit of the doubt on the defence of drunkenness that has been set up in my mind.

After acquitting him, the learned trial judge addressed the accused in part as follows:

> You are being acquitted not because you didn't do it—there is no doubt in my mind that you did do it—you are being acquitted because I have found that you were so drunk on the night in question that you were unable to form an intent to do it.

From this acquittal the Crown appealed to the Court of Appeal of British Columbia, and in rendering the decision of the majority of that Court Mr. Justice O'Halloran said[1]:

> I am unable with respect to accept Crown counsel's submission that in failing to convict respondent of assault upon this charge of robbery, the learned trial Judge omitted to instruct himself regarding any difference between the intent to commit the robbery and a specific intent to commit assault as one of the essential ingredients of the robbery with which he was charged.
>
> In my judgment, with respect, a sufficient answer thereto is; that having found the respondent so incapacitated by liquor that he could not form an intent to commit the robbery, it follows rationally in the circumstances here, that he must also be deemed to have found that respondent was equally incapable for the same reason of having an intent to commit the assault. If he could not have the intent to commit the robbery, viz. to assault and steal as charged, then he could not have the intent either to assault or to steal when both occurred together as charged; the charge reads "by violence steal".

Mr. Justice Sheppard dismissed the appeal on another ground, namely, that the Crown's case at the trial was confined to the charge of robbery with violence, and that in any event a conviction of assault should not be entered in the Court of Appeal without the accused having been given an opportunity to meet that included offence as the failure to do so in the circumstances of this case may have

[1] 126 C.C.C. at 128.

been due to his having been misled by Crown counsel presenting the case as solely that of robbery with violence. In the course of his decision Mr. Justice Sheppard said[1]:

> The learned trial Judge in his report states that common assault was not raised by Crown counsel at the trial. It, therefore, appears that the case presented by the Crown at the trial was that of robbery with violence; that is the sole offence which the accused was here called upon to meet.

It is to be noted that the report of the learned trial judge was not part of the record before this Court and this observation by Mr. Justice Sheppard is the sole reference made to it in the course of the proceedings.

Leave to appeal to this Court was granted pursuant to an application made on behalf of the Attorney-General of British Columbia. No appeal was taken from the acquittal of the respondent on the charge of robbery and the first five grounds of appeal are, in large measure, devoted to the question of whether a distinction should be drawn "between the degree of drunkenness required to negative the existence of" that intent which is, under the *Criminal Code,* an essential ingredient of the crime of robbery and the degree of drunkenness which is necessary to negative such intent as is an ingredient of common assault.

The sixth ground of appeal was directed to the decision of Mr. Justice Sheppard and the appellant put the question thereby raised in the following terms:

> Whether or not the Court of Appeal should substitute a conviction for the included offence of common assault, or order a new trial with respect thereto, when Crown counsel at the trial of the accused did not raise the issue of the accused's capacity to commit the included offence of common assault.

Pursuant to s. 569 of the *Criminal Code,* the learned trial judge was under a duty to direct his mind to the "included offence" of assault, and in the absence of any evidence to the contrary, I do not think that it should be assumed that he did not do so. Whether or not he properly directed himself as to the effect of drunkenness in negativing the intent to commit this offence is another question.

The report of the learned trial judge is not before us, and, with the greatest respect for those who may take a contrary view, I do not consider that the fact that it contains

[1] 126 C.C.C. at 130.

1960

THE QUEEN v. GEORGE

Ritchie J.

a statement "that common assault was not raised by Crown counsel at the trial" is sufficient ground for concluding that the learned trial judge did not consider this offence.

In my opinion, the duty which rests upon the trial judge to direct himself with respect to all included offences of which there is evidence can, in no way, be affected by the fact that the Crown Prosecutor has omitted to make reference to such offences. It follows, in my view, that in a case where the trial judge has wrongly applied the law applicable to such an offence the Crown is not deprived of its statutory right of appeal because of the omission of its agent at the trial to address the Court on the matter.

The fact that the learned trial judge found, as I think he did, that the respondent had "violently manhandled" an old man but was not guilty of assault because he was drunk at the time raises the question of law posed by the appellant as to whether, under the circumstances as found by the trial judge, drunkenness is a valid defence to common assault.

In considering the question of *mens rea,* a distinction is to be drawn between "intention" as applied to acts done to achieve an immediate end on the one hand and acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object on the other hand. Illegal acts of the former kind are done "intentionally" in the sense that they are not done by accident or through honest mistake, but acts of the latter kind are the product of preconception and are deliberate steps taken towards an illegal goal. The former acts may be the purely physical products of momentary passion, whereas the latter involve the mental process of formulating a specific intent. A man, far advanced in drink, may intentionally strike his fellow in the former sense at a time when his mind is so befogged with liquor as to be unable to formulate a specific intent in the latter sense. The offence of robbery, as defined by the *Criminal Code,* requires the presence of the kind of intent and purpose specified in ss. 269 and 288, but the use of the word "intentionally" in defining "common assault" in s. 230(*a*) of the *Criminal Code* is exclusively referable to the physical act of applying force to the person of another.

I would adopt the following passage from Kenny's Outlines of Criminal Law, 17th ed., p. 58, para. 42, as an authoritative statement on this subject. He there says:

> . . . in *Director of Public Prosecution v. Beard*, (1920) A.C. 479 . . . it was laid down that evidence of such drunkenness as "renders the accused incapable of forming the specific intent, essential to constitute the crime, should be taken into consideration, with the other facts proved, in order to determine whether or not he had this intent". In such a case the drunkenness, if it negatives the existence of the indispensable mental element of the crime "negatives the commission of that crime". Thus a drunken man's inability to form an intention to kill, or to do grievous bodily harm involving the risk of killing, at the time of committing a homicide, may reduce his offence from murder to manslaughter (which latter crime requires no more than a realization that some bodily harm may be caused). Drunkenness may likewise show that a supposed burglar had no intention of stealing, or that wounds were inflicted without any "intent to do grievous bodily harm", or that a false pretence was made with no "intent to defraud". But it must be remembered that a man may be so drunk as not to form an intention to kill or do grievous bodily harm while yet in sufficient control of his senses to be able to contemplate some harm and so to be guilty of manslaughter or of an unlawful wounding.

The decision of the learned trial judge, in my opinion, constitutes a finding that the respondent violently manhandled a man and knew that he was hitting him. Under these circumstances, evidence that the accused was in a state of voluntary drunkenness cannot be treated as a defence to a charge of common assault because there is no suggestion that the drink which had been consumed had produced permanent or temporary insanity and the respondent's own statement indicates that he knew that he was applying force to the person of another.

In view of the above, I would allow the appeal, and, having regard to the circumstances mentioned by him, I would dispose of this appeal as proposed by my brother Fauteux.

*Appeal allowed,* Locke J. *dissenting. Accused found guilty of common assault and sentenced to time already spent in gaol.*

*Solicitor for the appellant: V. L. Dryer.*

*Solicitor for the respondent: E. A. Alexander.*

1960
*Oct. 4
Nov. 21

JOHN GORDON CALDER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT;

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Criminal law—Perjury—Divorce action—Evidence of innocent bystander with no interest in outcome of trial—No evidence of intent to mislead, or knowledge of falsity of the evidence given—Criminal Code, 1953-54 (Can.), c. 51, s. 113(1).*

The appellant was charged with perjury in that, as a witness in a divorce case in the outcome of which he had no interest, he had given evidence well knowing same to be false and with intent to mislead. The appellant asserted that his evidence, given more than a year after the events to which it related, was an honest statement of what he could remember. An appeal from his conviction by a judge sitting without a jury was dismissed by the Court of Appeal. The appellant then appealed to this Court.

*Held*: The appeal should be allowed, the conviction quashed and a judgment of acquittal entered.

*Per Curiam*: There was no evidence of any intent to mislead, or knowledge of the falsity of the evidence given. The evidence may have been in error, although that was doubtful, but error alone affords no basis for the inference of the intent and knowledge necessary to support a charge of perjury.

*Per* Locke, Cartwright, Abbott, Martland and Ritchie JJ.: It was incumbent upon the prosecution to prove beyond reasonable doubt (i) that the appellant's evidence, specified in the indictment, was false in fact, (ii) that the appellant when he gave it knew that it was false, and (iii) that he gave it with intent to mislead the Court. Although there was some evidence on which it was open to the tribunal of fact to find that the first of these matters was proved, there was no evidence on which it could find that either of the other matters was proved. In such circumstances, had the trial been before a jury it would have been the duty of the trial judge to direct them to find a verdict of not guilty and it was equally his duty to so direct himself.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming the conviction of the appellant. Appeal allowed.

*W. G. Morrow, Q.C.*, for the appellant.

*W. Shortreed, Q.C.*, for the respondent.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

The judgment of Kerwin C.J. and of Taschereau, Locke, Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—John Gordon Calder appeals from the judgment of the Appellate Division of the Supreme Court of Alberta, which dismissed his appeal from his conviction on a charge of perjury after a trial before a judge sitting without a jury. The only reasons before us from the Appellate Division are those of the Chief Justice, who dissented and would have allowed the appeal.

The precise charge of perjury against the appellant was that, as a witness in a divorce case heard in September 1958, he had given evidence to the effect

> that shortly after the 1st day of July, A.D. 1957, Mr. Douglas Dunn and Mrs. Geraldine Holland and her two children moved to his trailer located about 30 feet west of his office facing south on 8th Street and Railway Avenue, Dawson Creek, British Columbia, and lived in the said trailer from three weeks to a month, well knowing same to be false and with intent to mislead.

In 1957 the appellant was living in Dawson Creek and carrying on a transport business. In his yard there was a trailer which he used for the accommodation of his drivers when they came in late at night and needed sleeping quarters. In June 1957 he permitted one Douglas Dunn, who also owned a small trucking business, to occupy this trailer. In the latter half of June 1957, Dunn was joined by a woman, whom he introduced as Mrs. Dunn. This woman was at that time married to William Holland. The two lived in this trailer for a period of about two weeks in the month of June 1957, and for part of this time there was another couple living there with them. At the end of June Mrs. Holland returned to Edmonton with Dunn to pick up her two children at the end of the school term. The two returned with the children to Dawson Creek early in the morning of July 2. Her story is that for the remainder of the first night she slept in the car with the two children and then immediately moved into a house with Dunn.

In the divorce action between Holland, as plaintiff, and his wife, as defendant, the appellant was subpoenaed as a witness. This is the evidence that he gave:

> Q. Was anybody else living in this trailer at the time you met Mrs. Dunn, as you were introduced to her?
>
> A. Mr. Dunn.

1960

CALDER
v.
THE QUEEN

Judson J.

Q. He was living there?

A. Yes.

Q. How long did Mr. Dunn and the woman you were introduced to as Mrs. Dunn live in this trailer?

A. I would say approximately three weeks to a month.

Q. Had Mr. Dunn slept in the trailer prior to the time that this lady appeared on the scene?

A. That is right, yes.

Q. And do you recall what period of time it would be that Mr. Dunn and this lady, who you now know to be Mrs. Holland, occupied the trailer?

A. Sometime shortly after the 1st of July. It was right within a week of that First of July.

Q. Were there any children?

A. Yes.

Q. The COURT: Do you mean that she started to occupy the trailer about the 1st of July or the latter part of June?

A. No, after the 1st of July, sometime right in there.

Q. The COURT: Sometime after the 1st of July, that was the first time she occupied it?

A. Yes.

Q. The COURT: Now you said something about the children, they were there too?

A. Yes.

Q. Mr. STANTON: How many children?

A. Two I believe sir.

Q. When did they appear on the scene?

A. Sometime just a few days after the 1st of July.

Mr. Miller cross-examines:

Q. Another thing now, Mr. Calder, I am suggesting to you that Mrs. Holland's children never stayed in that trailer, that when they came to Dawson Creek they immediately went to this house that we are speaking about that belonged to Henderson?

A. No sir.

Q. I want you to consider, Mr. Calder, I am suggesting to you that the children never stayed in that trailer.

A. Well, it is, they were there, that is all I know.

Q. I know they were in Dawson Creek.

A. They were there in that trailer. I have mentioned that twice or three times now sir.

Q. All right now, Mr. Calder, I am suggesting to you that Mr. and Mrs. Hine stayed in that trailer at the time that Mrs. Holland or/and Mr. Dunn were there?

A. I don't know anything about that.

The COURT: Were you ever in the trailer when Mrs. Holland and Mr. Dunn were in there?

A. No, not that I recall sir.

The COURT: When did you see Mrs. Holland in there with Mr. Dunn?

A. Every day, right there 30 feet from my office, I couldn't help but see.
The COURT: She was inside?
A. Yes, she was outside and inside and in and out all the time.
The COURT: And the children too?
A. Yes.

At the trial of the appellant on the charge of perjury, Mrs. Holland, who by that time had become Mrs. Dunn, denied that she had ever occupied the trailer at any time in the month of July 1957 with Dunn and the children. The appellant gave evidence in his own defence and stated that Dunn and the woman had stayed in the trailer in June for some time and that the next time he saw them was July 2. On the following day they moved into the trailer again and he saw them in and around the trailer for a few days, after which they moved into a house. He asserted that his evidence, given at the trial, was an honest statement of what he could remember and that he thought that the couple had stayed in the trailer for a few days with the children. He admitted that he had never walked around and looked in the trailer to see who was in it. His observations were made from his office which was about 30 feet away. His understanding from Dunn was that they would be there for a few days. He explained that his evidence of the occupation of the trailer for a period of three weeks to a month, given at the trial, related to the month of June. He also said that he had seen Mrs. Holland's children around the trailer after Dunn had spoken to him about arrangements for the use of the trailer.

The unquestionable facts are that Mrs. Holland was living in the trailer with Dunn in the second half of June 1957, with Dunn and the children in a small house nearby from some time early in July until the end of September 1957 and that the children did not arrive in Dawson Creek until July 2.

The appellant gave his evidence at the divorce trial on September 16, 1958, more than a year after the events to which he testified. He became involved, as an innocent bystander, in events which were of no particular significance to him at the time. He had no interest in the outcome of the divorce trial and he was in court under subpoena. On this record, there is, to me, a preponderance of evidence, coming

1960
CALDER
v.
THE QUEEN
Judson J.

from other witnesses as well as the appellant, that this couple, along with the children, were in occupation of the trailer for some period early in July 1957. This, however, is no ground for reversal in this Court. But I agree with the learned Chief Justice that this appellant should not have been convicted of perjury on the ground that there was no evidence of any intent to mislead, or knowledge of the falsity of the evidence given. The evidence may have been in error, although I doubt that, but error alone, and that is the most that can be found against the appellant, affords no basis for the inference of the intent and knowledge necessary to support this charge.

I would quash the conviction and direct that a judgment of acquittal be entered.

The judgment of Locke, Cartwright, Abbott, Martland and Ritchie JJ. was delivered by

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Judson and have little to add.

While the learned Chief Justice of Alberta dissented from the judgment of the majority of the Appellate Division on two questions of law I find it necessary to consider only the first of these which is expressed in the formal order in the following words:

> There was no evidence on which it could properly be found that the accused intended to swear as to the facts as was charged.

The test to be applied in determining whether or not there was *any* evidence, as distinguished from *sufficient* evidence, to support a conviction is to be found in the unanimous judgment of this Court delivered by Duff C.J.C. in *The King v. Décary*[1]. The question to be answered is whether "there was no evidence in support of the accusation before the jury in the sense that it was within the power of the trial judge, and therefore, of course, his duty, to direct a verdict of not guilty to be entered"; it has long been settled that the question so stated is one of law in the strict sense, while the question on which the Court of Appeal is empowered to pass by s. 592(1)(*a*)(i) of the *Criminal Code* —whether the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence—is a mixed question of fact and law.

[1] [1942] S.C.R. 80 at 83, [1942] 2 D.L.R. 401.

This Court has jurisdiction to review a decision of the Court of Appeal on the first but not on the second of these questions. The two questions have however a common feature; to answer either the Court must, speaking generally, review the whole of the evidence.

In the case at bar it was incumbent upon the prosecution to prove beyond a reasonable doubt three matters, (i) that the evidence, specified in the indictment, given by the appellant on September 16, 1958, before Greschuk J. was false in fact, (ii) that the appellant when he gave it knew that it was false, and (iii) that he gave it with intent to mislead the Court. It may well be that if there were evidence to support findings that the appellant had given evidence false in fact knowing it to be false the tribunal of fact, in the absence of other evidence as to his intention, could properly draw the inference that in so doing he intended to mislead the Court.

After reading all the evidence with care it appears to me that there was some evidence on which it was open to the tribunal of fact to find that the first of the matters mentioned above was proved but, in my opinion, there was no evidence on which it could find that either the second or third of such matters was proved. In such circumstances, had the trial been before a jury it would have been the duty of the learned trial judge to direct them to find a verdict of not guilty and it was equally his duty to so direct himself.

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

*Appeal allowed, conviction quashed and judgment of acquittal directed to be entered.*

*Solicitors for the appellant: Morrow, Reynolds & Stevenson, Edmonton.*

*Solicitor for the respondent: The Attorney General for Alberta.*

1960
*Oct. 11
Nov. 21

HER MAJESTY THE QUEEN .....APPELLANT;

AND

JOHN TOPECHKA .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Criminal law—Common gaming houses—Slot machines—Whether bowling machine giving amusement and chance of free game depending on skill a "slot machine" contrary to the Criminal Code, 1953-54 (Can.), c. 51, s. 170.*

The accused's premises contained an automatic machine whereby a person, on the insertion of a coin, could play a bowling game by aiming a device which propelled balls toward the pins at the other end of the machine. The skill used in playing the game was in aiming the mechanical bowler. If the scoring of points had a sufficient margin the operator became entitled to a free game. On a charge of keeping a common gaming house for the purpose of gambling contrary to the Criminal Code, the respondent was acquitted by the magistrate and this judgment was confirmed by the Appellate Division of the Supreme Court on an equal division. The Crown appealed to this Court.

*Held* (Fauteux and Judson JJ. *dissenting*): The appeal should be dismissed.

*Per* Taschereau, Martland and Ritchie JJ.: This machine is not a slot machine within the meaning of the Act. It is used for vending "services", and "services" include "amusements". *Laphkas v. The King*, [1942] S.C.R. 84, applied.

What the law forbids is a machine that by electronic devices or other means, defeats the ability of the player to obtain favourable results. To be within the law, the player must control the game, and not be at the mercy of a machine where skill is not the only element.

When the Act speaks of *a matter of chance or uncertainty* to the operator, it refers obviously to the machine itself which may produce different results independently of the skill of the player. *Laphkas v. R., supra; R. v. Isseman*, [1956] S.C.R. 798; *Regent Vending Machines v. Alberta Vending Machines*, [1954] S.C.R. 98, referred to.

The privilege of a free game is the result of skill in operating rather than an element of chance or uncertainty due to the machine and therefore does not make the machine unlawful.

*Per* Fauteux and Judson JJ., *dissenting*: It is an offence if the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator. Chance or uncertainty to the operator must be present unless he can, without possibility of failure, achieve any result that he wishes or unless the result is automatic.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming, on an equal division, the acquittal of the accused. Appeal dismissed, Fauteux and Judson JJ. dissenting.

*PRESENT: Taschereau, Fauteux, Martland, Judson and Ritchie JJ.

[1] (1959-60), 30 W.W.R. 359, 32 C.R. 144.

*S. A. Friedman,* for the appellant.

*T. A. Miller,* for the respondent.

The judgment of Taschereau, Martland and Ritchie JJ. was delivered by

TASCHEREAU J.:—The charge against the respondent is that on the 26th day of February, 1959, at the City of Edmonton, he did unlawfully keep a disorderly house, to wit: a common gaming house for the purpose of gambling contrary to the *Criminal Code.* His Honour Magistrate Barclay acquitted the respondent, and this judgment was confirmed by the Appellate Division of the Supreme Court of Alberta[1], on an equal division, Mr. Justice McBride having died before the rendering of the judgment.

The provisions of the *Criminal Code* which have to be examined for the purpose of determining this case, are the subsections of section 170. This section reads as follows:

170. (1) For the purpose of proceedings under this Part, a place that is found to be equipped with a slot machine shall be conclusively presumed to be a common gaming house.

(2) In this section "slot machine" means any automatic machine or slot machine

(*a*) that is used or intended to be used for any purpose other than vending merchandise or services; or

(*b*) that is used or intended to be used for the purpose of vending merchandise or services if

(i) the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator,

(ii) as a result of a given number of successive operations by the operator the machine produces different results, or

(iii) on any operation of the machine it discharges or emits a slug or token.

It was admitted at the trial that when the machine was seized, it was in good operating condition, and was on the premises of the accused. The only question that arises and which has to be decided is whether or not this "William Ten Strike" bowling machine is a "slot machine" contrary to the above section of the *Criminal Code.*

This alleged slot machine, as found by the learned trial judge, is operated as follows, and this is not contested by the appellant. "There is a mechanical man at one end, and when ten cents is inserted in the slot, a ball comes out and comes before the man's hand. The man can be turned through an angle and is aimed at the pins which are placed in the form of a triangle at the other or far end. The base

[1] (1959-60), 30 W.W.R. 359, 32 C.R. 144.

1960

THE QUEEN v. TOPECHKA

Taschereau J.

of the triangle is at the far end of the rectangle, with the apex facing the "man" and the player. After the man is aimed a plunger is pushed forward and the arm of the man moves and propels the ball forward. The direction of the ball is determined by the position of the man as determined by the player." The trial judge came to the conclusion that the skill used in playing the game is in aiming the man or bowler.

If the aim is accurate, the operator will get a "strike", and if he gets twelve strikes in a row, his score will be 300, which is the maximum that can be obtained. If the aim is inaccurate, the score will be lower. A better player will of course be the winner.

I do not think that this machine is a "slot machine" within the meaning of the Act. It is used for vending "services" and, "services" include "amusements". (*Laphkas v. The King*[1]).

This machine, I believe, procures an innocent amusement to the operator, and this is not within the ban of the Act. It is an automatic machine used for vending services, and it does not emit a *slug* or *token*. Of course, under s. 170, a machine used for vending services or amusements will be illegal, if the result produced by the machine is a matter of chance or uncertainty to the operator, or if different results as a consequence of the adjustment of the mechanism are obtained. But this has nothing to do with the skill of the operator and is quite independent of the ability of the player to hit the target if he aims properly.

What the law forbids is a machine that by electronic devices or other means, defeats the ability of the player to obtain favourable results. To be within the law, the player must control the game, and not be at the mercy of a machine where skill is not the only element, as it is in the present case.

When the Act speaks of *a matter of chance or uncertainty to the operator,* it refers obviously to the machine itself which may produce different results independently of the skill of the player. I think this is the letter and spirit of the law. (Vide: *Laphkas v. R., supra; R. v. Isseman*[2]*; Regent Vending Machines v. Alberta Vending Machines*[3]).

[1] [1942] S.C.R 84, 2 D.L.R. 47.
[2] [1956] S.C.R. 798, 24 C.R. 346. [3] [1954] S.C.R. 98, 2 D.L.R. 679.

Skill might be successful or not, it may produce uncertain results, as in baseball, football, trap or skeet shooting, golf or hockey, but the uncertainty then comes from the player, and not from the mechanism of a machine which nullifies the ability of the player.

I would hate to think that the law intends to brand as a criminal a Canadian citizen who, for a dime, procures an innocent amusement to the public where there is no element of gambling or hazard.

Of course, I have in mind a machine that functions properly and not a machine which does not operate normally, and where the skill of the player might be defeated. I finally believe, as did the learned Chief Justice of Alberta, that if the scoring of points shows that the operator has a sufficient margin, he is entitled to play another game without further payment of money for the operation. This feature can be eliminated by an adjustment of the scoring mechanism. As found by the courts below, the privilege so given is the result of skill in operating rather than an element of chance or uncertainty due to the machine, and does not make the machine unlawful.

I would dismiss the appeal.

The judgment of Fauteux and Judson JJ. was delivered by

JUDSON J. (*dissenting*):—For the reasons given by Porter J.A. in the Appellate Division, I would allow this appeal. While there is some element of skill involved in the operation of the machine, in that one player may obtain a better result than another, it is still an offence if the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator. Chance or uncertainty to the operator must be present unless he can, without any possibility of failure, achieve any result that he wishes or unless the result is automatic. I do not think that uncertainty to the operator can be given the restricted meaning set out in the reasons of my brother Taschereau.

*Appeal dismissed,* FAUTEUX *and* JUDSON JJ. *dissenting.*

*Solicitor for the appellant: The Attorney General for Alberta.*

*Solicitors for the respondent: Miller, Miller & Witten, Edmonton.*

1960

*Oct. 12
Nov. 21

REGAL HEIGHTS LIMITED .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

*Taxation—Income tax—Profit from land purchased for development of a shopping centre and later sold—Whether taxable income as profit derived from a venture in the nature of trade—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).*

A group of persons formed a partnership and purchased certain lands for the purpose of developing a large shopping centre in the City of Calgary. They later incorporated the appellant company to which all the property in question was transferred. Due to the failure to negotiate a lease with a major department store the shopping centre plan was dropped, and the holdings of the company were disposed of at enhanced prices resulting in a substantial profit to the company.

The appellant was assessed for income tax on this profit. An appeal by it to the Income Tax Appeal Board and a further appeal to the Exchequer Court were dismissed. Appellant then appealed to this Court.

*Held* (Cartwright J. *dissenting*): The appeal should be dismissed.

*Per* Fauteux, Martland, Judson and Ritchie JJ.: As found by the trial judge, the promoters and the company failed to promote a shopping centre and they then disposed of their speculative property at a profit. This was a venture in the nature of trade and the profit from it is taxable within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*.

There is no analogy between the sale of long-held bona fide capital assets and the realization of a profit from a speculative venture in the nature of trade, as was the case here. *Sutton Lumber and Trading Co. Ltd. v. Minister of National Revenue,* [1953] 2 S.C.R. 77, distinguished.

*Per* Cartwright J., *dissenting*: The evidence does not support the view that the appellant or its promoters would have purchased, or did purchase, the lands in question as a speculation looking to re-sale. The sales of the lands were a realization of its capital assets when the purpose for which they had been acquired was defeated, owing to circumstances beyond the control of the appellant.

The result is not affected by the circumstance that these capital assets were held for a much shorter time than those which were under consideration in *Sutton Lumber and Trading Co. Ltd. v. Minister of National Revenue, supra.*

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], affirming a decision of the Income Tax Appeal Board. Appeal dismissed, Cartwright J. dissenting.

*PRESENT: Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

[1] [1960] Ex. C.R. 194, [1960] C.T.C. 46.

*R. H. Barron, Q.C.*, for the appellant.

*D. S. Maxwell*, for the respondent.

CARTWRIGHT J. (*dissenting*):—The relevant facts out of which this appeal arises are set out in the reasons of my brother Judson. I agree with his view that the question to be determined is what business the appellant did in fact engage in, and that cases of this sort must all depend on their particular facts.

The respondent seeks to uphold the assessment on the ground that the profit resulting from the sale of the lands in question was income of the appellant for the year 1955 from its business. There is no doubt that the appellant was carrying on a business which it wound up when it became apparent that its scheme to develop a shopping centre could not be carried out. The question to be determined is whether the gain which resulted to the appellant from the sale of the lands was a capital gain or was income within the meaning of the applicable provisions of the *Income Tax Act*.

It is clear from many decisions that the *Income Tax Act* does not impose tax upon a profit which is in truth a capital gain. On this point it is sufficient to refer to the unanimous judgment of this Court delivered by Locke J. in *Sutton Lumber and Trading Company Ltd. v. Minister of National Revenue*[1], in which are set out the principles by which the Court should be guided in dealing with the question, essentially one of fact, whether a particular profit is in truth a capital gain.

In the case at bar the question whether the profit realized by the appellant is subject to tax is dependent upon whether in fact the true nature of the business in which it engaged was, (i) the purchase of lands with a view to reselling them at a profit or, (ii) the development of a shopping centre to be held and operated as an investment or, (iii) both of these.

As I read the reasons of the learned trial judge, he has accepted as truthful the evidence of the appellant's witnesses and has found that the "motivating intention" of the appellant and its promoters and directors was to purchase the lands as the first step in the erection and development

[1] [1953] 2 S.C.R. 77, [1953] 4 D.L.R. 801.

1960

REGAL HEIGHTS LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

of a shopping centre to be held and operated as a revenue-producing investment. He has however held the profit realized subject to tax on the ground that reasonable and experienced business men, such as the promoters were, must have envisaged the possibility of being unable to carry out the scheme of developing the shopping centre and have hoped in that event to dispose of the lands at a profit. Accepting this as a reasonable inference, it does not appear to me to justify the finding that the appellant was in fact engaged in the business of buying and selling lands. I do not think the evidence supports the view that the appellant or its promoters would have purchased, or did purchase, the lands in question as a speculation looking to re-sale.

Applying the principles set out in the *Sutton Lumber* case it appears to me that the sales of the lands made by the appellant were a realization of its capital assets when the purpose for which they had been acquired was defeated by the decision of the department store mentioned in the evidence to build on a nearby site. To put the matter colloquially, the lands were acquired and disposed of not as the stock-in-trade or inventory of a dealer in land but as capital assets of a developer of a shopping centre which, owing to circumstances beyond the control of the appellant, it became impossible to develop. The result is not affected by the circumstance that these capital assets were held for a much shorter time than those which were under consideration in the *Sutton Lumber* case.

I would allow the appeal with costs throughout and direct that the judgment of the Exchequer Court and the assessments should be set aside.

The judgment of Fauteux, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—Regal Heights Limited appeals from the judgment of the Exchequer Court[1] which dismissed its appeal from the judgment of the Income Tax Appeal Board. The issue is whether the appellant was properly assessed on a profit of $135,704.73 arising from its dealings with certain real property in the City of Calgary. The appellant reported an income for the year 1955 of $970.94. The department re-assessed at $135,704.73. Both the Income Tax

[1] [1960] Ex. C.R. 194, [1960] C.T.C. 46.

Appeal Board and the Exchequer Court have held that the re-assessment was correct. Hence this appeal. The question is whether the appellant's profit from the sale of this real estate in the 1955 taxation year was a profit derived from a venture or concern in the nature of trade and was therefore income from a business within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148.

In September 1952 one Benjamin Raber became interested in the purchase of 40 acres of land in the City of Calgary which was then being operated as the Regal Golf Course. Mr. Raber took in three other associates and the four, as partners, purchase the property for $70,000. They intended to attempt to establish a large shopping centre on the property.

In May 1953 the partners purchased for $14,700 a property on the other side of the road which would be useful in giving more ready access to a shopping centre. They also purchased in March 1954 an undivided one-third interest in a property some distance away which they proposed to use for the purpose of advertising the existence of the shopping centre. The total outlay of the partners for the acquisition of these properties was, therefore, $88,700. In February 1954 they incorporated Regal Heights Limited and transferred all the property in question to the company in return for shares. The partners were the sole shareholders of the company. It became apparent in September 1954 that a shopping centre of the kind intended could not be established on the property. The reason was that a large department store, which the promoters hoped to interest in their centre, announced publicly that it intended to locate in the neighbourhood but on another site 20 blocks away.

The company, in December 1954, disposed of 30 acres for $88,500. In May 1955 the shareholders passed a resolution to wind up the company. The company next sold the property on the other side of the road, which had been purchased for the purpose of access, for $20,000, and finally, in May 1955, it sold 6.3 acres of the remaining property for $143,200.

There is no doubt that the primary aim of the partners in the acquisition of these properties, and the learned trial judge so found, was the establishment of a shopping centre but he also found that their intention was to sell at a profit if they were unable to carry out their primary aim. It is

1960

REGAL HEIGHTS LTD. v. MINISTER OF NATIONAL REVENUE

Judson J.

the second finding which the appellant attacks as a basis for the taxation of the profit as income. The Minister, on the other hand, submits that this finding is just as strong and valid as the first finding and that the promoters had this secondary intention from the beginning.

The appellant adduced much evidence concerning the efforts of the promoters to establish what was described as a "regional shopping centre". This means the largest of this type of enterprise and requires an area of from 30 to 60 acres. These promoters undoubtedly had the necessary land but a scheme of this kind involves an expenditure of anything from $2,000,000 to $5,000,000 and its financing and establishment depend upon the negotiation of leases with satisfactory tenants, and above all, upon the negotiation of a lease with a major department store as the centre of attraction.

It is necessary to set out the efforts made by the promoters to develop this property in this way. The acquisition of the two additional properties, the one for the purpose of easy access and the other for the purpose of advertising the centre, fits into the scheme. In February 1953 they secured a favourable opinion from the Calgary Planning Board that the property would be re-zoned from residential to commercial purposes although the Board withheld formal approval until there should be some indication that construction would begin. In addition, they had sketches made to show what the centre would look like. These sketches were no more than promotional literature. They made studies of other shopping centres; with professional help they compiled lists of prospective tenants; they entered into discussions with four department stores although the evidence shows that there was only one which might possibly be interested; they had discussions with one of the banks concerning the financing of the project; they had a special survey made at a fee of $3,000 for the purpose of influencing one particular department store; and they incorporated this company.

These efforts were all of a promotional character. The establishment of a regional shopping centre was always dependent upon the negotiation of a lease with a major department store. There is no evidence that any such store did anything more than listen to the promoters' ideas. There

is, understandably, no evidence of any intention on the part of these promoters to build regardless of the outcome of these negotiations. There is no evidence that these promoters had any assurance when they entered upon this venture that they could interest any such department store. Their venture was entirely speculative. If it failed, the property was a valuable property, as is proved from the proceeds of the sales that they made. There is ample evidence to support the finding of the learned trial judge that this was an undertaking or venture in the nature of trade, a speculation in vacant land. These promoters were hopeful of putting the land to one use but that hope was not realized. They then sold at a substantial profit and that profit, in my opinion, is income and subject to taxation.

Throughout the existence of the appellant company, its interest and intentions were identical with those of the promoters of this scheme. One of the objects stated in the memorandum of association of the company was

> To construct and operate apartment houses, blocks, shopping centres and to otherwise carry on any business which may be conveniently carried on in a shopping centre.

Nothing turns upon such a statement in such a document. The question to be determined is not what business or trade the company might have carried on but rather what business, if any, it did in fact engage in. (*Sutton Lumber and Trading Co. Ltd. v. Minister of National Revenue*[1]). What the promoters and the company did and intended to do is clear to me on the evidence, as it was to the learned trial judge. They failed to promote a shopping centre and they then disposed of their speculative property at a profit. This was a venture in the nature of trade and the profit from it is taxable within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*. These cases must all depend on their particular facts and there is no analogy between the sale of long-held bona fide capital assets, as in the *Sutton Lumber* case, and the realization of a profit from this speculative venture in the nature of trade.

I would dismiss the appeal with costs.

[1] [1953] 2 S.C.R. 77 at 93, [1953] 4 D.L.R. 801.

1960

REGAL HEIGHTS LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

*Appeal dismissed with costs,* CARTWRIGHT J. *dissenting.*

*Solicitors for the appellant: Helman, Fleming & Neve, Calgary.*

*Solicitor for the respondent: A. A. McGrory, Ottawa.*

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*Oct. 7

Nov. 21

HER MAJESTY THE QUEEN .....APPELLANT;

AND

THE PROCTER AND GAMBLE COMPANY OF CANADA, LTD. ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA APPELLATE DIVISION

*Criminal law—Lotteries—Scheme of distributing by chance questionnaire forms to be completed and returned for value—Whether scheme for the disposition of property by chance—Criminal Code, 1953-54 (Can.), c. 51, ss. 2(32)(a), 179(1).*

The respondent corporation distributed over 100,000 packages of its soap products, each package being marked with a five star seal. The corporation advertised to the public that it had enclosed a questionnaire form in 10,000 of these containers. The questionnaire sought certain information from the recipient which would be valuable to the respondent in the operation of its business. A recipient who completed the form and mailed it to the respondent was entitled to a payment of $5 from the respondent.

The corporation was charged with three offences under s. 179(1) of the *Criminal Code,* the lotteries section. All three charges were dismissed in magistrate's court, and this decision was sustained on appeal to the Appellate Division of the Supreme Court on equal division. The Crown appealed to this Court.

*Held:* The appeal should be dismissed.

The contention that what was disposed of by lot or chance under the respondent's scheme was the sum of $5 failed. It was not the money that was disposed of by chance, but a form by means of which the recipient thereof could, on compliance with the required conditions, obtain the payment.

An uncompleted questionnaire form is not an instrument "giving a right to receive money" within the definition of property in s. 2(32)(a) of the *Criminal Code.* In itself the questionnaire created no right to property.

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*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

The services which the recipient of the form was asked to perform were not a mere formality, serving as a device seeking to avoid the application of s. 179(1) of the Code.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming, on an equal division, the acquittal of the accused. Appeal dismissed.

*S. A. Friedman,* for the appellant.

*C. W. Clement, Q.C.,* and *B. M. Osler, Q.C.,* for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The respondent is a corporation which manufactures soap products. On April 11, 1959, it advertised by newspaper, in Edmonton, that it had enclosed a questionnaire in 10,000 packets of its products, distributed across Canada, and identified by a five star seal on the container. Over 100,000 packages of soap products were distributed in Canada in the containers marked with the five star seal. A person who obtained a questionnaire, by purchase of a package containing it, could, by completing and mailing it to a specified address, receive the sum of $5. The scheme was also advertised on television.

The questionnaire sought information from the recipient of it, among other things, as to the product in the package in which the questionnaire was found, the type of washing machine used, the laundry product mostly used, whether bleach was used in laundering, how certain kinds of garments were washed and concluded with a question as to the ways in which the respondent's laundry, dish washing, and house cleaning products could be improved.

The respondent was charged with three offences under s. 179(1) of the *Criminal Code.* The first was that it "did unlawfully conduct a certain scheme for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed

[1] (1959-60), 30 W.W.R. 352, 32 C.R. 137.

1960

THE QUEEN v. PROCTER AND GAMBLE CO. OF CANADA, LTD.

Martland J.

to be advanced, loaned, given, sold or disposed of, to wit: Questionnaire forms each of which when completed and returned to the said Company had a value of $5. Contrary to the Criminal Code of Canada." The second and third charges were that the respondent unlawfully advertised and that it unlawfully caused to be advertised this scheme.

Section 179(1) of the *Criminal Code* provides:

179(1) Every one is guilty of an indictable offence and is liable to imprisonment for two years who

(*a*) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever;

* * *

(*d*) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, loaned, given, sold or disposed of;

* * *

The relevant definition of "property" is contained in para. (*a*) of subs. (32) of s. 2 of the *Criminal Code*, which reads:

(32) "property" includes

(*a*) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods,

All three charges were dismissed by the learned Magistrate who tried the case. In the written reasons for his decision he makes the following findings:

Therefore, to sum up, I find that the forms were sent out in these packages, to various areas throughout the whole of Canada, that there was a sincere effort on the part of the company to ascertain the desires and opinions of the housewives who used their property with the intention of improving the property, the packages of soap in this case. I find that the reward was not unduly high, and that it didn't vary, and that the price of the packages didn't vary and that no extra money had to be sent in with the form, that once the questionnaire form was sent in, duly answered by the person sending it, there was no lottery or no choice of who would

win. It was a conscientious effort on the part of the company to obtain the views of the people using their product. I don't think there was any sham about the whole proceedings, and I think that the company have proved this in their evidence by calling the member of the research department of their firm to show that the answers received were treated seriously, . . .

His decision was sustained on appeal to the Appellate Division of the Supreme Court of Alberta[1] on an equal division. The appellant has appealed from that judgment.

It is not questioned that the distribution of the questionnaire forms was determined by chance. The question is whether, because of that fact, the respondent's scheme was one for the disposition of property by chance. This involves the question as to what it was that the purchaser of a five star seal package, which contained a form, had obtained.

The contention of the appellant is that, under the respondent's scheme, what was disposed of by lot or chance was the sum of $5. It was contended that the acquisition of the questionnaire form gave to the recipient a right to receive the sum of $5 from the respondent.

The obtaining of a form in a package did not, however, immediately entitle the recipient to the payment. Before he could claim the payment he was required to complete the form and to mail it to the respondent. That which was disposed of by chance was not, therefore, the money, but a form, by means of which, on compliance with the required conditions, he could obtain the payment.

This brings us to the question as to whether an uncompleted questionnaire form is an instrument "giving a right to receive money" within the paragraph defining "property" in the *Criminal Code*.

I do not think that it was. Assuming that the form was an instrument, the questionnaire uncompleted, or completed but not mailed, did not confer any right to receive a $5 payment. The form gave to the recipient an opportunity

[1] (1959-60), 30 W.W.R. 352, 32 C.R. 137.

1960

THE QUEEN v. PROCTER AND GAMBLE CO. OF CANADA, LTD.

Martland J.

to obtain the payment by performing the stipulated services; i.e., completion and mailing of the form. The questionnaire constituted nothing more than an offer, but the right to receive the payment could only arise by contract, which would result if the offer were accepted in the manner which it had indicated, which involved the furnishing of information to the respondent. In itself it created no right to property.

As previously pointed out, the learned Magistrate has found, and the evidence supports the finding, that the requirement for the completion and mailing of the questionnaire form was not a sham. The services which the recipient of the questionnaire form was asked to perform were not a mere formality, serving as a device seeking to avoid the application of s. 179(1) of the *Criminal Code*. On the contrary, the evidence, accepted by the learned Magistrate, establishes that the whole plan was a genuine effort on the part of the respondent to obtain information which would be valuable to it in the operation of its business. For those services the respondent agreed to make a standard payment of $5 in each case.

For these reasons it is my opinion that the appeal should be dismissed.

*Appeal dismissed.*

*Solicitor for the appellant: The Attorney General for Alberta.*

*Solicitors for the respondent: Clement, Parlee, Whittaker, Irving, Mustard & Rodney, Edmonton.*

STERLING GILBERT VAIL .....APPELLANT;

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*Oct. 11, 12
Nov. 21

AND

HER MAJESTY THE QUEEN, ON THE INFORMATION AND COMPLAINT OF RONALD G. DICKSON ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

*Criminal law—Further appeal in summary conviction matter—Application for leave to appeal—Question of law—The Summary Convictions Act, R.S.A. 1955, c. 325, s. 15.*

*Professions and trades—Dental mechanic fitting set of false teeth—Unlawful practice of dentistry—The Dental Association Act, R.S.A. 1955, c. 82, s. 37(a).*

The accused, who did not hold a valid certificate to practise dentistry, fitted a complete set of false teeth for one H, for which he was paid $90. According to his uncontradicted evidence this payment was simply for the manufacture of the dentures, and no charge was made for any part of the other dental work. On a charge of practising dentistry for hire, contrary to s. 37(a) of *The Dental Association Act,* R.S.A. 1955, c. 82, the accused was acquitted in magistrate's court, and an appeal from this acquittal was dismissed by the District Court judge.

On an *ex parte* application to a Supreme Court judge, made under s. 15 of *The Summary Convictions Act,* R.S.A. 1955, c. 325, leave to appeal to the Appellate Division was granted as a question of law was involved of sufficient importance to justify a further appeal. The Appellate Division allowed the appeal and from this decision the accused appealed to this Court. The appellant contended that s. 15(1) makes no provision for an appeal by the informant from an acquittal, and is confined to applications made by "the Attorney General or counsel instructed by him".

*Held*: The appeal should be dismissed.

Sections 581 to 592 inclusive of the *Criminal Code,* as adopted by s. 15(2) of *The Summary Convictions Act* of Alberta, are limited in their effect to matters of procedure and are in no way related to the right of appeal itself which is fully stated in s. 15(1). As the informant is a "person affected by the conviction or order" to which the Act applies, it follows that he is accorded a right to apply to a Supreme Court judge under s. 15(1).

The contention that because of the omission of the term "order of dismissal" from s. 15 of *The Summary Convictions Act,* the right of appeal to the Appellate Division does not apply where there has been an acquittal by the District Court, failed in view of the provisions of s. 692(1) of the *Criminal Code.*

*PRESENT: Kerwin C.J. and Taschereau, Martland, Judson and Ritchie JJ.

1960

VAIL
v.
THE QUEEN

Ritchie J.

The argument that the Appellate Division exceeded its jurisdiction which was limited to a question of law alone also failed. As the facts were not in dispute, the only question at issue was as to the true construction to be placed upon ss. 30 and 37(*a*) of *The Dental Association Act*. This is a question of law and was so dealt with in the majority judgment.

As the appellant's "skill and experience" in doing dental work were part of the value or price he was able to obtain for the finished dentures, it followed that the appellant's conduct constituted "practising the profession of dentistry . . . for hire" within the meaning of the statute.

Furthermore the words "for hire" as used in s. 37(*a*) do not necessarily import the payment of money and should be construed as including any kind of compensation or reward. At least part of the compensation which the appellant received for doing the dental work was that he thereby obtained an order to manufacture the dentures.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from a judgment of Edwards D.C.J. Appeal dismissed.

*E. M. Woolliams,* for the appellant.

*S. J. Helman, Q.C.,* for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] allowing an appeal by the private prosecutor from a judgment of His Honour Judge M. J. Edwards and entering a conviction against the appellant for practising the profession of dentistry within the Province of Alberta "for hire" contrary to the provisions of s. 37(*a*) of *The Dental Association Act,* R.S.A. 1955, c. 82.

At all times relevant to these proceedings, the appellant, who did not hold a valid certificate of registration from the Alberta Dental Association, resided at Drumheller in the Province of Alberta where he carried on the business of a dental mechanic in an office, over the door of which there was a sign reading "Valley Dental Lab". In the Autumn of 1958 a man by the name of Hill came to this office by

[1] (1959-60), 30 W.W.R. 101, 125 C.C.C. 349.

appointment to be fitted for a complete set of false teeth. On his first visit a preliminary impression was taken of his jaws and he paid $42.33. On his second visit a "final impression" was taken. On his third visit "bite blocks" were placed in his mouth to determine the relation of the upper and lower jaws, and at the fourth appointment the teeth were set up in wax and placed in his mouth and a further appointment was then made for the "finished date" at which time the plates were put in his mouth and he paid the appellant a further sum of $47.63, making a total of $90. All this work was done by the appellant.

The above facts are not in dispute, but the appellant's uncontradicted evidence was that the $90 charge was "simply for the manufacture of those dentures" and that no charge whatever was made for obtaining "the bite", making the impression or any of the other dental work. The sole question before the Appellate Division was whether or not, under these circumstances, the appellant was practising dentistry within the meaning of *The Dental Association Act*.

Section 37 of *The Dental Association Act* reads as follows:

> 37. A person not holding a valid certificate of registration and a subsisting annual certificate who
>
> (*a*) practises the profession of dentistry within the Province either publicly or privately for hire, gain or hope of reward,
>
> * * *
>
> is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred dollars and not less than fifty dollars for the first offence, and to a fine of four hundred dollars for each and every subsequent offence.

The practice of dentistry is described in the following words in s. 30 of the same statute:

> 30. A person who, for a fee, salary, reward or commission, paid or to be paid by an employer to him, or for fee, money or compensation, paid or to be paid either to himself or an employer or any other person
>
> (*a*) examines, diagnoses or advises on any condition or the tooth or teeth in the jaw or jaws of any person,
>
> (*b*) directly in the oral cavity of any person takes, makes, performs or administers any impression, operation or treatment or any part of any impression, operation or treatment of any kind of or

1960

VAIL
v.
THE QUEEN

Ritchie J.

upon the tooth or teeth or jaw or jaws, or of, for or upon any disease or lesion of the tooth or teeth or jaw or jaws, or the malposition thereof, in the mouth of any person,

(c) fits any artificial denture, tooth or teeth in, to or upon the jaw or jaws of a person, or

(d) advertises or holds himself out as being qualified or entitled to do all or any of the above things,

shall be deemed to be practising the profession of dentistry within the meaning of this Act.

On October 30, 1958, the appellant was arraigned before Magistrate Hardcastle and pleaded not guilty to an Information sworn against him by Dr. Ronald G. Dickson, a dentist of Drumheller, it being submitted on his behalf that as he had charged nothing for doing any of the work described in s. 30 but only for his work as a dental mechanic in manufacturing the dentures he could not be found guilty of practising dentistry "for hire" within the meaning of s. 37(*a*), and that he was, in fact, guilty of no offence under that section. In dismissing the charge, the learned magistrate said:

According to the evidence as I see it, I cannot see where there was a charge made for dentistry. The witness distinctly stated he paid $90.00 for the making of the teeth.

An appeal from this acquittal was duly asserted to the Divisional Court of the District of Southern Alberta by the informant's solicitor pursuant to the provisions of Part XXIV of the *Criminal Code* which, except as otherwise specifically provided, are made to apply "to all convictions and all orders and the proceedings relating thereto made by a justice" by s. 5 of *The Summary Convictions Act* of Alberta.

At the trial *de novo* held before His Honour Judge Edwards the informant's solicitor was expressly authorized to act on behalf of the Crown by the Department of the Attorney General of Alberta, and the above facts, including the fact that the money was paid simply for manufacturing the teeth were sworn to both by the appellant and by Mr. Hill.

In dismissing this appeal, the learned District Court judge said:

> The evidence before me, and uncontradicted, is that the $90.00 was paid to the accused for making a set of dentures, and not for doing any of the things specifically itemized in Section 30, of the Dental Association Act.

The relevant section of *The Summary Convictions Act* of Alberta governing an appeal from a judgment or a decision of a District Court judge in such circumstances as these reads as follows:

> 15. (1) Where it is made to appear to a judge of the Supreme Court, on the application of the Attorney General or any person affected by a conviction or order to which this Act applies, that a judgment or decision of a judge of the district court made on appeal from any such conviction or order involves a question of law of sufficient importance to justify a further appeal, the judge of the Supreme Court may so certify, and thereupon an appeal lies to the Appellate Division of the Supreme Court from the judgment or decision of the judge of the district court.
>
> (2) The procedure on the appeal shall be the same as that provided by sections 581 to 592 of the *Criminal Code* and the rules relating thereto in so far as they are applicable where the ground of appeal involves a question of law.

In purported compliance with this section, the informant's solicitor, who, for this purpose, does not appear to have been instructed by the Attorney General, made an *ex parte* application to Mr. Justice W. G. Egbert of the Supreme Court who duly certified that a question of law was involved of sufficient importance to justify a further appeal, and Notice of Appeal having been served the appeal came on for hearing before the Appellate Division.

It was urged before the Appellate Division that Mr. Justice Egbert lacked jurisdiction to make the order embodying the aforesaid certificate because the accused had been given no notice of the application. Although this ground of appeal was included in the notice pursuant to which leave to appeal to this Court was granted, it was specifically abandoned at the hearing of this appeal.

1960

VAIL
v.
THE QUEEN

Ritchie J.

It was, however, contended before the Appellate Division and before this Court that Mr. Justice Egbert lacked jurisdiction on another ground, viz., that s. 15(1) of *The Summary Convictions Act* of Alberta makes no provision for an appeal by the informant from an acquittal, and is confined to applications made by "the Attorney General or counsel instructed by him".

In this regard the argument was advanced that because the procedure provided by s. 584 of the *Criminal Code,* for appealing from a verdict of acquittal in proceedings by indictment, is adopted by s. 15(2) "in so far as . . . applicable" and because that section of the Code only refers specifically to appeals by "the Attorney General or counsel instructed by him", it, therefore, follows that there can be no appeal by an informant under s. 15 of *The Summary Convictions Act* of Alberta.

In my opinion ss. 581 to 592 inclusive of the *Criminal Code,* as adopted by the said s. 15(2), are limited in their effect to matters of procedure and are in no way related to the right of appeal itself which is fully stated in s. 15(1) (see *Scullion v. Canadian Breweries Transport Limited*[1], *per* Fauteux J.) and as I take the view that the informant is a "person affected by the conviction or order" to which *The Summary Convictions Act* applies, it follows that I am of opinion that the informant is accorded a right to apply to a Supreme Court judge under s. 15(1).

The application "of the Attorney General or any person affected by a conviction or order to which this Act applies" for which provision is made in s. 15(1) of *The Summary Convictions Act* is only to be granted when it has been made to appear to a Supreme Court judge

> . . . that a judgment or decision of a judge of the district court *made on appeal from any such conviction or order* involves a question of law of sufficient importance to justify a further appeal . . . (The italics are mine.)

[1] [1956] S.C.R 512 at 514

It was, however, contended on behalf of the appellant that

> the legislature, having omitted the term "order of dismissal" from s. 15 of the Summary Convictions Act, the right of appeal to the Appellate Division does not apply where there has been an acquittal by the district court. (The quotation is from the factum of the appellant.)

As the "conviction or order" from which an appeal lies to a District Court judge is the "conviction or order" of the justice, I am of opinion that those words as used in s. 15(1) can only refer to such a "conviction or order", and as the summary conviction provisions of the *Criminal Code* apply "to all orders and the proceedings relating thereto made or to be made by a justice", it follows that the word "order" as used in s. 15(1) is to be given the meaning assigned to it by s. 692(1) of the *Criminal Code* which provides that: " 'Order' means any order, including an order for payment of money." These words are, in my opinion, sufficiently wide to include an "order of dismissal". If it were otherwise it would mean that there could be no appeal to the Appellate Division under *The Summary Convictions Act* of Alberta in any case in which an order of dismissal had been made by a justice even if that order had later been reversed and the accused had been convicted by a District Court judge. That the legislature should have intended such a result is, in my opinion, so unlikely that I would have been inclined to attach the wider meaning to the word "order" as used in s. 15(1) even if it had not been for the provisions of s. 692(1) of the Code.

I am, accordingly, of opinion that Egbert J. had jurisdiction to grant the order which he did and that the Appellate Division was clothed with jurisdiction to hear and determine this appeal, but it is said on behalf of the appellant that that Court exceeded its jurisdiction which was limited to a question of law alone because the reasons of Chief Justice Ford and Mr. Justice Porter

> . . . are based on facts found by them and inferences drawn by them and not on facts found by the trial judge and inferences drawn by him.

1960

VAIL
v.
THE QUEEN

Ritchie J.

As the facts are not in dispute, the only question at issue is as to the true construction to be placed upon ss. 30 and 37(*a*) of *The Dental Association Act*. This is a question of law and was so dealt with by Ford C.J. in rendering the decision on behalf of the majority of the Appellate Division, in which he held that as the appellant's "skill and experience" in doing dental work were part of the value or price he was able to obtain for the finished dentures, it followed that the appellant's conduct constituted "practising the profession of dentistry . . . for hire" within the meaning of the statute.

I am in full agreement with the reasoning and conclusion of the Appellate Division, but I am of opinion that the dental work was also done "for hire" in another sense. The words "for hire" as used in s. 37(*a*) do not necessarily import the payment of money and should, in my view, be construed as including any kind of compensation or reward. In the present case, at least a part of the compensation which the appellant received for doing the dental work was that he thereby obtained Mr. Hill's order to manufacture the dentures and incidentally received it for a better price than the dentists had been in the habit of paying for such work so that even if it could be said that the appellant was paid no money for doing the work of a professional dentist it would, nevertheless, be apparent that he was compensated for such work by receiving a profitable order for his work as a dental mechanic, and this, in my opinion, was one measure of his hire. I am, accordingly, of opinion that the transaction between the appellant and Mr. Hill, as the appellant himself described it, constituted practising dentistry "for hire" within the meaning of ss. 37(*a*) and 30 of *The Dental Association Act*.

I would dismiss the appeal, but in view of the circumstances of this case there should be no costs.

*Appeal dismissed without costs.*

*Solicitors for the appellant: Woolliams & Kerr, Calgary.*

*Solicitors for the respondent: Helman, Fleming & Neve, Calgary.*

# INDEX

## COMPANIES



## CONSTITUTIONAL LAW



## CONTRACTS

## INSURANCE

1. Comprehensive—Taxi company claiming from insurer for negligence of driver—Breach of duty to retarded child passenger—Negligence—Immediate or proximate cause of accident—Chain of causation—Complementary policies—Claims arising out of ownership or operation of motor vehicle.

LAW, UNION & ROCK INSURANCE CO. LTD. v. MOORE'S TAXI LTD. 80.

2. Fire—Insured building and contents destroyed by fire—Proofs of loss—What constitutes delivery—Proofs sent by mail but not received—Mandate of agent—Waiver—Whether action premature—Civil Code, art. 2478—The Quebec Insurance Act, R.S.Q. 1941, c. 299, s. 240 (13), (17).

MILINKOVICH v. CDN. MERCANTILE INSURANCE CO. 830.

## JURY TRIAL

Ex parte case—Whether plaintiff entitled to jury trial—Whether inscription for hearing only sufficient—Code of Civil Procedure, arts. 421, 423.

DUMONT EXPRESS LTD. v. KLEINBERG 617.

## LABOUR

1. Collective agreement—Retirement plan during life of agreement instituted unilaterally by employer—Whether violation of seniority provisions in agreement—Grievance of compulsory retired employee dismissed by Council of Arbitration—Whether entitled to action for wrongful dismissal—Jurisdiction of Council of Arbitration.

CDN. CAR & FOUNDRY CO. LTD. v. DINHAM et al. 3.

2. Liability of union for tort—Illegal threats to picket company employing independent contractor—Whether contractor has cause of action against union—The Labour Relations Act, 1954 (B.C.), c. 17, ss. 4, 5, 6, 7—The Trade-unions Act, R.S.B.C. 1948, c. 342.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. THERIEN 265.

3. Collective bargaining—Refusal of town to bargain—Mandamus—Whether Trade Union Act superseded by powers of town council under its Act of incorporation—Legality and applicability of Trade Union

## LABOUR—Concluded

Act, R.S.P.E.I. 1951, c. 164, ss. 3(1)—The Town of Summerside Incorporation Act, 1903 (P.E.I.), c. 18.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. TOWN OF SUMMERSIDE ET AL 591.

## LIBEL AND SLANDER

Newspaper—Editorial during election campaign on fitness of candidate—Defence of qualified privilege not available—Fair comment—Rights and duties of newspapers.

GLOBE & MAIL LTD. v. BOLAND 203.

## MECHANICS' LIENS

Time for filing—Whether from date of substantial completion or entire completion—Waiver of lien—Estoppel—The Mechanics' Lien Act, R.S.O. 1950, c. 227, as amended by 1952, c. 54.

COUNTY OF LAMBTON v. CDN. COMSTOCK CO. ET AL 86.

## MOTOR VEHICLES

1. Car hitting truckload extending 9 feet beyond rear of truck—Fatal injuries—Poor visibility—Inadequate lighting—The Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 27—Allegation of contributory negligence—Burden of proof.

EASTERN METALS CORP. LTD. v. PROTEAU 96.

2. Collision on straight highway—Conflict between evidence of parties and evidence of objective witnesses—Burden of proof to establish sudden emergency causing accident.

MCMONAGLE v. SOCIETE DE REHABILITATION INC. 119.

3. Negligence—Findings of fact by trial judge sitting without jury—Whether judgment at trial should by varied by appellate court—Survival of Actions Act, R.S.N.B. 1952, c. 223—Fatal Accidents Act, R.S.N.B. 1952, c. 82—Motor Vehicle Act, 1955(N.B.), c. 13.

BELL & MACLAREN v. ROBINSON 611.

## MUNICIPAL CORPORATIONS

Building by-law—Erection and location of signs—Permit required from building inspector—Whether inspector has discretion to refuse when by-law requirements met —Whether delegation of power to inspector —Validity of by-law.

CITY OF TORONTO ET AL v. OUTDOOR NEON DISPLAYS LTD. 307.

## NEGLIGENCE

1. Boy injured by another during school recess—Injury aggravated by teacher ordering boy into line and into class—Liability —Finding of failure to have sufficient teachers on duty—Whether liability of Board of Education and teacher—The Public Schools Act, R.S.O. 1950, c. 316, s. 108(g).

BD. OF EDUCATION FOR TORONTO v. HIGGS ET AL 174.

2. Passenger injured on escalator—Persons preceding victim scuffling and falling back on victim—Whether duty to provide attendant—Whether negligence in having metal-clad hand rail instead of rubber type —Absence of causality.

KAUFFMAN v. TORONTO TRANSIT COMMISSION 251.

## PEREMPTION

Nothing done after filing of joint case in Court of Appeal—Motions to have suits perempted—Limitation period—Code of Civil Procedure, arts. 279, 280a, 1223(2), 1239.

PROGRESS FURNITURE MFGS. LTD. v. EASTERN FURNITURE LTD. 116.

## PROFESSIONS AND TRADES

Dental mechanic fitting set of false teeth —Unlawful practice of dentistry—The Dental Association Act, R.S.A. 1955, c. 82, s. 37(a).

VAIL v. THE QUEEN 913.

## PROMISSORY NOTE

Conditional sale contract—Transaction through agent—Transaction made in Saskatchewan and action brought in Manitoba

## PROMISSORY NOTE—Concluded

—Endorsee of note with knowledge of want of consideration—Whether the Limitation of Civil Rights Act, R.S.S. 1953, c. 95, applicable—Whether procedural and not applicable to Manitoba action.

TRADERS FINANCE CORP. LTD. v. CASSELMAN 242.

## PUBLIC UTILITIES

Case stated by Public Utilities Commission—Matters to be considered by Commission in changing rates—Order of priority to be given to factors considered—The Public Utilities Act, R.S.B.C. 1948, c. 277, s. 16(1)(a) and (b).

B.C. ELECTRIC RY. CO. LTD. v. PUBLIC UTILITIES COMM. OF B.C. ET AL 837.

## REAL PROPERTY

1. Mines and Minerals—Option to purchase mineral claims—Second option given to different company—Specific performance on first option sought—Whether option created equitable interest in land—Failure of optionee to comply with statutory requirement to hold licence—Pleadings—Amendments at trial—Regulations 8(1), 9(1), 124 of the Mineral Resources Act, R.S.S. 1953, c. 47.

FROBISHER LTD. v. CDN. PIPELINES & PETROLEUMS LTD. ET AL 126.

2. Mines and minerals—Whether lease for petroleum and gas expired at end of five year period—Pooling provision.

SHELL OIL COMPANY v. GUNDERSON 424.

## SHIPPING

1. Ship colliding with Crown owned bascule bridge—Bridge failing to rise due to mechanical defect—Whether excessive speed—Whether warning—Conflicting evidence—Whether agony of collision—Negligence of bridge operator and ship Master—Whether contributory negligence—Recovery on basis of Ontario Negligence Act—Whether liability restricted by ss. 649 and 651 of the Canada Shipping Act, 1934 (Can.), c. 44.

GARTLAND STEAMSHIP CO. v. THE QUEEN 315.

**STATUTES**—Continued



**STATUTES**—Continued

STATUTES—Continued



STATUTES—Continued

---

## TAXATION

1. Income tax—Capital gain or income—Company—Powers under memorandum of association—Moneys received for options to purchase oil rights—Moneys received when options exercised—Moneys received from leases—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 4—The Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4, 127(1).

WESTERN LEASEHOLDS LTD. v. MINISTER OF NATIONAL REVENUE 10.

2. Income tax—Capital gain or income—Company—Powers under memorandum of association—Money received under oil leasing agreement—The Income Tax Act, 1948, (Can.), c. 52, ss. 3, 4.

WESTERN MINERALS LTD. v. MINISTER OF NATIONAL REVENUE 24.

3. Municipal—Missionary training centre—Whether property exempt from municipal taxation as "seminary of learning maintained for philanthropic or religious purposes"—The Assessment Act, R.S.O. 1950, c. 24, s. 4(5).

WORLDWIDE EVANGELIZATION CRUSADE (CANADA) v. VILLAGE OF BEAMSVILLE ET AL 49.

4. Income tax—Right to life income under will contested—Legal fees incurred to have right determined—Whether fees deductible expenses or capital outlay—The Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(a) and (b).

EVANS v. MINISTER OF NATIONAL REVENUE 391.

5. School taxes—Issue of public school debentures—Taxpayer a public school supporter at the time—Subsequent establishment of separate school—Taxpayer then became separate school supporter—Whether taxpayer liable to pay assessment to retire debentures—The Public Schools

**TAXATION**—Continued

Act, R.S.O. 1950, c. 316, s. 3—The Separate Schools Act, R.S.O. 1950, c. 356, s. 56(1), (5), (6).

TWP. OF CROWLAND v. SLEVAR 408.

6. Succession duty—Residue of estate left to wife with power of disposal—Undisposed portion to go to named legatees—Disclaimer of right of disposal made in favour of named legatees within 6 years of death—Whether disclaimed residue taxable as part of wife's estate—Whether disclaimer a gift inter vivos—Whether substitution created by will—Whether "succession" within Dominion Succession Duty Act, R.S.C. 1952, c. 89, s. 3(1)(c) and (4)—Civil Code, arts. 925 et seq., 960, 962.

MINISTER OF NATIONAL REVENUE v. HOWARD SMITH ET AL 477.

7. Excise tax—Taxpayer under mistakes of law paid excise on "mouton"—Petition of Right to recover amounts paid—Whether payment made under duress or compulsion—Excise Tax Act, R.S.C. 1927, c. 179 as amended, ss. 80A, 105(1)(5)(6). (Excise Tax Act, R.S.C. 1952, c. 100, ss. 24, 46(1)(5)(6).

THE QUEEN v. BEAVER LAMB & SHEARLING CO. LTD. 505.

8. Income tax—Exemption claimed as a personal corporation—Claim rejected—The Income Tax Act, R.S.C. 1952, c. 148, ss. 63(1)(2), 68(1)(a), 139(1)(u)(ac).

SETTLED ESTATES LTD. v. MINISTER OF NATIONAL REVENUE 606.

9. Sales tax—Whether certain chemicals used in pulp mill exempt as catalysts or direct agents—Validity of regulation limiting time for claiming exemption—The Social Services Tax Act, R.S.B.C. 1948, c. 333, ss. 3(1), 5(h), Sales Tax Regulations 3-11.

THE QUEEN v. ALASKA PINE AND CELLULOSE LTD. 686.

10. Income tax—Determination of base on which depletion allowance calculated—Whether profits should be treated on an individual well basis—Whether losses of loss producing wells must be deducted from profits of profitable producing wells—Whether unrelated drilling, exploration and other costs deductible—Whether deduction of "unrealized profits" should be allowed—Income Tax Act, 1948 (Can.), c. 52, s. 11(1)(b)—Income Tax Regulations, s. 1201 as amended by Order in Council 4443, August 29, 1951—Income Tax Amendment Act, 1949 2nd Sess. (Can.), c. 25, s. 53(1).

MINISTER OF NATIONAL REVENUE v. IMPERIAL OIL LTD. 735.