1939

CANADA
LAW REPORTS

Supreme Court of Canada

REPORTERS

ARMAND GRENIER, K.C.

S. EDWARD BOLTON, K.C.

PUBLISHED PURSUANT TO THE STATUTE BY

J. F. SMELLIE, K.C., Registrar of the Court

OTTAWA
J. O. PATENAUDE, I.S.O.
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1940

MEMORANDUM

LAYING OF THE FOUNDATION STONE OF THE SUPREME COURT OF CANADA BUILDING

On Saturday, the twentieth day of May, in the year of our Lord one thousand nine hundred and thirty-nine, the foundation stone of the new Supreme Court Building was laid by Her Majesty Queen Elizabeth, in the presence of His Majesty King George VI, and a great and distinguished assembly, including Ministers of the Federal Cabinet, Members of the Senate, the House of Commons, the Judiciary and the Bar.

Among those present at the ceremony were His Excellency the Governor General of Canada, Lord Tweedsmuir, and the Lady Tweedsmuir; the Prime Minister of Canada, the Right Honourable W. L. Mackenzie King, C.M.G.; the Right Honourable Ernest Lapointe, K.C., Minister of Justice; the Honourable P. J. Arthur Cardin, K.C., Minister of Public Works; the Right Honourable Sir Lyman Duff, G.C.M.G., Chief Justice of Canada; the Honourable Mr. Justice Thibaudeau Rinfret, the Honourable Mr. Justice Lawrence Arthur D. Cannon, the Honourable Mr. Justice Oswald S. Crocket, the Honourable Mr. Justice Henry Hague Davis, the Honourable Mr. Justice Patrick Kerwin, and the Honourable Mr. Justice Albert Blellock Hudson, Judges of the Supreme Court of Canada; the Honourable Mr. Justice A. K. Maclean, President of the Exchequer Court of Canada; and the Honourable Mr. Justice Eugène R. Angers, Judge of the Exchequer Court of Canada.

Her Majesty the Queen, speaking first in English and then in French, said:

I am happy to lay the foundation stone of a building devoted to the administration of Justice in this great Dominion.

Perhaps it is not inappropriate that this task should be performed by a woman; for woman's position in civil society has depended upon the growth of law. Canada is rightly proud of being a land governed by the rule of law. Her judiciary and the members of her legal profession have been true to the highest British Traditions of Bench and Bar. It is fitting that on these heights above the Ottawa—surely one of the noblest situations in the world—you should add to the imposing group of buildings which house your Parliament and the executive branch of government, a worthy home for your Supreme Court. Henceforth, on these river-side cliffs, there will stand in this beautiful Capital, a group of public buildings unsurpassed as a symbol of the free and democratic institutions which are our greatest heritage.

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Au Canada, comme en Grande-Bretagne, la justice s'administre selon deux grandes législations différentes. Dans mon pays natal, en Ecosse, nous avons un droit basé sur le droit romain: il sort de la même source que votre droit civil dans la vieille province de Québec.

En Angleterre, comme dans les autres provinces du Canada, le droit coutumier l'emporte. A Ottawa, comme à Westminster, les deux sont administrés par la Cour suprême de justice. Cela est, à mes yeux, d'un très heureux augure.

Voir vos deux grandes races avec leurs législations, leurs croyances et leurs traditions différentes, s'unir de plus en plus étroitement, à l'imitation de l'Angleterre et de l'Ecosse, par les liens de l'affection, du respect et d'un idéal commun: tel est mon désir le plus cher.

The Right Honourable Ernest Lapointe replied to Her Majesty, speaking first in English and then in French, in the following words:

May I be permitted, as Minister of Justice, and on behalf of the Canadian people, to pray Her Majesty the Queen to accept the homage of our gratitude for having so graciously consented to lay the foundation stone of the new Supreme Court of Canada.

The high compliment paid to the respect and love of justice predominating in this country will remain as an inspiring message.

Our Judiciary and our Bar are greatly and justly honoured, and will remain protagonists of British ideals, of British traditions and of British Justice.

The massive architecture of this new temple of supreme judicial authority, symbolizing the strength of the bonds existing between Canadians and their institutions, will add to the beauty of our national Capital. As the other buildings housing our legislative and executive powers, it is built upon solid rock; so are founded our principles of true democracy, which proudly we hold in common with all members of the British Commonwealth of Nations.

La population de langue française du Canada est heureuse d'offrir un témoignage de reconnaissance particulier à Sa Majesté la Reine qui vient de faire gracieusement un si beau rapprochement entre les relations cordiales de l'Angleterre avec l'Ecosse et les liens de respect, de tolérance et d'affection, propres à unir les deux grandes races de notre pays.

Les Canadiens, fiers de leur avènement à la dignité d'Etat souverain, ont profondément à cœur le maintien de l'unité nationale. Ils comprennent de mieux en mieux que leur double héritage sacré, de culture française et de civilisation anglo-saxonne, constitue l'inépuisable source de richesse et de fécondité spirituelle où doit s'alimenter la véritable mentalité canadienne.

Nos deux systèmes de loi, issus l'un de la France, l'autre de l'Angleterre, apports précieux et jalousement gardés du patrimoine national, sont à bon droit considérés comme des remparts protecteurs de la survivance du caractère ethnique.

Nous avons confiance qu'il ne tombe pas sur une terre stérile, le noble enseignement d'union de notre gracieuse souveraine, qui personnifie la beauté et le charme de sa terre natale unis au prestige et à l'éclat de la Couronne britannique.

La visite royale que nous avons l'honneur de recevoir,—fait d'importance historique sans précédent,—m'autorise à prendre la liberté de saluer Sa Majesté du titre de première Reine du Canada, et de l'assurer que notre peuple tout entier lui gardera pour toujours, ainsi qu'à Sa Majesté le Roi, loyauté, fidélité, en même temps que de profonds sentiments de respectueuse affection.

God Save the King

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Sir LYMAN POORE DUFF, G.C.M.G., C.J.C.
The " THIBAUDEAU RINFRET J.
" " LAWRENCE ARTHUR CANNON J.
" " OSWALD SMITH CROCKET J.
" " HENRY HAGUE DAVIS J.
" " PATRICK KERWIN J.
" " ALBERT BLELLOCK HUDSON J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Right Hon. ERNEST LAPOINTE, K.C.

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On the twenty-fifth day of December, 1939, the Honourable Lawrence Arthur Dumoulin Cannon, Puisne Judge of the Supreme Court of Canada, died.

ERRATA

in Volume, 1938

Page 121, f.n. (1) [1927] A.C. 327 should be (1) [1936] S.C.R. 398; f.n. (4) [1896] A.C. 348, at 359 should be (4) [1937] A.C. 405, at 417.

NOTICE

This volume contains the Consolidation of the Rules of the Supreme Court of Canada, 1939, in English. The French version will be published in an early succeeding part of the Reports.

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

Birtwistle (Peter) Trust v. *Minister of National Revenue.* [1939] S.C.R. 125. Leave to appeal granted, 12th May, 1939. Appeal allowed, 12th October, 1939.

Canada Rice Mills Limited v. *The King.* [1939] S.C.R. 84. Leave to appeal granted, 5th May, 1939. Appeal dismissed, 14th July, 1939.

Connors v. *Connors Bros. Ltd.* [1939] S.C.R. 163. Leave to appeal granted, 24th March, 1939.

Pioneer Laundry & Dry Cleaning Ltd. v. *The Minister of National Revenue.* [1939] S.C.R. 1. Leave to appeal granted, 24th April, 1939. Appeal allowed, 13th October, 1939.

Royal Bank of Canada v. *Port Royal Pulp and Paper Co. Ltd.* [1939] S.C.R. 186. Leave to appeal granted, 12th May, 1939.

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OF THE
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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

PIONEER LAUNDRY & DRY CLEANERS LTD..... APPELLANT;

AND

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

1938

*April 28,29
*Dec. 12.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Revenue—Amount deductible for depreciation—Discretion of the Minister of National Revenue—Income War Tax Act, R.S.C., 1927, c. 97, sections 2 (h), 3, 5, 6, 9, 60, 75, 80.

The appellant was incorporated under the *Companies Act* of British Columbia. On the form of income tax return for 1933, the appellant set out, for the purpose of an allowance for depreciation, the value of machinery and other equipment at $168,458.72, and the amount of depreciation claimed was $17,255.55. Such equipment had been purchased by the appellant from another company bearing the same name and having the same shareholders as the appellant company. The amount of depreciation was totally disallowed, except for a small amount of $255.08 in respect of three new motor cars, by the Commissioner of Income Tax, acting on behalf of the Minister of National Revenue, on the ground that, as the company who had sold the machinery and equipment had been allowed over a period of years approximately 100% depreciation in their work values, the appellant was not entitled to any deduction for depreciation upon the same machinery and equipment. Section 5 of the *Income War Tax Act* provides that "'Income' * * * shall * * * be subject to", as exemption and deduction, "such reasonable amount as the Minister, in his discretion, may allow for depreciation * * *." Upon appeal, the Exchequer Court of Canada affirmed the decision of the Minister of National Revenue.

Held, The Chief Justice and Davis J. dissenting, that the judgment appealed from should be affirmed.

Per Crocket and Hudson JJ.—The provisions of the relevant sections of the *Income War Tax Act* indicate that it was the intention of Parliament that there should be no depreciation allowance unless the Minister of National Revenue, in his sole discretion, decided that there should be. In this case, the Minister has exercised his discretion and the statute does not define or limit the field for operation of such discretion.

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

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Per Kerwin J.—The discretion conferred upon the Minister by section 5 of the Act has been exercised without disregarding any statutory provision; and there is no ground upon which his determination may be challenged.

Per The Chief Justice and Davis J. (dissenting): The ground upon which the Commissioner of Income Tax put his denial of any amount of depreciation was not a proper ground upon which to exercise the discretion that has been vested in the Minister. The Commissioner was not entitled, in the absence of any fraud or improper conduct, to disregard the separate legal existence of the appellant company, which was a new owner for all legal purposes; and its predecessor's depreciation allowance is immaterial when considering what is a reasonable amount to be allowed for its own depreciation. The decision of the Minister was not a legitimate exercise of the discretion which Parliament vested in him. The discretion granted by the statute to the Minister involves an administrative duty of a quasi-judicial character and is a discretion to be exercised on proper legal principles. The Commissioner, acting for the Minister, having exercised such discretion upon principles wrong in law, the case should be remitted to the reconsideration by the Minister of the subject-matter, stripped of the application of these wrong principles.

Judgment of the Exchequer Court of Canada ([1938] Ex. C.R. 18) affirmed, The Chief Justice and Davis J. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada, Angers J., dismissing an appeal from the decision of the Minister of National Revenue confirming the appellant's assessment under the *Income War Tax Act* for the fiscal period of appellant ending March 31st, 1933.

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

Martin Griffin K.C. for the appellant.

F. P. Varcoe K.C. and *J. R. Tolmie* for the respondent.

The judgment of the Chief Justice and of Davis J. (dissenting) was delivered by

DAVIS J.—The appellant is a company which was incorporated under the *Companies Act* of British Columbia on the 23rd day of March, 1932, with its head office and principal place of business in the city of Vancouver, where it carries on a laundry and dry cleaning business. The company is a taxpayer within the definition of that word in the (Dominion) *Income War Tax Act,* R.S.C., 1927, chap. 97 and amendments. As in duty bound it made its income tax return to the Government for its fiscal year that ended March 31st, 1933. On the form of return supplied

by the Income Tax Department and required to be filled in and returned, the appellant set out, for the purpose of an allowance for depreciation, the value of the company's machinery at $146,690.13, furniture and fixtures at $5,740.74, horses and wagons at $1,352.50, and automobiles at $14,675.35; and in its said return the appellant claimed deductions for depreciation according to the customary percentages which were being allowed by the Department: 10% on machinery, horses and wagons, furniture and fixtures; and 20% on automobiles. The total amount of depreciation claimed amounted to $17,255.55. The amount was totally disallowed, with the exception of $255.08 in respect of three new motor cars which had been purchased by the appellant.

The correctness of values of the machinery and other equipment as set out in the return was not questioned by the Department. By sec. 80 of the *Income War Tax Act*,

> Any person making a false statement in any return or in any information required by the Minister, shall be liable on summary conviction to a penalty not exceeding ten thousand dollars or to six months' imprisonment, or to both fine and imprisonment.

No fraud or improper conduct was alleged against the appellant. What was said against the appellant was that the machinery and other equipment (save and except the three new motor cars) had been purchased by the appellant from another company, Home Service Company Limited, and that the latter company in turn had purchased the same from the liquidator of still another company (hereinafter for convenience called "the first company"), which had had the same name as the appellant company, and that the shareholders of the appellant are the same persons as the shareholders of the first company (which had gone into voluntary liquidation) and that as the first company had been allowed over a period of years, approximately 100% depreciation on its book values of the said machinery and equipment, the present company, appellant, is not entitled to any deduction for depreciation upon the same machinery and equipment.

Further, it was said against the appellant that it set up its assets on its books at a greater sum than that at which the same assets had been carried on the books of the first company. The appellant does not deny that. It

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was proved in evidence that the figures which the appellant set up in its books as the value of the assets in question were the same as the prices which had been fixed by an independent appraisal as the purchase price of the machinery and equipment when purchased by the appellant from the said Home Service Company Limited. The appellant admitted that these amounts were greater than the amounts at which the same assets had been carried on the books of the first company—but, it said, that was no concern of its. What is suggested is that the first company had carried these assets on its books for years, in fact prior to the coming into existence of a Dominion income tax in 1917, at valuations much below their real value, in consequence of which the allowance for depreciation to that company, on the ordinary percentage basis that had been adopted by the Department, had become exhausted.

The appellant is a separate legal entity. The Government looks to it as such as a taxpayer and has assessed it for income tax. What then are its rights? It is taxable upon its "income," which by sec. 3 of the Act means its "annual net profit or gain." Now the annual net profit or gain of a commercial corporation cannot fairly be arrived at without taking into account depreciation in its machinery and equipment due to the ordinary wear and tear during the year. While sec. 6 (*b*) of the Act provides that in computing the amount of the profits or gains to be assessed a deduction is not to be allowed in respect of any depreciation, depletion or obsolescence, "except as otherwise provided in this Act," sec. 5 had provided that

> "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, * * *

It was under this sec. 5 that the Minister of National Revenue disallowed entirely the deduction claimed from gross profits in respect of depreciation of the machinery and equipment.

The decision of the Minister was in fact the decision of the Commissioner of Income Tax whom the Minister, purporting to act under and by virtue of the provisions of the Act and particularly sec. 75 thereof, had authorized to exercise the powers conferred by the said Act upon the Minister as fully and effectively as he could do himself,

he being of the opinion that such powers may be more conveniently exercised by the said Commissioner of Income Tax. Counsel for the appellant took no objection to the fact that the decision was that of the Commissioner and not that of the Minister.

The grounds for denying any depreciation on the said machinery and equipment to the appellant were very frankly and fairly stated in the decision, as follows:

> The Honourable the Minister of National Revenue, having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating hereby affirms the said assessment on the ground that while the company was incorporated and commenced operations during the year 1932 there was no actual change in ownership of the assets purchased or taken over from Pioneer Investment Company Limited by Home Service Company Limited (of which the taxpayer is a subsidiary) and set up in the books of the taxpayer at appreciated values; that in the exercise of the statutory discretion, a reasonable amount has been allowed for depreciation and that the assessment is properly levied under the provisions of the *Income War Tax Act*.
>
> Notice of such decision is hereby given in accordance with section 59 of the said Act.
>
> Dated at Ottawa this 30th day of May, A.D. 1935.
>
> R. C. MATTHEWS,
> Minister of National Revenue.
> per C. F. ELLIOTT,
> Commissioner of Income Tax.

The appellant was entitled to an exemption or deduction in "such reasonable amount as the Minister, in his discretion, may allow for depreciation." That involved, in my opinion, an administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles. Section 60 of the Act entitles a taxpayer, after receipt of the decision of the Minister upon appeal from an assessment, if dissatisfied therewith, to appeal to the Court. The decision is appealable; but the exercise of the discretion will not be interfered with unless it was manifestly against sound and fundamental principles.

The Commissioner of Income Tax put his denial of any amount for depreciation on the said machinery and equipment upon the ground that "there was no actual change of ownership of the assets" and they were "set up in the books of the taxpayer at appreciated values." In my view that was not a proper ground upon which to exercise the discretion that had been vested in the Minister. The Commissioner was not entitled, in the absence of any fraud or

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improper conduct, to disregard the separate legal existence of the company and to inquire as to who its shareholders were and at what figures these assets had been carried on the books of some other individual, partnership or corporation. In the words of Lindley J. (as he then was) in *Ryhope Coal Company, Ltd.* v. *Foyer* (1):

> This company was incorporated and formed on the 21st of December, 1875, under the *Companies Act* of 1862, by persons who had for many years previously carried on and worked the colliery which the company was formed to continue to work and carry on. The Income Tax Commissioners have assessed the company upon the principle that the company is in substance, and for legal purposes, the same as the old partners. In my opinion, at starting, that cannot be right in point of law. A company incorporated under the Act of 1862 is for no legal purpose the same as the persons who have become a corporation with distinct rights and distinct liabilities, and whether the shares are bought by those who form it seems to me for that purpose utterly immaterial; and I think, therefore, the principle on which the Commissioners have proceeded from first to last in assessing this corporation of five, six, or seven old partners, is to be regarded as erroneous and fundamentally wrong.

The appellant was a new owner for all legal purposes and its predecessor's depreciation allowance is immaterial when considering what is a reasonable amount to be allowed for its own depreciation. What is virtually said here against the appellant is—You are entitled to nothing because the beneficial ownership of your company is the same as the beneficial ownership of another company from which, indirectly, you purchased your machinery and equipment and we are entitled to look right through your legal existence and say that you are entitled to nothing at all for depreciation on your machinery and equipment.

In my view that is not a legitimate exercise of the discretion which Parliament vested in the Minister. I have not the slightest doubt that the Commissioner was as anxious to do justice as I am, but the public have been given the right to appeal to the court from the decision of the Minister and if the court is of the opinion that in a given case the Minister or his Commissioner has, however unintentionally, failed to apply what the court regards as fundamental principles, the court ought not to hesitate to interfere. I confess that I am influenced in this case by the insistence of many great judges upon the full recognition of the separate legal entity of a joint stock company and the impropriety in dealing with its affairs of ignoring

(1) (1881) 7 Q.B.D. 485, at 498.

its legal status as if it had never been incorporated and organized. And as to the familiar argument that we ought always to look "at the substance" of the thing, I shall only refer to the words of Lord Tomlin in *Inland Revenue Commissioners* v. *The Duke of Westminster* (1):

> Apart, however, from the question of contract with which I have dealt, it is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called "the substance of the matter," and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting "the incertain and crooked cord of discretion" for "the golden and streight metwand of the law" (4 Inst. 41). Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable.

Lord Loreburn in the House of Lords in *Leeds Corporation* v. *Ryder* (2), said that the justices there were acting "administratively, for they are exercising a discretion which may depend upon considerations of policy and practical good sense—and they must, of course, act honestly. That is the total of their duty." But that was a certiorari proceeding and the Licensing Act under consideration "expressly leaves" as Lord Loreburn observed,

> to the discretion of the justices whether they will grant licences or not to persons whom they deem fit and proper persons.

That was, of course, quite a different case from the appeal now before us. Here the Minister was to say what was "a reasonable amount" to be allowed for depreciation and he says, in effect—nothing. The statute expressly gives the taxpayer a right of appeal from the Minister's decision. In *The Queen* v. *Vestry of St. Pancras* (3), a metropolitan vestry had a discretion by a statute not

(1) [1936] A.C. 1, at 19. (2) [1907] A.C. 420, at 423, 424.
(3) (1890) 24 Q.B.D. 371.

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merely as to granting or refusing a superannuation allowance to a retiring officer, but also, if an allowance were granted, as to the amount, subject to the scale of maximum allowance prescribed by the statute. Lord Esher, at p. 375, said:

> If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

The *Income War Tax Act* gives a right of appeal from the Minister's decisions and while there is no statutory limitation upon the appellate jurisdiction, normally the Court would not interfere with the exercise of a discretion by the Minister except on grounds of law. But here the Commissioner, acting for the Minister, did exercise a discretion upon what I consider to be wrong principles of law and it is the duty of the Court in such circumstances to remit the case, as provided by sec. 65 (2) of the Act, for a reconsideration of the subject-matter, stripped of the application of these wrong principles.

I would therefore allow this appeal, set aside the assessment and the judgment appealed from and refer the matter back to the Minister. The appellant should have its costs throughout.

The judgment of Crocket and Hudson JJ. was delivered by

HUDSON J.—The appellant company in its income tax return for the fiscal period ending March 31st, 1933, claimed a depreciation allowance of $17,775.55. The Minister, on an appeal to him, disallowed this claim with the exception of $255.08, and an appeal from his decision to the Exchequer Court of Canada was dismissed.

The appellant contends (1) that under section 5 (*b*) of the *Income War Tax Act* the Minister is obliged to make some allowance for depreciation; and (2) that, in consequence of certain directions issued by him from time to time to inspectors of income tax, such allowance should be on a percentage basis as therein specified.

The Minister, on the other hand, contends that under section 5 he has an unfettered discretion to allow or disallow any claim in respect of depreciation, and moreover that in the present case the appellant company, although technically a different legal entity from a former company

of the same name is in reality the *alter ego* of the old company, having the same name, the same shareholders, the same assets for few exceptions and no new capital, and that the old company had already been allowed a total of 100% depreciation in respect of the assets in question, and under these circumstances that he, the Minister, had not acted unreasonably.

The relevant provisions of the Act are as follows: the charging section is no. 9:

9. There shall be assessed, levied and paid upon the income during the preceding year, of every person (*a*) residing or ordinarily resident in Canada during such year;

* * *

2. Save as herein otherwise provided, corporations and joint stock companies, no matter how created or organized, shall pay a tax upon income at the rate applicable thereto set forth in the first schedule of this Act.

Section 3 defines income as the annual net profit or gain. Section 6 provides:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

* * *

(*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.

Section 5:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:

(*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation.

Reading these sections by themselves and without reference to any outside authorities, it would seem fairly plain that it was the intention of Parliament that there should be no depreciation allowance unless the Minister, in his sole discretion, decided that there should be. There is nothing anywhere to indicate the principle or basis on which the depreciation allowance is to be ascertained. It might vary according to different accounting methods, different economic theories, different general business conditions in the country. Nor is there anything in the statute which denies a right in the Minister to look beyond the legal facade for the purpose of ascertaining the realities of ownership or the possibilities of schemes to avoid taxation, and it would seem to be that it was the intention of Parliament that the Minister, and he alone, could properly estimate these different factors.

The authorities cited on behalf of the appellant are mostly of statutes, somewhat differently worded from ours,

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and in effect hold no more than that where the statute gives a discretion to administrative officers and provides an area in time or space for the exercise of such discretion, the Commissioners must take that into account. In the present case, the Minister has exercised his discretion and, as already stated, the statute does not define or limit the field for operation of such discretion.

The second point raised by the appellant need not be discussed. The regulations referred to turned out to be merely directions given to local officers of the department for their general guidance and could not be considered as any general rule binding in any way on the Minister. I would dismiss the appeal with costs.

KERWIN J.—By subsection 1 of section 9 of the *Income War Tax Act* a tax is to be assessed, levied and paid upon the income during the preceding year of every person therein described. By section 2 (*h*) "person" includes any body corporate and politic, and by subsection 2 of section 9 corporations and joint stock companies are to pay the tax at the rate applicable, as set forth in the First Schedule. As applicable to this appeal, section 3 defines "income" as the annual net profit or gain from any trade, manufacture or business. The relevant parts of section 6 provide:

> In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> * * *
>
> (*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;

The only provision for an allowance for depreciation is contained in section 5 whereby income, for the purposes of the Act, shall be subject to the following exemptions and deductions:—

> (*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation * * *

In the present case the Minister has made an allowance of $255.08 (as to which no question arises) and has given his reasons for not allowing the balance of the appellant's claim for depreciation as appears from the following extract from his decision:—

> The Honourable the Minister of National Revenue, having duly considered the facts as set forth in the Notice of Appeal and matters thereto relating hereby affirms the said assessment on the ground that while the company was incorporated and commenced operations during

the year 1932 there was no actual change in ownership of the assets purchased or taken over from Pioneer Investment Company Limited by Home Service Company Limited (of which the taxpayer is a subsidiary) and set up in the books of the taxpayer at appreciated values; that in the exercise of the statutory discretion, a reasonable amount has been allowed for Depreciation and that the assessment is properly levied under the provisions of the *Income War Tax Act*.

It appears that the discretion conferred upon him by section 5 has been exercised without disregarding any statutory provision and I can find no ground upon which his determination may be challenged.

The English cases referred to by counsel for the appellant do not appear to me to assist in the determination of the matter. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Griffin, Montgomery & Smith.*

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

CANADIAN NATIONAL STEAMSHIPS COMPANY LTD. (DEFENDANT)..... APPELLANT;

AND

ALFRED WATSON (PLAINTIFF) .....RESPONDENT.

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

Negligence—Shipping—Maritime law—British ship—Accident to member of crew—High seas—Port of registration—Defence of common employment—Conflict of laws—Which law applicable—Section 265 of the Merchants' Shipping Act (Imperial), 1894—Jury trial—Verdict—Ascertaining its meaning—Intention of the jurors—Answer to question—Terms not clearly enunciated—New trial.

The respondent, while a member of the crew of the ss. *Cornwallis*, owned by the appellant company, met with an accident on November 6th, 1935. The *Cornwallis* was a British vessel registered at Vancouver, B.C., and at the time of the accident was proceeding from the West Indies to Charlottetown, P.E.I. The respondent, a carpenter on board the vessel, who had been hired in Montreal, was engaged with other members of the crew in putting locking bars on the hatches. While so engaged, about one hundred miles off Bermuda, a wave

* PRESENT:—Duff C.J. and Cannon, Crocket, Kerwin and Hudson JJ.

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crashed onto the deck, swept the respondent against the bulkhead and hatch combings and caused injuries for which the action was brought. The jury found the accident to be due to the fault of the appellant in the following language: "Question: Was the said accident due to the fault of the defendant; if so, state in what said fault consisted? Answer: Yes (unanimous). If the Chief Officer, Lieutenant Scott, had ordered life lines erected earlier the accident might have been avoided." The trial judge, on the finding of the jury, ordered judgment to be entered for the respondent, and this judgment was affirmed on appeal. The appellant's grounds of defence was a denial of negligence, and, alternatively that, if there was any, it was the negligence of a fellow servant from which under the common law of England, which was applicable, no cause of action arose.

Held that there should be a new trial.

Per The Chief Justice and Crocket, Kerwin and Hudson JJ.—The answer of the jury to the question submitted to them should be read as a whole; and, if so read, the meaning of the verdict is not sufficiently free from obscurity to enable one to conclude that the jury have found or intended to find the existence of a causal *nexus* between the fault and the injury to the respondent. The second sentence of the answer, in which the nature of the fault is explained, does seem to be concerned not only with the character of the fault, but with the relation between the fault and the accident as well. If the jury intended, by answering the first question in the affirmative, to say, with an appreciation of the purport of the words, that the accident was due (i.e., caused by) the fault of the appellant, it is difficult to understand how the jury could have used the language they do employ in the second sentence.

Per Cannon J.—The finding of the jury was unsatisfactory. The verdict seems to be based not on a fact of which the jurymen were convinced, but on a probability or a possibility. The verdict is not sufficient to create the certainty required to connect the injuries suffered by the respondent with the alleged negligence or omission of the officer to order life lines erected earlier.

Per The Chief Justice and Crocket, Kerwin and Hudson JJ.—In an action brought in the province of Quebec for damages in respect of personal injuries due to a tortious act committed outside that province, it is essential, as a first condition, that the plaintiff prove an act or default actionable by the law of Quebec; and in order to fulfil the second condition necessary for his right to recover, i.e., to establish that the tort charged is non-justifiable by the *lex loci delicti*, the plaintiff is entitled to pray in aid a presumption which is a presumption of law, viz., that the general law of the place where the alleged wrongful act occurred is the same as the law of Quebec. Where a defendant relies upon some differences between the law of the locality and the law of the forum, the onus is upon him to prove it. The provisions of section 265 of the *Merchants' Shipping Act*, 1894, apply to this case. It was the duty of the trial judge to apply the law of Quebec unless that law or some law of the Imperial Parliament or competently enacted law of the Parliament of Canada prescribed another rule. But a conflict of law appeared within the meaning of that section when it became apparent that the trial judge had to determine whether it was his duty to follow the rules of the law of Quebec or rules derived from some other system of jurisprudence. Therefore the *lex loci*

delicti was the law of the port of registry, i.e., the law of British Columbia; and the trial judge was entitled to assume that that law was the same as the law of Quebec.

Per Cannon J.—The law applicable to this case is the law of Quebec. *Lex fori* was the law of Quebec; *lex loci contractus* was also the law of Quebec, because the respondent was engaged in Montreal. The *lex loci commissi delicti* would be either the law of England or that of the port of registration: the latter was not pleaded and the defence of common employment, under the law of England, was not established and was not put to the jury.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge, Greenshields C.J., with a jury (1), which had maintained the respondent's action for an amount of $4,000.

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

I. C. Rand K.C. for the appellant.

A. I. Smith and *H. H. Harris* for the respondent.

The judgment of the Chief Justice and of Crocket, Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—It is now settled that, in an action brought in the province of Quebec for damages in respect of personal injuries due to a tortious act committed outside that province, the plaintiff's right to recover rests upon the fulfilment of two conditions. These conditions are stated in the following passage in the judgment of Lord Macnaghten in *Carr* v. *Fracis Times & Co.* (2):

> In the first place, the wrong must be of such a character that it would have been actionable if committed in England; and, secondly, the act must not have been justifiable by the law of the place where it was committed.

"Justifiable" here refers to legal justification; and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than "justifiable" within the meaning of the rule (*Walpole* v. *Canadian Northern Railway*) (3).

That this rule prevails in Quebec results from *O'Connor* v. *Wray* (4).

It is essential that the plaintiff prove an act or default actionable by the law of Quebec. While it is also part of

(1) (1937) Q.R. 75 S.C. 123.
(2) [1902] A.C. 176, at 182.
(3) [1923] A.C. 113, at 119.
(4) [1930] S.C.R. 231.

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his case to establish that the tort charged is non-justifiable by the *lex loci delicti* in the sense mentioned, he is entitled to pray in aid a presumption which is a presumption of law, viz., that the general law of the place where the alleged wrongful act occurred is the same as the law of Quebec. Where a defendant relies upon some difference between the law of the locality and the law of the forum the onus is upon him to prove it. (*The Parchim*) (1); *Dynamit Actien-Gesellschaft* v. *Rio Tinto Co. Ltd.* (2).

In practice, it appears to have been treated as matter of defence for the purposes of pleading as well as proof. (*The M. Moxham* (3); *Carr Times & Co.* v. *Fracis* (4), per Lord Lindley). Statements of textwriters of a seemingly contrary import must be read in light of this consideration e.g., Cheshire, Private International Law, 306).

The alleged wrong was committed on board the ss. *Cornwallis,* a British ship owned by the appellants and registered in Vancouver. The tort, as the jury found, consisted in the negligent omission of the chief officer to order the erection of life lines at the proper time.

Among other defences, the appellants pleaded that the law governing the liability of the appellants for acts done by the officers and crew on board the ship was the common law of England; and that, by the common law of England, the appellants were not legally responsible to the respondent for the negligence of his fellow servant, the chief officer, in the course of his duties as such. At the trial, the appellants after verdict moved on this ground for judgment *non obstante veredicto.* On behalf of the respondent, the application was answered by reference to section 265 of the *Merchants' Shipping Act* (Imperial), 1894, which is in these words:

> 265. Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this Part of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

The learned Chief Justice of the Superior Court (5) who tried the action held that the section applied, that the law applicable was the law of British Columbia; and that, on

(1) [1918] A.C. 157, at 161.
(2) [1918] A.C. 260, at 301.
(3) (1876) 1 P.D. 107.
(4) [1902] A.C. 176, at 184.
(5) (1937) Q.R. 75 S.C. 123.

the state of the record and the evidence, he was bound to give judgment on the assumption that the law of British Columbia is the same as the law of Quebec. The Court of King's Bench agreed with the learned trial judge.

I think the learned Chief Justice was right in holding that section 265 of the *Merchants' Shipping Act* applies. It was the duty of the learned Chief Justice to apply the law of Quebec unless that law or some law of the Imperial Parliament or competently enacted law of the Parliament of Canada prescribed another rule. I think a conflict of law appeared within the meaning of the section when it became apparent that the trial judge must determine whether it was his duty to follow the rules of the law of Quebec or rules derived from some other system of jurisprudence. I think, moreover, that this class of case is within the scope of the section, and that the law applicable for determining it is the law of the place of registry.

I have not overlooked the doubt which has been expressed whether for the present purpose a wrong committed upon a ship on the high seas stands in the same relation to the law of the flag as that in which a wrong committed on land within the territory of another jurisdiction stands to the jurisprudence which exclusively prevails there. Having given the matter the best consideration I am capable of, I think the effect of this section is that the *lex loci delicti* is the law of British Columbia. We are not concerned with the question whether, if section 265 had no application, the learned trial judge ought to have dismissed the action upon the application of the appellants.

In this Court the appellants contended that the field of jurisprudence concerned with the responsibility of ship owners for the negligent acts of the ship's officers in the management of the ship is within the exclusive jurisdiction of the Dominion Parliament in respect of Navigation and Shipping and, there being no Dominion legislation dealing with the matter, the common law applies and British Columbia legislation is irrelevant. I am unable to agree with this view. It is inconsistent with the judgment in *Workmen's Compensation Board* v. *Canadian Pacific Railway Co.* (1).

(1) (1920) A.C. 184.

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In the absence of Dominion or Imperial legislation on the subject or of some special rule of law relating to navigation and shipping prevailing at the date of Confederation, the general rules of the law of British Columbia applicable to the responsibility of masters for the acts of their servants govern the liability of shipowners to whom such rules apply.

Nor do I think any ground of appeal based upon the law of British Columbia is admissible in this Court. In the first place, the law of British Columbia was not pleaded. Then there was no suggestion at the trial that the law of that province would be relied upon. This Court has power to amend, a power which it has exercised in appeals from Quebec, but I think we ought not to exercise it in this case.

The most serious question remains. The finding on the subject of negligence is expressed in question 4 and the answer thereto. They are in these words:

4. Was the said accident due to the fault of the defendant; if so, state in what said fault consisted?

A. Yes (unanimous). If the Chief Officer, Lieutenant Scott, had ordered life lines erected earlier the accident might have been avoided.

The view taken by the Court of King's Bench appears to be that the affirmative answer to the question whether the accident was due to the fault of the defendant is unequivocal and that the remaining words ought to be read as merely descriptive of the fault.

I have given this matter anxious consideration. It is of the greatest importance that the verdict of a jury should be read with a determined effort to ascertain its meaning in substance and, if, on a fair reading, the intention of the jury in substance can be discovered effect ought to be given to that intention. I am forced to the conclusion, however, that this answer must be read as a whole. The second sentence, in which the nature of the fault is explained, does seem to be concerned not only with the character of the fault, but with the relation between the fault and the accident as well. *Ex facie* that seems to be so. My difficulty then is this: If they mean, by answering the first question in the affirmative, as they do, to say, with an appreciation of the purport of the words, that the accident was due to (that is to say, caused by) the fault of the appellants, I cannot really understand how

the jury could have used the language they do employ in the second sentence. I am driven to the conclusion that the meaning of the verdict is not sufficiently free from obscurity to enable one to conclude that the jury have found or intended to find the existence of a causal *nexus* between the fault and the injury to the respondent. I say this with the greatest respect for the views of the judges of the Court of King's Bench who thought otherwise.

In the result, there should be a new trial; the costs of both appeals and of the abortive trial to abide the result of the new trial.

CANNON J.—The appellant complains of the concurrent judgments of the lower courts allowing to the respondent $4,000 damages unanimously awarded by a jury for an accident to the respondent, on November 6th, 1935, while a member of the crew of the ss. *Cornwallis*, owned by the appellant. The *Cornwallis* was a British vessel registered at Vancouver, B.C., and at the time of the accident was proceeding on the high seas to Charlottetown, P.E.I. The respondent, a carpenter on board the vessel, was engaged, with other members of the crew, in putting locking bars on the hatches. While so engaged, about one hundred miles off Bermuda, a wave crashed onto the deck, where the respondent was working, swept him off his feet and carried him about twenty-five feet across the deck, causing him to strike his head violently against a bulkhead with the result that the respondent suffered a severe injury which necessitated an operation and a long treatment in the hospital from which he was finally discharged on the 17th of March, 1936.

The jury found the accident to be due to the fault of the appellant, in the following language:

> Question 4: Was the said accident due to the fault of the defendant; if so, state in what said fault consisted? Answer: Yes (unanimous). If the Chief Officer, Lieutenant Scott, had ordered life lines erected earlier the accident might have been avoided.

The defence was a denial of negligence, and, alternately that, if there was any, it was the negligence of a fellow servant from which, under the common law of England, which was applicable, no cause of action arose.

On appeal it was held that section 265 of the *Merchants' Shipping Act* (Imperial), 1894, applied, whereby, upon a

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conflict of laws appearing, the Court is to apply the law of the port of registry, in this case, Vancouver; that the law of British Columbia, in Quebec, must be proved as a fact; that no such fact had been alleged and no proof offered and that such law must be presumed to be the same as the law of Quebec, where the rule of common employment does not exist.

Section 265 of the *Merchants' Shipping Act* of 1894 reads as follows:

> Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws then if there is in this part of this Act any provision on the subject, which is expressly made to extend to that ship, the case shall be governed by that provision, but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

The only provision in the Act which might have an application to the *Cornwallis* and its crew is section 261 applying to seagoing British ships registered out of the United Kingdom; but none of the paragraphs would cover damages resulting from an accident caused by the negligence of the owner or his servants; therefore, the case must be governed by the law of the port where the ship was registered. The vessel being registered in the port of Vancouver, in the province of British Columbia, the law of that province on negligence might have applied if it had been alleged and proven. The absence of allegation distinguishes this case from that of *Logan* v. *Lee* (1). This Court, in cases from the province of Quebec, must follow the rule that all facts in support of the action, e.g., the law of another province, must be alleged and proved; otherwise it would be unfair for this Court to take *suo motu* judiciary notice of the statutory or other laws of another province, ignored in the pleadings, when the Quebec courts did not consider them, and, forsooth were prohibited from considering them as applying to the case.

Moreover, common employment must not only be alleged but proven; and there should be a finding of the fact of common employment by the jury. This has not been done in this case.

I, therefore, reach the conclusion that *lex fori* is the Quebec law; *lex loci contractus* is also Quebec law, because the respondent was engaged in Montreal. The *lex loci*

(1) (1907) 39 Can. S.C.R. 311.

commissi delicti would be either the law of England or that of the port of registration. The latter was not pleaded; and the defence of common employment, under the law of England, is not established—was not put to the jury.

To my mind, the real difficulty in the case is the nature of the finding of the jury as to the cause of the accident. They affirm that the accident was due to the fault of the defendant; but, when asked in what the fault consisted, they would not affirm categorically that the cause of the accident was the omission of the Chief Officer Scott to order life lines erected earlier. They simply say that the accident *might* have been avoided. Is this a verdict sufficient to give us the certainty required to connect the injuries suffered by the respondent with the alleged negligence or omission? Is it clear, under the verdict, that the cause of the accident was this omission? The verdict seems to be based not on a fact of which the jurymen were convinced but on a probability or a possibility. It may be fairly implied from the verdict that even if these lines had been erected, in view of the nature of some of the evidence, as to the protection afforded by the life lines, against such a wave, the plaintiff would have been unable to resist the impact of the water and would have suffered the injuries of which he complains. This finding, which must be the basis of the judgment allowing damages, is unsatisfactory. If the jury were uncertain and unable to affirm that plaintiff would have been saved if the life lines had been erected, and this is the only negligence now suggested against the appellants, are we entitled to say that the verdict shows that the plaintiff has discharged the onus of proving that the alleged negligence or fault caused the damage?

I would, therefore, agree with the Chief Justice and order a new trial, the costs of both appeals and of the abortive trial to abide the result of the new trial.

New trial ordered, costs of both appeals and abortive trial to abide result of new trial.

Solicitor for the appellant: *C. A. Harwood.*

Solicitor for the respondent: *H. H. Harris.*

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*Oct. 4.
*Dec. 12.

THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA (PLAINTIFF). } APPELLANT;

AND

DAVID COWEN (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Injunction—Professions—Foreign dentist advertising in British Columbia—Holding out "as being qualified or entitled" to practice—Restraining advertising—Advertiser not licensed in British Columbia—Dentistry Act, R.S.B.C., 1936, c. 72, ss. 62, 63.

The respondent, a citizen of the United States residing in Spokane, Washington, where he practices dentistry, inserted advertisements in newspapers in British Columbia, with a view of inducing residents of that province to go to him for dental treatment. The respondent was not licensed under the *Dentistry Act* (R.S.B.C., 1936, c. 72) and did not do any work in British Columbia. Section 62 of that Act provides that "any person not registered under the Act * * * who practises dentistry or dental surgery in the province shall be guilty of an offence against this Act"; and section 63 provides that "any person shall be deemed to be practising the profession of dentistry" who does certain specified things "or who holds himself out as being qualified or entitled to do all or any of the above things * * *." At the suit of the Attorney-General on relation of the College of Dental Surgeons of the province, the trial judge granted an injunction restraining the respondent from (*a*) holding himself out within the province by means of advertising as being qualified to practise dentistry and (*b*) advertising within the province in a manner which if done by a registered dentist would be improper or unprofessional. On appeal to the Court of Appeal, this judgment was set aside.

Held, affirming the judgment of the Court of Appeal (53 B.C.R. 50), that the respondent was not subject to the provisions of the *Dentistry Act* of British Columbia. This statute applies only to a person holding himself out within the province as being qualified or entitled to do in the province any of the things enumerated in section 63; and *held,* also, that the dental college has no right to be granted an injunction restraining the respondent, who is not one of its members, from inserting advertisements which may, in the opinion of the college, be considered as improper or unprofessional conduct.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, D. A. MacDonald J. (2), by which the respondent was restrained from advertising in the province of British Columbia in respect of the practice of dentistry.

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

(1) (1938) 53 B.C.R. 50; [1938] 2 W.W.R. 497; [1938] 1 D.L.R. 758.

(2) (1937) 52 B.C.R. 305; [1938] 1 W.W.R. 48.

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

R. L. Maitland K.C. for the appellant.

J. A. MacInnes and *F. C. Aubrey* for the respondent.

THE CHIEF JUSTICE.—I have fully considered the able and ingenious argument of Mr. Maitland who rests his appeal on two grounds: first, that the respondent in his advertisements in the newspapers in Fernie and Nelson held himself out as qualified or entitled to examine, diagnose, or advise or to perform operations as set forth in section 63 of the *Dentistry Act* (R.S., 1936, c. 72); second, that these advertisements were offences against the rules of professional ethics as understood and practised by the members of the dental profession properly qualified to practice in British Columbia.

As regards the second ground, notwithstanding the able and attractive manner in which it was advanced by Mr. Maitland, I am really unable to discover anything in the *Dentistry Act,* nor do I know of any rule or principle of law which confers upon the dental college or the qualified members of the dental profession the right to invoke the aid of the courts in regulating the conduct of people who are not members of the profession, except by way of prosecution under section 62, which is now to be considered in connection with the first ground.

As to the first ground, section 63 is concerned with defining what constitutes "practising the profession of dentistry within the meaning of" the *Dentistry Act.* By that definition acts constituting the practice of dentistry fall into two main categories. The first of these categories comprises examining, diagnosing, advising on the condition of the teeth and the jaws; taking, making, performing and administering impressions, operations and treatments of, for and upon the teeth and jaws; and fitting artificial teeth and dentures in and upon the jaws. The second category includes cases in which anybody "holds himself out as being qualified or entitled to do all or any" of the things falling within the first category.

By section 62, any person not registered under the Act "who practices dentistry or dental surgery in the prov-

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ince" in the sense of section 63 is guilty of an offence against the Act.

On behalf of the appellant it is contended that by the advertisements in evidence the respondent held himself out as being qualified or entitled to do all or some of the things which constitute the practice of dentistry as embraced within the first category; and that, as the publication of the advertisement is an act within British Columbia, done at his instance, he is thereby practising dentistry in that province.

I am disposed to attribute a liberal and comprehensive scope to the word "qualified"; but I think the advertisements with which we are here concerned do not fall within the second category in section 63 for this reason. The primary object of the statute is to regulate the practice in British Columbia of dentistry in the ordinary sense of these words; in the sense, that is to say, of the first of the categories in section 63. Authority to practise dentistry in British Columbia in this sense is given to persons on the register by section 61; and, by section 62, persons not on the register are prohibited from doing so. Then, there is statutory authority by section 61, to do the things within the second of the categories of section 63 (holding out) and there is a prohibition against them by section 62 which applies to persons who are not registered. The last mentioned authority and prohibition are plainly ancillary; and, *prima facie* therefore, they do not extend to things having no intelligible relation to the practice of dentistry in British Columbia in the ordinary sense, that is to say, in the sense of the first category; and that seems to be an admissible reading of the language. The words "holds himself out" (in British Columbia) "as being qualified or entitled to do all or any of the above things" may fairly be read as equivalent to "presents himself in British Columbia," etc.; and, having regard to the context, to the sense in which such words as "entitled" and "qualified" are employed in other parts of the Act, and to the general object of the statute, I think that is the right construction.

The appeal accordingly should be dismissed with costs.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—The appellant, the Attorney-General for British Columbia, on the relation of the College of Dental Surgeons of British Columbia, brought action against the respondent, David Cowen, for an injunction. Before the judge of first instance the motion for an injunction was by consent turned into a motion for judgment, which judgment was given in the following terms:—

This Court doth order, adjudge and decree that the defendant be and he is hereby perpetually restrained from holding himself out within the province of British Columbia by means of advertising of any kind as being qualified to practise the profession of dentistry and the defendant, his servants and agents and each and every of them be and he is and they are hereby perpetually restrained from advertising within the province of British Columbia in respect of the practice of dentistry in any manner which if done by a member of the College of Dental Surgeons of British Columbia would be improper or unprofessional.

On appeal, this judgment was set aside with Mr. Justice O'Halloran dissenting, as he would have dismissed the appeal with a variation in the judgment by striking out the words:—

and the defendant, his servants and agents and each and every of them be and he is and they are hereby perpetually restrained from advertising within the province of British Columbia in respect of the practice of dentistry in any manner which if done by a member of the College of Dental Surgeons of British Columbia would be improper or unprofessional.

The respondent is a United States citizen residing in Spokane, in the state of Washington. He has an office there and in Coulee Dam in the same state where he practises his profession of dentistry. He does not do any work in British Columbia. In various newspapers published in the southeastern part of British Columbia he has inserted advertisements which, in the opinion of several members of the relator college, are unethical and unprofessional. The respondent takes the position that he is not bound by these opinions, with which he does not agree, and insists that he has the right to continue such advertisements.

The appellant's claim may be divided into two branches. The first depends upon the construction of section 63 of the *Dentistry Act* of British Columbia, R.S.B.C., 1936, chapter 72, which reads as follows:—

Any person shall be deemed to be practising the profession of dentistry within the meaning of this Act 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, examines, diagnoses, or advises on any condition of the tooth or teeth, jaw or jaws of any person, or who

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either directly or indirectly takes, makes, performs, or administers any impression, operation, or treatment or any part of any impression, operation, or treatment of any kind, of, for, or upon the tooth or teeth, jaw or jaws, or of, for, or upon any disease or lesion of the tooth or teeth, jaw or jaws, or the malposition thereof, of any person, or who fits any artificial denture, tooth, or teeth in, to, or upon the jaw or jaws of any person, or *who holds himself out as being qualified or entitled to do all or any of the above things:* Provided that this section shall not interfere with the privileges conferred upon physicians and surgeons by any Act relating to the practice of medicine and surgery in this province, nor with the privileges heretofore conferred upon registered students, nor with the ordinary vending or calling of a druggist.

The real dispute hinges upon the meaning to be ascribed to the italicized words. The mere enumeration of certain things, the doing of any one of which is to be deemed practising, was apparently not considered sufficient for the protection of the profession and the public. The enumeration would make clear that certain things were considered dentistry as to which some question might otherwise arise but the legislature has not attempted to declare the doing of any of these acts outside the province an offence and in my opinion it has not constituted the advertising done by the respondent an offence. I read the words under discussion to relate to a holding out within the province by a person that he has the education and training, or that he is registered under the Act, to do any of the enumerated things *in the province.*

That construction is borne out by a reference to the other sections of the Act. By section 2 a College of Dental Surgeons in and for the province of British Columbia is continued, the membership of which is to be composed of those who on or before a certain date were by law authorized to practise the profession *in the province* and of all other persons who may become and be registered members under the Act. By sections 3 and 4 the members are constituted a body corporate with a governing body styled the Council. By section 19, this Council is to cause to be kept by the registrar "The Register of the Members of the College of Dental Surgeons of British Columbia," and by section 20:—

Only those persons whose names are entered and registered in the register shall be qualified and permitted to practise dentistry and dental surgery *in the province* except as hereinafter provided.

Provision is then made for the registration of members, for the rectification of the register in certain events and (section 39) for the suspension or cancellation of the regis-

tration of any person registered under the Act who, after due inquiry by the Council, is adjudged to have been guilty of infamous or unprofessional conduct. By section 56, there is due and payable to the College annually by each member of the College actually engaged in the practice of his profession, the sum of ten dollars, upon which a certificate is to be issued by the registrar stating that such member is entitled to practise the profession *in the province*. By section 57, if any member practises the profession *in the province* without having taken out a certificate for the current year, he is rendered subject to a fine and suspension from membership. By section 59 an annual list of members is to be prepared and a copy published in the *Gazette;*

and production of a copy of the *Gazette* containing the list shall be *prima facie* evidence of the right of every person named in the list to practise the profession of dentistry or dental surgery *in the province* for one year from the date of the list, and the absence of the name of any person from the list shall be *prima facie* evidence that such person is not registered or entitled to practise under this Act.

Section 61 enacts that every person registered and holding an unexpired annual certificate shall be entitled to practise the profession *in the province,* while section 62 provides that any person not registered under the Act or not holding an unexpired annual certificate or permit (for which provision is made later in the statute), or who has been suspended from practice, or whose name has been erased from the register, who practises the profession *in the province* shall be guilty of an offence against the Act.

Without mentioning in detail later sections of the Act in which the expression is used, a final reference may be had to the proviso in section 63 itself whereby

this section shall not interfere with the privileges conferred upon physicians and surgeons by any Act relating to the practise of medicine and surgery *in this province.*

These continued references make it clear to me at least that the proper construction of section 63 is as I have indicated.

The second branch of the appellant's case is that even if the above conclusion be held to be the correct one, it is against the public interest to permit the respondent to continue advertisements of the nature complained of. As to this, it appears sufficient to point out, that while, in the opinion of several reputable dentists in the province,

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such advertising, if done by a member of the College, would be improper or unprofessional conduct, such matters are by the Act left to the Council for inquiry and determination subject to an appeal; and furthermore, the Council could, of course, exercise jurisdiction only over its own members. Having concluded that the respondent had not committed an offence against the Act, I fail to see how it may be said that he has infringed any public right at common law. There is no basis for the suggestion that he had committed public mischief.

I would dismiss the appeal with costs.

CANNON J.—I would dismiss the appeal with costs.

HUDSON J.—The defendant is a dentist residing and practising his profession in the city of Spokane, in the state of Washington. Although not a member of the College of Dental Surgeons of British Columbia, he advertises freely in a number of newspapers in British Columbia published in cities near the border, with a view to inducing residents of British Columbia to go to him for dental treatment. This action was brought in the name of the Attorney-General on the relation of the College of Dental Surgeons of British Columbia, for an injunction restraining the defendant, his servants and agents from advertising by any means in the province of British Columbia in respect of the practice of dentistry by him, and particularly from advertising in such respects in any newspapers published in British Columbia.

The complaint of the relator is, first, that the advertising of the defendant was of such a nature that, if carried on by a member of the plaintiff college, it would be considered as a breach of professional ethics and as unprofessional conduct, according to the standards of that college; secondly, that the defendant's advertising campaign was an invasion of the statutory rights of members of the plaintiff college.

On a motion for injunction heard by agreement as a motion for judgment before Mr. Justice MacDonald, an order was made perpetually restraining the defendant from holding himself out within the province of British Columbia by means of advertising, as being qualified to practise the profession of dentistry. On appeal to the Court of

Appeal this judgment was reversed by a majority of the Court. Chief Justice Martin there held that the *Dentistry Act*, chapter 72 of R.S.B.C., is concerned alone with the practice of dentistry within the province, and the prohibition there of acts relating to the practice of dentistry does not extend to those carried outside it, as in this case. Mr. Justice McQuarrie concurred with the Chief Justice and held that the plaintiff is not subject to any rule, regulation or principle of ethics established by the College of Dental Surgeons of British Columbia, of which he is not a member, and furthermore that there is no statutory enactment prohibiting a resident of a foreign country from advertising in British Columbia. Mr. Justice O'Halloran took the view that the advertising in question did not amount to any violation of the provisions of the statute on the ground that it was of a non-professional or non-ethical character, but held that by the provisions of the statute the defendant had no right to hold himself out in British Columbia as being qualified to practise the profession of dentistry, even though that practice was carried on in another jurisdiction.

I agree with the view that the advertising itself although it may be unethical and unprofessional according to the standards of the plaintiff college, does not justify an injunction against the defendant who is not a member of such a college.

The purpose of the *Dentistry Act* was to regulate and control the practice of dentistry in the province of British Columbia. Sections 62 and 63 seem to me to be the only ones which require consideration in this case. Section 62 provides:

> Any person not registered under this Act, or not holding an unexpired annual certificate or permit as hereinafter provided, or who has been suspended from practice, or whose name has been erased from the register, who practises dentistry or dental surgery in the province shall be guilty of an offence against this Act.

Section 63:

> Any person shall be deemed to be practising the profession of dentistry within the meaning of this Act who * * *

Then follows an enumeration of the different acts which shall be considered as "practising dentistry." This portion of the section ends by these words:

> or who holds himself out as being qualified or entitled to do all or any of the above things.

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Section 62 creates the offence, namely, the practice by unqualified persons of dentistry in the province. Section 63 defines what shall be considered the practice of dentistry. Mr. Maitland ably and ingenuously argued that the later words in the section meant "holding out within the province" and must be construed to include the practice of dentistry, whether within or without the province. After very careful consideration of all that has been said, I cannot agree with this argument. It seems to me quite clear that the "holding out" referred to in the section must mean holding out as being qualified to do the things which were forbidden by the preceding words and by section 62, namely, the practice of dentistry within the province.

I think, therefore, that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Maitland, Maitland, Remnant & Hutcheson.*

Solicitor for the respondent: *F. C. Aubrey.*

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* May 26, 27.
* Dec. 5.

DAME ROSE KERT (DEFENDANT).....APPELLANT;

AND

DAME REBECCA WINSBERG (PLAINTIFF) ..... } RESPONDENT.

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

Servitudes—Right of view—Wall not common—Lights or windows—Wall resting on two adjoining properties—One owner not having acquired title to rights of mitoyenneté—Articles 515, 533 and 534 C.C.

Lights or windows, as described in article 534 C.C., can only be made in a wall "not common adjoining the land of another.—When a wall has been erected as to one half on an adjoining property and has all the characteristics of a wall designed to become common, even though it does not appear that the owner of the adjoining land has acquired title to, and paid for, the rights of *mitoyenneté* in it, the owner who has erected the wall has not the right to make such openings.

Judgment of the Court of King's Bench (Q.R. 64 K.B. 78) aff.

* PRESENT:—Duff C.J. and Cannon, Crocket, Kerwin and Hudson JJ.

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

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

M. M. Sperber K.C. for the appellant.

M. I. Sigler for the respondent.

THE CHIEF JUSTICE.—The issue between the parties to this appeal concerns a brick wall, fourteen feet in length and twelve inches thick at its base, diminishing to a thickness of eight inches at the third story. The wall rests, as to one half on the property of the appellants and as to the other on the property of the respondents.

The courts below have agreed that, the wall having been erected by the appellant's predecessor in title, the respondent never acquired title to rights of *mitoyenneté* in it. The appellant has created openings in this wall and inserted therein sheets of translucent but not transparent glass. The question in controversy concerns their right to maintain these openings in this state.

I agree with the Court of King's Bench that article 534 of the Civil Code of Quebec is plainly not applicable, the wall in question not being "un mur non-mitoyen joignant l'héritage d'autrui." Nor does article 533 strictly apply because, to quote the judgment of that Court, "ce mur n'est pas mitoyen au sens de l'article 533 du Code Civil."

I agree also with the Court of King's Bench that the last paragraph of article 515 appears to give the key to the principle for determining the controversy before us. Although that article deals with a different case, yet, reading it with articles 533 and 534, there can, I think, be little doubt as to the governing consideration. Mr. Justice St. Jacques says:

> Cette disposition du dernier paragraphe de l'article 515 nous fait voir le sens et la signification qu'il faut donner aux mots employés dans l'article 534, pour désigner le mur dans lequel il peut être pratiqué des jours ou fenêtres à fer maillé et verre dormant. Ce n'est que dans un mur non-mitoyen joignant immédiatement l'héritage d'autrui que de telles fenêtres ou jours peuvent être pratiqués.

With this I agree.

(1) (1938) Q.R. 64 K.B. 78.

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Mr. Justice St. Germain has given convincing reasons for concluding that the openings in question here constitute "jours" in the sense of article 534.

It follows that the appeal should be dismissed with costs.

The judgment of Cannon, Crocket and Kerwin JJ. was delivered by

CANNON J.—The parties own two adjoining immoveables situate on Hutchison street, in the city of Montreal. Appellant's property was built in 1910; respondent's in 1911. The twelve inches northwest brick wall of appellant's property is for a depth of 55 feet built half on appellant's land and half on the adjoining land acquired by the respondent in 1919. When respondent's building was erected, in 1911, the appellant's wall was used, for a depth of forty-one feet; and on that part joists and beams were inserted to support the weight of respondent's building. The remaining fourteen feet of the wall for its whole height has never been used by respondent or her *auteurs*. It is a plain brick wall which faces the back yard of respondent's building.

In September, 1936, appellant made two openings in the said fourteen feet of the said wall. These openings, one on the second story and the other on the third story, had inside or interior window frames with blue coloured frosted glass. The windows were nailed to the sills at the bottom and at the sides, and in addition there were mouldings put up at the sides to prevent the windows being pushed up; these mouldings were also nailed. There were hinges for shutters or exterior windows which were never put on.

The date of the construction of the windows, as originally or later used, is of little importance, except perhaps in respect to the costs of the injunction proceedings, with which we are not now concerned, as the Court intimated to the parties during the argument that, in view of the concurrent judgments of the Quebec courts on this question of procedure, it should not be raised again before us. It is enough to say that, after the demand for injunction, appellant caused the outside frame to disappear, filled the opening with bricks of translucent but not transparent glass, which bricks are sealed and do not project outside the wall.

The trial judge found that the structure or alterations made by the appellant were illegal and based his finding on article 534 C.C. which prohibits, not only windows, but lights, i.e., anything that will permit the light of day to penetrate, except in the manner indicated by the article. Such lights or windows must be provided with an iron trellis the bars of which are not more than four inches apart, and a window-sash fastened with plaster or otherwise in such a way that it must remain closed. The trial judge, therefore, ordered the appellant to close completely that part of the windows which is less than seven feet from the floor in such a manner that the light could not penetrate through this part, and in so far as the surplus height is concerned, the appellant was ordered to put in window sashes pursuant to the terms of article 534.

The respondent accepted this judgment and precluded the Court of King's Bench from giving full effect to their finding which was that the appellant had no right whatsoever to construct opening windows or lights.

The appellant accepts the findings of fact of the Court of King's Bench, which are as follows:

Attendu qu'il est prouvé que le mur dans lequel la défenderesse a pratiqué les fenêtres ou jours est construit en partie sur le terrain de la demanderesse et en partie sur celui de la défenderesse; qu'il a toutes les caractéristiques d'un mur fait pour devenir mitoyen;

Attendu qu'il ne ressort pas de la preuve que la demanderesse et ses auteurs aient la mitoyenneté du mur en en payant la valeur;

Considérant que si ce mur n'est pas mitoyen au sens de l'article 533 du Code Civil, il n'est pas non plus un mur non-mitoyen joignant l'héritage d'autrui, puisqu'il est assis en partie sur le terrain de la demanderesse;

The Court of King's Bench refused to the appellant the benefit of article 534 because the wall does not adjoin the land of the respondent but is built half on it. They applied, however, the principle established in par. 3 of article 515, which reads as follows:

515. Every proprietor may raise the common wall at will, but at his own cost, upon paying an indemnity for the additional weight imposed, and bearing for the future the expense of keeping it in repair above the height which is common.

The indemnity thus payable is the sixth of the value of the superstructure.

On these conditions such superstructure becomes the exclusive property of him who built it; but it remains, as to the right of view, subject to the rules applicable to common walls.

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The *ratio decidendi* of the Court of King's Bench may be found in the following quotation from the reasons of Mr. Justice St. Jacques:

La défenderesse peut-elle prétendre que ce mur lui est propre et qu'elle peut y faire des ouvertures permettant à la lumière ou au jour de pénétrer à l'intérieur de sa maison?

Dans cette partie du mur de six pouces d'épaisseur qui est assise sur le terrain de la demanderesse, il ne peut s'agir d'un mur *propre* à la défenderesse, au sens de l'article 534 du Code civil. Ce mur n'en est pas un "joignant immédiatement l'héritage" de la demanderesse; il y est assis en partie, et ce n'est pas parce que la demanderesse n'aurait pas payé la moitié du coût ou de la valeur de ce mur que la défenderesse peut y faire des ouvertures, même pour y obtenir le jour, suivant les dispositions des articles 534 et 535.

Les codificateurs nous disent que l'article 533 et les deux suivants sont tirés de la Coutume de Paris et sont conformes au Code Napoléon. Et ils ajoutent que "c'est à leur occasion que s'élève la question déjà mentionnée de savoir si le copropriétaire, qui exhausse à ses propres frais le mur mitoyen, a droit de faire dans l'exhaussement les ouvertures permises dans le mur qui lui serait propre; et l'on se rappellera que les Commissaires ont fait adopter de décider cette question dans la négative au moyen du paragraphe ajouté à l'article 515, pour les raisons qui ont été exposées en le commentant."

Or, sous l'article 515, ils ont dit:

"Les deux premiers paragraphes de cet article sont pris des articles 195 et 197 de la Coutume de Paris, et diffèrent peu de l'article 658 du Code Napoléon. Quant au troisième paragraphe qui ne se trouve ni dans l'un ni dans l'autre, il a été ajouté afin de trancher la question controversée sous l'ancienne jurisprudence de savoir si dans cet exhaussement, il était permis à celui qui l'avait fait d'y pratiquer des vues de coutume, de même que *si tout le mur lui était propre,* suivant l'article 200 de la Coutume. Les Commissaires ont pensé que le mur mitoyen exhaussé ne saurait être assimilé *au mur propre joignant sans moyen à l'héritage d'autrui,* parce que, en réalité, cet exhaussement est fait pour moitié sur le terrain du voisin et peut à peine être regardé comme lui appartenant exclusivement; ils sont donc d'avis que le droit en question ne doit pas exister, et l'ont ainsi déclaré, sans prétendre qu'en cela il y ait eu introduction de droit nouveau."

Le troisième paragraphe de l'article 515 est à l'effet que bien que la partie du mur ainsi exhaussée soit propre à celui qui l'a faite, elle reste, quant au droit de vue, sujette aux règles applicables au mur mitoyen. Cette disposition a pour but, ainsi que le disent les codificateurs, d'éviter la controverse qui existait en France à ce sujet.

* * *

On voit donc quelle a été la raison qui a inspiré les codificateurs dans le rédaction de l'article 515; c'est que l'on a voulu éviter ce conflit de jurisprudence et déterminer, d'une façon nette, que la partie du mur exhaussée, bien que propre à celui qui a fait cet exhaussement, reste soumise à la prohibition de l'article 533 quant au droit de vue, parce que le mur repose sur deux héritages et qu'on ne peut pas dire que, tout en n'étant pas mitoyen, il est propre exclusivement à l'une des parties.

Cette disposition du dernier paragraphe de l'article 515 nous fait voir le sens et la signification qu'il faut donner aux mots employés dans l'article 534, pour désigner le mur dans lequel il peut être pratiqué des

jours ou fenêtres à fer maillé et verre dormant. Ce n'est que dans un mur non-mitoyen *joignant immédiatement l'héritage d'autrui* que de telles fenêtres ou jours peuvent être pratiqués.

Le mur dans lequel la défenderesse a pratiqué des ouvertures qui, à l'origine, avaient l'apparence de véritables fenêtres pouvant donner droit de vue, n'est pas ce mur que décrit l'article 534. Il n'est pas mitoyen, en ce sens que rien ne fait voir dans la preuve que le droit de copropriété ait été acquis par le paiement d'une partie du coût de construction du mur; mais il a été construit avec toutes les caractéristiques d'un mur destiné à devenir mitoyen, et, en plus, il est assis en partie, pour une moitié, sur l'immeuble de la demanderesse. Celle-ci peut, en tout temps, acquérir la copropriété du mur, si elle n'est pas déjà en mesure d'établir que ses auteurs l'ont fait.

Quant à la copropriété du terrain sur lequel le mur est bâti, elle est certaine et admise de part et d'autre. Les ouvertures que la défenderesse a pratiquées dans ce mur ne me paraissent pas autorisées par l'article 534, même si elles avaient été faites strictement en conformité avec les exigences de l'article 535.

I accept the views of the Court of King's Bench and apply as they have done, by analogy, the principle of art. 515, par. 3, concerning the superstructure built by one of the owners of a common wall to the wall built, as in this case, by the owner half on his property and half on his neighbour's land. It may be true that under modern conditions these articles of our Code may create difficulties and unnecessary hardships to those who wish to improve their properties. There seems to be a tendency in France to alleviate the strictness of the rule. For instance, in the case of *Lacrevaz* C. *Ecuvillon* (1), they have decided what would seem favourable to the appellant's contention:

Les art. 676 et 677, C. Civ., qui réglementent les jours de souffrance, de façon à empêcher de voir dans le fonds voisin, d'y jeter des immondices et de s'y introduire, ne sont pas applicables au cas où un propriétaire fait garnir une ouverture pratiquée dans son mur de "plots" ou blocs de verre d'une certaine épaisseur, formant par leur assemblage une cloison solide qui permet de recevoir la lumière de l'extérieur à l'intérieur, mais à travers laquelle il n'est pas possible de distinguer les objets placés au dehors; la paroi de verre ainsi scellée dans la mur, et qui ne permet ni la vue, ni le jet des immondices, ni l'introduction des personnes, constitue une sorte de mur éclairant, et il n'est pas nécessaire qu'elle soit revêtue d'un treillis de fer, ni qu'elle soit placée à la hauteur déterminée par l'art. 677 (C. civ., 676 et 677).

Il en doit être surtout ainsi, lorsque cette cloison translucide est établie au-dessus et au-dessous d'autres ouvertures incontestées, prenant jour et vue sur l'héritage voisin, et ne saurait, partant, être pour ce dernier la source d'aucune gêne.

It must be said, however, that this decision of a court of first instance is not accepted as final by the official report, in a foot-note.

(1) S. 1901-2-147.

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See Gazette du Palais, Table 1930-1935, Vo. Servitudes, nos 97 & Seq.

See also authorities in Juris Classeur Civil, Art. 675, No. 19.

Any change in the law, however, should come from the legislators and not from the courts.

We must say that the glass bricks placed in this wall by the appellant constitute "jours" because they are translucent and allow the light of day to penetrate the respondent's building. The reasons given by the codifiers would exclude from our consideration the controversies of the commentators of the Code Napoléon.

As to the right of the builder of the wall to use it as his own, although one half of it is built on the neighbour's land, the commissioners ruled that this superstructure, being for one half built on the neighbour's property, could not be considered as the exclusive property of the builder; and they have applied to it the restrictions as to the right of view applicable to superstructures built by one owner on common walls.

The other points raised in appellant's factum as to the failure of the respondent to prove that she was duly authorized to "ester en justice" was not pressed before us in the argument. In any case, in view of the concurrent judgments, the finding of the Quebec courts should not be disturbed on this matter of procedure.

As to the costs of the injunction, I have already disposed of it.

Therefore, I cannot agree with the appellant that the judgment *a quo* is erroneous and should be reversed; and, therefore, I dismiss the appeal with costs.

HUDSON J.—I agree this appeal should be dismissed with costs for the reasons mentioned by Mr. Justice St. Jacques and Mr. Justice St. Germain in the court below.

Appeal dismissed with costs.

Solicitors for the appellant: *Sperber, Godine & Hayes.*

Solicitors for the respondent: *Myerson & Sigler.*

ROUX *v.* CLARKSON

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* Dec. 5.

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

Res judicata—Stock exchange—Evidence—Valid proof—Statements of account—Action dismissed sauf à se pourvoir.

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

The appellant, during the period December, 1930, to July, 1931, entered into a number of transactions with Carroll & Wright, brokers, of the city of Toronto, and was indebted to them in the sum of $3,542.55 when they went into bankruptcy on or about the 10th September, 1931. The respondent, having been appointed trustee in bankruptcy, instituted against the appellant an action on the 17th November, 1932, which was, however, dismissed by the Hon. Mr. Justice Prevost on the 4th April, 1934, on the ground that it was drafted in the form of an action for goods sold and delivered, without alleging the actual relations between the parties, of broker and client, and the advances made by the former in execution of his orders. The action was, however, dismissed without costs "et sauf à se pourvoir." The present action was instituted on the 19th February, 1935, and alleged in detail the purchase and sales of stock on orders received from the appellant, and the respondent claimed a sum of $3,566.28, the difference between the amounts claimed in the first and second actions being added interest on the sums due.

The action was maintained by the Superior Court, Gibsone J. and on appeal, the judgment was affirmed by the Court of King's Bench, appeal side (1).

The Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

Paul Belcourt for the appellant.

J. A. Legris K.C. for the respondent.

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

(1) (1937) Q.R. 64 K.B. 319.

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*April 26, 27.
*Dec. 5.

DAVID SPENCER LIMITED (DEFENDANT) ..... APPELLANT;

AND

EDNA FIELD AND JAMES W. FIELD (PLAINTIFF) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Burns by permanent-wave machine—Onus of proof—Charge to jury—Trial judge laying burden on plaintiffs—No objection taken—Jury finding no negligence—Appellate court ordering new trial—Misdirection of jury—Res ipsa loquitur.

The female respondent claimed damages for injuries alleged to have been suffered by her as the result of burns she said she received while having a permanent wave in the beauty parlour operated and conducted by the appellant in its departmental store in Vancouver. The trial judge instructed the jury that the burden lay upon the respondent to prove negligence against the appellant. The jury found that the burns on the respondent's head were not "the result of negligence, but rather accidental." The trial judge dismissed respondent's action. On appeal, the Court of Appeal ordered a new trial, on the ground that the doctrine of *res ipsa loquitur* was applicable to the facts of this case and, therefore, the jury had been misdirected as to the onus of proof.

Held, reversing the judgment of the Court of Appeal (52 B.C. Rep. 447), that the judgment of the trial judge dismissing respondents' action should be restored.

Per The Chief Justice and Davis and Hudson JJ.—It is unnecessary to consider whether or not the doctrine of *res ipsa loquitur* has any application to this case. It is sufficient to observe that the case for the respondents was formulated in the pleadings and developed at the trial as an action for negligence against the appellant without any reference to that rule. The case went to the jury, without any objection, on the basis of an action for negligence in which the burden lay upon the respondents. That being so, the respondents are not entitled upon an appeal to recast their case and put it upon a basis which had not been suggested at the trial.—*Scott* v. *Fernie* (11 B.C.R. 91) approved.—Comments on section 60 of B.C. *Supreme Court Act,* R.S.B.C., 1936, c. 56.—*Sisters of St. Joseph* v. *Fleming* ([1938] S.C.R. 172) ref.

Per Crocket and Kerwin JJ.—The rule of *"res ipsa liquitur"* was not relied upon at the trial and may not be put forth to assist the respondents before the Court of Appeal or this Court. This being so, there is no ground upon which the verdict of the jury should have been disturbed.

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

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SPENCER v. FIELD.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of D. A. MacDonald J. which had dismissed the respondents' action, after a trial with a jury, and ordering a new trial.

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

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

C. F. H. Carson K.C. for the respondents.

The judgment of the Chief Justice and of Davis and Hudson JJ. was delivered by

DAVIS J.—The respondent Edna Field claimed damages in this action for injuries alleged to have been suffered by her as the result of a burn which she says she received in the appellant's departmental store in Vancouver while having a permanent wave in the beauty parlour operated and conducted by the appellant in its store; and her husband claimed in the same action substantial special damages for hospital and medical attention as well as general damages. The claims were based upon the alleged negligence of the appellant, its servants or agents, and particulars of the negligence were set forth in the statement of claim as follows:

(*a*) The operators in charge at the said defendant's beauty parlour did not take due care in giving the treatment in question.

(*b*) The said operators allowed the apparatus used to become extremely hot, causing the burn in question.

The case was tried with a jury and it was essentially a question of fact. Two totally different stories were presented to the jury. The appellant's evidence went to show that during the giving of the permanent wave in the beauty parlour the woman complained that she was hot at the back of her head and that the operator at once applied a cooling device. The appellant said that the woman had only a blister at the back of her head which probably was caused, as was not unusual, by the pulling effect of the treatment on the hair. To those in charge of the beauty parlour it appeared to be an insignificant thing. That occurred in the morning and in the evening the woman came back to the store with her husband, complaining that

(1) (1937) 52 B.C. Rep. 447; [1938] 2 W.W.R. 385; [1938] 2 D.L.R. 245.

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Davis J.

she had been burnt. The nurse in attendance at the store (Miss Walker) said she found a slightly reddened area about the size of a five-cent piece at the back of the head, slightly to the left, and that the skin had evidently been broken. The woman was complaining of severe pain and in order to give her relief and to protect the area from infection, the nurse cleansed the area round about with alcohol and applied a moist boracic compress for a minute or so until it was clean, and then put on a sterile dressing. The husband asked to be reimbursed the $5 his wife had paid for the permanent wave and wanted to be paid for his time in coming down to the store in the evening with his wife. Upon the appellant's evidence there was merely a small blister, not as a result of any excessive application of heat but as one of the incidents of the modern electrical treatments for waving the hair which may occur to certain people by a pulling effect on the hair at some particular point and result in a slight blister.

But the respondents' story was entirely different. It rested largely upon the evidence of a Dr. McEown. He said he was called to examine the woman the same evening and according to his story he found a deep burn on the left scalp about the size of a fifty-cent piece and on the right hand side of the head another burn about the size of a quarter, not as deep as the burn on the left. He proceeds in his story to attribute to this a severe condition of shock together with a heart condition and a hemorrhage and subsequently a very serious physical condition of the thyroid glands and very severe internal trouble which necessitated removal of certain organs of the body, resulting in a very serious condition of health. Several medical witnesses were called on both sides.

Two stories could not be more different. The learned trial judge expressed no view upon the facts but told the jury the facts were entirely for them.

> You have got to decide before you give a verdict in this case whether Dr. McEown is an honest man. There is no side stepping it, because counsel for the defence made it an issue as to Dr. McEown when he was in the box. There is no misunderstanding. It is a clear issue. He said, "Dr. McEown, I think you are trying to mislead this jury, trying to deceive them." Now, maybe he did. It is for you to say. I have no opinion on it at all.

The items of the special damages claimed by the husband which the jury had before them showed a charge of Dr. McEown for services amounting to $580.

It is perfectly plain on the findings of the jury that they did not accept the respondents' story. If they had the damages could not have been anything but a very substantial amount. For the reasons to which we shall refer later, the jury made it abundantly plain that they regarded the occurrence in the beauty parlour as giving rise to a small amount of damages. The husband's claim for special damages for hospital, nursing and medical attendances amounted to $1,410.30. The jury's award of $500 to Mrs. Field, alone, indicated clearly, we think, that the jury concluded that the husband's expenses were in no way attributable to the burn in the beauty parlour.

The learned trial judge put the case to the jury very clearly on three separate issues, though no specific questions were put to the jury.

The first issue was whether the woman was burnt by any act of negligence on the part of Miss Ferguson, the operator in the beauty parlour who administered the treatment for a permanent wave.

> The charge is that Miss Ferguson, no matter how expert she may be, on this occasion did not take the care which a reasonable operator would have taken in order to prevent her customer from being injured; and that is a question of fact for you to decide, and it is the first fact, because if you find that Miss Ferguson was not to blame at all for this accident, then the case ends right there and you need not worry about doctors or anything else.
>
> * * *
>
> It is not necessary that she intended to injure the woman. She, of course, did not; it is the last thing in the world she wanted; but did she fail to do what a reasonably competent person would do, with the result that this woman's head was burned. That is a question for you.

Now the jury found on that issue:

> It is our opinion that there has been nothing to show that the burns on Mrs. Fields' head was the result of negligence, but rather accidental.

No one could rightfully quarrel with the jury coming to that conclusion upon the evidence. The jury might have stopped at that conclusion, for they had been told by the learned trial judge that if Miss Ferguson was not to blame for the accident that would be the end of the case.

The second issue put to the jury, if they found that negligence caused injury to the woman, was the question of damages. The trial judge divided the claims for damages into three parts. Firstly, he dealt with the husband's claim for special damages. As to that item the trial judge told the jury:

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* * * the amount that was agreed upon was $1,410.30, which may be subject to any deduction that you may make from that if you say, oh, now, a lot of this treatment was the result of the operation and had nothing to do with the burn at all, then you would have to make some deduction there. What it would be you would have to decide.

The second item in the claim for damages dealt with was that of the husband for general damages for loss of consortium. The third item was that of Mrs. Field for general damages. The learned trial judge on this last item told the jury:

She is entitled to compensation for her pain and her suffering and her loss of time, and in this particular case she is entitled, if you find that her present condition is the result of that accident, of that negligence, she is entitled to fair and full compensation for the serious condition in which her health now is.

The other side of the picture is this: If all that happened here, as the defence contends, was a slight burn which broke the skin, and as so often happens when the skin is broken anywhere and by any means blood poisoning set in and she was laid up for a month—you might give her the benefit of the doubt, say two months, but that there was nothing very serious about it, and they got it all healed up, the hair is growing in again, and nobody would ever know the scar was there, now if you take that view you would not allow her very much; and it is a question of the time and the burn suffered there, so you see the very difficult question you have to decide, and all you have to go on is the history of the case, and the doctors' evidence is as to what did cause this present condition; and there is a straight line of cleavage as I pointed out before. If you think that the plaintiff's doctors are right, the damages would be very substantial indeed. If you think the defendant's doctors are right, they would not be very much; but in either case, it would be for you to fix.

A third issue distinctly arose out of the claims for damages. That was, was the condition of the woman at the time of the trial the result of the injury alleged by her to have been sustained in the beauty parlour? There was a great deal of medical testimony on both sides on this question. The learned trial judge told the jury:

I do not wish to influence you in any way and I can tell you perfectly frankly that I have formed no opinion on these facts. It is not the part of my duty to do so, and I have not done it. I knew most of these doctors, and I am very glad that you are here to make the decision as to which of them was mistaken. They are directly at issue, and you will have to take the responsibility of deciding which one of them—which line of doctors has made a mistake. Somebody has made a mistake, as you know, you have got to make the decision.

Now the finding of the jury on this question was:

As to the effect of the shock and infections on Mrs. Field's present condition, we find no connection.

Here again no one could rightfully quarrel with the jury in reaching that conclusion upon the very conflicting testi-

mony. But the jury added: "We award her $500." The learned trial judge said, after hearing the verdict of the jury:

> You cannot award her anything. Mr. Foreman, the action must be dismissed. I made that as clear as language can make, that unless you found the defendant to blame, you could not give the plaintiff any damages. The action will be dismissed.

The jury having expressly found that in their opinion the burns on Mrs. Field's head were not the result of negligence, but rather accidental, the jury had no right, as the trial judge very properly held, to award her anything. Obviously they wanted to give her some solatium.

Upon an appeal to the Court of Appeal for British Columbia from the judgment dismissing the action with costs, the Court of Appeal set aside the judgment and directed a new trial. Mr. Justice McQuarrie said that if the verdict as interpreted by the learned trial judge amounts to a finding that the plaintiffs are not entitled to any damages, it showed in his opinion that the jury disregarded material indisputable facts in evidence, and in that case there should be a new trial. He thought that the appellant's nurse, Miss Walker, having admitted that when she examined the alleged burn she had found a small slightly reddened area on the back of the woman's head, and that the skin was broken as if there had been a blister, together with the fact that there was no fault on the part of the injured woman herself, would entitle the plaintiffs to some damage. But the learned judge in appeal said further that he considered a new trial was also rendered necessary by reason of misdirection by the trial judge inasmuch as he erred in his direction to the jury as to the onus of proof and should have instructed the jury that the doctrine of *res ipsa loquitur* applied to the facts of the case. On that point he agreed with the reasons for judgment of Mr. Justice Sloan.

Mr. Justice Sloan (with whom the Chief Justice of British Columbia concurred) put his judgment upon the ground that the doctrine of *res ipsa loquitur* was applicable to the facts of the case. After reviewing and considering a number of authorities, Mr. Justice Sloan concluded:

> This case falls within that class of case where "the onus is upon the defendant to establish affirmatively inevitable accident, or in other words, absence of negligence on his part."

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The learned trial judge had told the jury that the burden throughout lay upon the plaintiffs to prove to the jury that the woman was injured by negligence and that that negligence was the cause of the illness. Mr. Justice Sloan reached the conclusion, in reliance upon the decision of this Court in *United Motor Service* v. *Hutson* (1), amongst other cases, that the learned trial judge misdirected the jury on the law relative to the burden of proof. We had occasion recently in *Sisters of St. Joseph* v. *Fleming* (2), to make some observations which we thought pertinent upon the application of the maxim *res ipsa loquitur*. It is unnecessary for us in this case to consider whether or not that doctrine has any application to this case. It is sufficient in our view to observe that the case for the respondents was formulated in the pleadings and developed at the trial as an action of negligence against the appellant without any reference to the rule of *res ipsa loquitur*. And the case went to the jury, without any objection, on the basis of an action for negligence in which the burden lay upon the respondents. That being so, the respondents are not entitled upon an appeal to recast their case and put it upon a basis which had not been suggested at the trial.

The case of *Scott* v. *Fernie* (3) laid down that rule and held that nothing in then sec. 66 of The (British Columbia) *Supreme Court Act* afforded an escape. The present sec. 60 (R.S.B.C., 1936, chap. 56) is substantially the same as old sec. 66 which was considered in that case. The unanimous judgment of the Court (Hunter C.J., Martin and Duff JJ.) was delivered by the present Chief Justice of this Court. The then sec. 66 of the Act of 1904 (although the first and second provisoes had been introduced into the section after the trial of the action, the Court considered itself governed by them so far as they were applicable) was held not to abrogate the long established rule which holds a litigant to a position deliberately assumed by his counsel at the trial.

In the case before us in this appeal the issues of fact for the jury were settled during the conduct of the trial and the issues submitted to the jury were accepted on both sides as the issues upon which the jury were to pass.

(1) [1937] S.C.R. 294. (2) [1938] S.C.R. 172.
(3) (1904) 11 B.C. Rep. 91.

Counsel for the respondents urged that in any case the finding of the jury that there was nothing to show that the female plaintiff's head had been burnt as a result of negligence was perverse. Mr. Justice McQuarrie in the Court of Appeal thought it clear that the respondents were entitled to some damages, the amount of which should have been fixed by the jury. That learned judge relied upon the fact that there was no fault on the part of the injured woman. In his view if the verdict as interpreted by the trial judge amounts to a finding that the respondents were not entitled to any damages, it showed that the jury had disregarded material undisputed facts in the evidence and that there should be a new trial. It is really another way of applying the *res ipsa loquitur* rule, and Mr. Justice McQuarrie agreed with the other members of the Court of Appeal that the trial judge erred in his direction to the jury as to the onus of proof and should have instructed the jury that the doctrine of *res ipsa loquitur* applied to the facts of the case. The case having been put to the jury as one of negligence, the jury undoubtedly accepted the evidence of Miss Macdonald, the manager of the beauty parlour, when she said that she had never known in her experience as an operator of any head burns occurring before this case.

> It is just one of those things you can't account for—no fault of the operator and no fault of the machine.

Asked if the hair ever gets at times pulled tight, Miss Macdonald answered:

> It is usually what causes what we call a pull blister. It is not a burn. It is the pulling of the scalp tight which causes the blister and it will have the same effect as a burn, because the skin will break and it will blister.

This evidence of Miss Macdonald, I think, explains the language of the jury on the question of negligence:

> It is our opinion there has been nothing to show that the burns on Mrs. Field's head was the result of negligence, but rather accidental.

Dealing with the case as one of negligence, which was the way the case was developed and presented to the jury, their finding cannot in my view be said to be perverse.

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

The respondents made a motion to quash the appeal upon the ground that, the appeal being from a judgment

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upon a motion for a new trial, sec. 65 of the *Supreme Court Act* required notice to be given in writing to the opposite party, or his attorney of record, within twenty days after the decision complained of, or within such further time as the Court appealed from, or a judge thereof, allows. The motion was well founded at the time it was launched but before it came on for hearing the necessary extension of time had been granted by a judge of the court appealed from. The motion was therefore not pressed but the respondents are entitled to their costs of the motion.

The judgment of Crocket and Kerwin JJ. was delivered by

KERWIN J.—The rule of *res ipsa loquitur* was not relied upon at the trial and may not be put forth to assist the plaintiffs before the provincial Court of Appeal or this Court. This being so, there is no ground upon which the verdict of the jury may be disturbed. It reads as follows:

> It is our opinion that there has been nothing to show that the burns on Mrs. Field's head was the result of negligence, but rather accidental. As to the effect of the shock and infections on Mrs. Field's present condition, we find no connection. We award her $500.

The finding that there was no negligence and no connection between the female plaintiff's condition at the time of the trial and the shock and infection of which she complained disposes of the matter and the latter part of the answer must be disregarded.

The appeal should be allowed and the judgment at the trial restored, with costs throughout, but the respondents are entitled to the costs of their motion to quash the appeal as the appellant secured an extension of time only after service of the notice of motion.

Appeal allowed with costs.

Solicitors for the appellant: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

Solicitors for the respondents: *Wismer & Fraser.*

A. B. ZACKS (DEFENDANT).....APPELLANT;

AND

C. A. GENTLES & COMPANY (PLAINTIFFS) .....RESPONDENTS.

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* June 8, 9.
* Dec. 5.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Brokers—"Short" sale for customer—Non-compliance by customer with brokers' requirements to protect speculative margin account—Purchases by brokers to cover—Claim by brokers against customer for debit balance in the account.

In the case of a "short" sale of shares of stock by a broker for his customer, if the customer fails to comply with the broker's reasonable requirements to protect his speculative margin account against an adverse balance, the broker is entitled from time to time to do what is reasonable under the existing circumstances to protect the account against loss, having regard to the prevailing prices of the stock. (*Samson* v. *Frazier*, [1937] 2 K.B. 170, and *Morten* v. *Hilton* therein cited and reported in foot-note).

In the present case, the judgments at trial and on appeal for recovery by the brokers of balance of account, on the basis of the loss represented by subsequent purchases by the brokers to cover the short sale and charged to the customer, were sustained.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario dismissing his appeal from the judgment of Rose C.J.H.C. by which the plaintiffs recovered against him the sum of $2,413.72 (and interest from date of the writ) claimed by the plaintiffs (stock brokers) as being the balance owing by the defendant to them on purchases made by them to cover the defendant's short sale of shares of stock. The material facts of the case are sufficiently stated in the judgment of Davis J. now reported. The appeal to this Court was dismissed with costs.

L. M. Singer K.C. for the appellant.

J. R. Cartwright K.C. and *G. D. Watson* for the respondents.

THE CHIEF JUSTICE.—I have had the advantage of reading and considering the judgment of my brother Davis and I fully concur in his conclusion as well as his reasons.

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Hudson JJ.

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On the hearing of the appeal, I was impressed by the force of Mr. Singer's argument touching the purchases of Bidgood Kirkland Gold stock on the 23rd of January, 1936. I think the tenor of the judgment of Rose, C.J.H.C., shows he had concluded that the subsequent purchases charged against the appellant were in fact purchases made by the broker on the appellant's account; that such, in other words, was the real nature of these transactions.

It would seem that the learned Chief Justice must have been satisfied that the purchases of the 23rd of January were on account of other customers and that the Court of Appeal must have agreed with the conclusions of the Chief Justice on both these points.

CANNON J.—I would dismiss the appeal with costs.

The judgment of Crocket, Davis and Hudson JJ. was delivered by

DAVIS J.—This appeal involves a short selling transaction in an unlisted mining stock. The appellant was the customer; the respondents were his broker. The stock rose rapidly in price when the customer expected it would go down, with the result that when the account was closed it showed a loss to the customer of $2,413.72, for which amount with interest the respondents sued in this action. Judgment was delivered at the conclusion of the trial of the action by Rose, C.J.H.C., in favour of the respondents for the full amount of the claim. That judgment was unanimously affirmed by the Court of Appeal for Ontario. The customer appealed further to this Court.

The respondents carry on business as stock brokers in the city of Toronto and are members of the Toronto Stock Exchange. They also deal in unlisted mining shares. On January 16th, 1936, the appellant instructed the respondents to sell short for his account and risk 4,000 shares in Bidgood Kirkland Gold Mines, Limited. The stock at the time was not listed on any stock exchange and dealings were effected between brokers who were dealing in unlisted securities. It is plain that both parties knew and intended that the transaction was to be a short sale; that the appellant did not own or possess any of the shares of the com-

pany; and that the respondents would lend or obtain the necessary shares to complete the sale.

On the said 16th of January, 1936, the respondents sold, pursuant to the appellant's instructions and for his account, 4,000 shares of the Bidgood stock to another Toronto broker, Stratton, Hopkins & Company, at 34 cents per share. That that was a genuine sale is really not disputed. The price of the Bidgood shares shortly thereafter began to rise and kept up at a substantially higher price at all material times. The range of the prices of the stock is indicated by the evidence:

January 30th, 1936	.52 - .55
February 6th	.70
" 19th	.82
" 24th	1.00
" 25th	1.15 - 1.21
March 3rd	.93
" 4th	1.03 - 1.05
" 9th	.86
April 3rd	.96½
" 8th	1.00
" 17th	1.25
" 18th	1.52

and subsequently went as high as $2.10. At the date of the trial, March 16th, 1937, the price was $1.50.

Although repeated demands were made upon the customer for margin, either by cash or collateral, it is plain that the account was never at any time adequately margined within the requirements of the broker. The learned trial judge found as a fact that the appellant's account was insufficiently margined and that the appellant knew that the respondents were not satisfied with its position. The respondents say that under these circumstances, for the protection of their customer as well as of themselves, they bought in Bidgood shares for the appellant's account as follows: on February 25th, 1936, 200 shares at 1.14 and 100 shares at $1.20; on April 18th and 20th, 2,000 shares in eight lots at prices ranging from 1.48 to 1.58; and on April 25th, 1,700 shares in fourteen small lots at prices ranging from 1.42 to 1.45. Confirmations of these purchases were sent to the appellant as the same were made. The appellant never at any time instructed the respondents to purchase shares of the stock to cover his short sale and endeavoured to repudiate the purchases, on the ground that he had neither instructed the purchases nor consented

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to them. The net loss in the appellant's account was $2,413.72. The appellant declined to pay this sum and this action followed.

In a short sale, brokers are entitled to do what is reasonable having regard to the interests of their customer as well as to their own interests and if a customer fails to comply with the reasonable requirements of his broker to protect his speculative margin account against an adverse balance, the broker is entitled from time to time to do what is reasonable under the existing circumstances to protect the account against loss, having regard to the prevailing prices of the stock. *Samson* v. *Frazier* (1), where a decision in the House of Lords in 1908, *Morten* v. *Hilton* (2), in a case involving a short sale of speculative securities, was relied upon and a report of the case appended as a foot-note. Lord Loreburn in the House of Lords in the *Morten* case (2) said that he thought brokers, left without proper instructions, would be entitled to do what was reasonable in their own interests and those of their principal, which were largely identical, and that in a speculative account when their principal would not close the account, or give security, or even attempt to transfer the account to some other broker's care, their action ought not, if in good faith, to be lightly condemned.

But what is said here, and with great force in the able argument of Mr. Singer on behalf of the appellant, is that the respondents on January 23rd, 1936, within a few days of the sale of the 4,000 shares, purchased the same number of shares for the appellant's account at a loss of only $440 and that the respondents' right of indemnity, if any, is fixed and limited by the purchase made that day. Moreover, the appellant charges that when he instructed the respondents to sell short 4,000 shares of the Bidgood stock, Charles A. Gentles, one of the respondents, and S. J. Zacks, the respondents' manager, attracted by what appeared to be an opportunity to make some profit themselves in the stock, sold short on the same day they sold for the appellant 500 and 2,000 shares for their own respective accounts, and that on January 23rd, 1936, when the respondents bought 6,500 shares of the stock they were

(1) [1937] 2 K.B. 170.

(2) [1937] 2 K.B., foot-note at 176, 177, 178.

in reality covering not only the appellant's but their own accounts. It was proved in evidence that the respondents did purchase 6,500 of Bidgood on January 23rd, 1936. If the purchase of 4,000 of those shares was actually made by the respondents for the appellant's account, the respondents were not justified at that time in buying back 4,000 shares to close the appellant's account, but in any case the loss to the appellant would only have been $440. Neither were the brokers entitled, as against the appellant, to go out into the market as purchasers for themselves of Bidgood shares, if such purchases had the effect of raising the price of the stock, adverse to the interest of their principal. But the respondents' evidence was directed to show that there were several customers other than the appellant, some of them individuals and some of them well-known stock exchange brokers in Toronto, who were dealing at the time in this unlisted mining stock through the respondents and that the purchases which were made on January 23rd, 1936, were made for some of these other customers who were in fact buying the stock for an expected upward rise. The whole evidence is rather loose and unsatisfactory but the learned and experienced Chief Justice who heard the case went into the matter with his usual care and I think the result of his judgment is that he treated these purchases on January 23rd, 1936, as having been made in the ordinary course of business by the respondents for other customers and that the subsequent purchases, charged up to the account of the appellant as above set forth, represented real purchases made and intended to be made to close the appellant's account. This is at least a reasonable implication from all the facts that were put in evidence. Unless that was in substance the finding of the learned trial judge, he could not, and of course would not, have given judgment in favour of the respondents for the balance of the account on the basis of the loss represented by the subsequent purchases charged to the appellant. The evidence is by no means as clear and convincing as it might well be in a case such as this, but the Court of Appeal reviewed the evidence and came to the same conclusion as the learned trial judge and unanimously dismissed the appeal. We have not the advantage

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of any written reasons. In my opinion, we would not be justified in taking a different view of the case.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Louis M. Singer.*

Solicitors for the respondents: *Smith, Rae, Greer & Cartwright.*

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* Dec. 5.

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* Feb. 7.

FRED. CHRISTIE (PLAINTIFF).....APPELLANT;

AND

THE YORK CORPORATION (DEFENDANT) ..... } RESPONDENT.

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

Appeal—Jurisdiction—Action in damages by negro for refusal to sell beer by a tavern-keeper—Judgment by trial judge for $25 reversed by appellate court—Motion for leave to appeal—Matter in controversy—Future rights—Matter of general importance—Section 41 of the Supreme Court Act.

The appellant, a negro, brought action against the respondent to recover the sum of $200 as damages suffered as a result of the refusal by the respondent, a tavern-keeper, to serve a glass of beer. The action was maintained for $25, the trial judge holding that the respondent's premises came within the definition of a "restaurant" and that owners of hotels and restaurants have no right to discriminate between their guests. This judgment was reversed by the appellate court (Q.R. 65 K.B. 104) which held that a tavern was not subject to the laws governing hotels and restaurants and that, as a general rule, a merchant or trader was free to carry on his business in the manner that he conceives to be the best for that business. The appellant moved before the court for special leave to appeal.

Held that special leave to appeal should be granted. The matter in controversy in the appeal will involve "matters by which rights in future of the parties may be affected" within the meaning of section 41 of the *Supreme Court Act*. Further, the matter in controversy is of such general importance that leave to appeal ought to be granted.

MOTION for leave to appeal to this Court from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the

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

(1) (1938) Q.R. 65 K.B. 104.

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trial judge, P. Demers J. and dismissing the appellant's action.

The material facts of the case are as follows: About half past eight in the evening of July 11th, 1936, the appellant, who is a negro, accompanied by two friends one of whom was also a negro, entered the tavern operated by the respondent and seated themselves at a table to which they summoned a waiter. The appellant placed fifty cents on the table and ordered three steins of beer, but was informed by the waiter that he was unable to serve them. The appellant asked the reason for such refusal and was informed by the assistant manager of the respondent company that, according to the regulations of the establishment, it was forbidden to serve coloured people. The respondent and his friends left the place. By his action, the appellent claimed $200 as damages for pain and suffering and humiliation caused to him in the presence of a number of people present in the tavern.

Lovell C. Carroll for motion.

Hazen Hansard contra.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—We think that the matter in controversy in this appeal will involve "matters by which rights in future of the parties may be affected" within the meaning of section 41 of the *Supreme Court Act.* We also think the matter in controversy is of such general importance that leave to appeal ought to be granted.

Special leave to appeal is, therefore, granted; the costs of the application will be costs in the appeal.

Leave to appeal granted.

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*March 2, 3.
*June 23.

WALKERVILLE BREWERY LTD. (SUPPLIANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Contract—Crown—Petition of right to recover from the Crown sum paid in settlement of prior action by the Crown on claim for revenue taxes—Suppliant claiming refund under alleged oral condition of settlement—Evidence—Letter from Minister of the Crown subsequent to settlement, not enforceable as an agreement binding the Crown.

Appellant company sought to recover from the Crown, in right of the Dominion, a sum paid in settlement of a prior action brought by the Crown to recover revenue taxes alleged to have been due and payable by appellant. In the present suit, appellant claimed that said settlement had been subject to the (oral) condition that a refund would be made to appellant if it were later established that it was not liable for the taxes. At the time of the settlement there was pending a similar action by the Crown against another company, which action was ultimately decided largely against the Crown; and appellant contended that on the application of the law therein determined to the facts in appellant's case, it would not be liable for the taxes claimed against it in the action in which the settlement had been made, and that under the alleged condition to the settlement it was now entitled to a refund. Subsequent to the said settlement, in reply to a letter from the member of Parliament for the district in which appellant carried on business, the Minister of National Revenue wrote to said member that "we do not desire to collect any taxes not properly due the Crown, and if it can be shown that any overpayment has been made * * * or if it is established that they [appellant] were not liable for any tax that they may have paid, you can assure them that refund will be made." There was no reference in said correspondence to any alleged condition of the settlement (and appellant did not base a claim upon the Minister's said assurance as an independent agreement).

Held: On the evidence, appellant had failed to establish that the settlement was subject to the alleged condition.

Held also: The minister's said letter could not be a basis for claim by appellant. The moneys paid by appellant became part of the consolidated revenue fund of Canada and it would require a statute, or something of like force, to clothe the minister of a department with authority to agree to repay to a subject moneys voluntarily paid by the subject in settlement of an action brought by the Crown for payment of taxes alleged to have become due and payable. The Minister's assurance in said letter, once it was determined that it was not confirmation of a condition to the original settlement, could not be sued upon as an independent agreement, because it was not competent for the Minister to fetter the future executive action of the Government.

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

Judgment of Maclean J., President of the Exchequer Court of Canada, [1937] Ex. C.R. 99, dismissing appellant's petition of right, affirmed.

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APPEAL by the suppliant company from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing its action. The action was brought by way of petition of right to recover from the Crown moneys paid by the suppliant to the Crown under a settlement made in a prior action taken by the Crown against the present suppliant to recover payment of certain sales taxes and excise taxes under the *Special War Revenue Act*, 1915, as amended, alleged to be due and payable in respect of beer manufactured and sold, and for interest and penalties in respect thereof. In the present action the suppliant alleged (and the Crown denied) that the said settlement in the prior action had been subject to the condition that a refund would be made to the suppliant if it were later established that the suppliant was not liable for the taxes. The suppliant claimed exemption from the taxes under provisions in the said Act. At the time of the said settlement there was pending a similar action by the Crown against another company in which questions were involved which were ultimately decided against the Crown (2). In the present action the suppliant contended that on the application of the law determined in the said action by the Crown against the other company to the facts of the present suppliant's own case (which facts, it was contended by the suppliant, but disputed by the Crown, were similar in effect to those in the said action against the other company), the suppliant would not be liable for the taxes which the Crown had claimed against it in the action in which said settlement had been made; and that under the alleged condition to the settlement, the suppliant was now entitled to a refund.

By the judgment now reported, the appeal to this Court was dismissed with costs (on the ground that said alleged condition to the settlement was not established).

S. L. Springsteen K.C. for the appellant.

W. N. Tilley K.C., *A. C. Hill K.C.*, and *C. F. H. Carson K.C.* for the respondent.

(1) [1937] Ex. C.R. 99; [1937] 4 D.L.R. 81.
(2) *Carling Export Brewing & Malting Co. Ltd.* v. *The King*, [1931] A.C. 435.

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Davis J.

The judgment of the court was delivered by

DAVIS J.—The appellant in this action by way of Petition of Right seeks to recover from the Crown, in right of the Dominion, the sum of $268,338.32 paid by it to the Crown in settlement of a prior action brought by the Crown against the appellant in respect of non-payment of certain revenue taxes alleged to have been due and payable by the appellant to the Crown. The prior action was commenced in October, 1927, and the period covered was from January 1st, 1925, to May 1st, 1927. The settlement of that action in June, 1928, at $260,000 included the Crown's further claims in respect of the period from May 1st, 1927, to March 31st, 1928. The amount of the settlement, though large, was considerably less than the total claim for taxes, interest and penalties in respect of the period covered by the settlement. The balance of the sum sought to be recovered in this action, $8,338.32, is the amount subsequently agreed upon and paid for the month of April, 1928. There was considerable discussion between the parties, after the settlement, as to the claim for April, 1928, to which we shall refer later.

The appellant was a brewery company incorporated under the laws of the province of Ontario and carried on business at the town of Walkerville near the international boundary between Canada and the United States across the river from the large city of Detroit, Michigan. This action is founded upon the allegation that the settlement of the prior action was subject to the condition that, broadly speaking, the appellant was to be entitled to the return of the moneys paid under the settlement in the event that a similar action which was then pending against the Carling company should be finally determined in favour of the contention of both companies that the taxes sought by the Crown were not in law recoverable because the beer in question had been manufactured and sold for export. The Carling company subsequently carried its litigation through to the Judicial Committee of the Privy Council and successfully resisted the claim against it for payment of the taxes. *Carling Brewing and Malting Company Ltd.* v. *The King* (1).

(1) [1931] A.C. 435.

There was no formal agreement of settlement of the first action. On June 7th, 1928, the appellant sent the Minister of National Revenue its cheque for $200,000 with the following letter:

Walkerville Brewery Limited
Walkerville, Ontario

June 7, 1928.

The Minister of National Revenue,
Ottawa, Canada.

Dear Sir,—

Confirming the verbal arrangement arrived at between your Department and our Mr. Thistle, we herewith enclose you our cheque for $200,000. The understanding is that we are to send you a further cheque for $60,000 within sixty days. The last mentioned cheque, together with the cheque enclosed is in full settlement of the claim contained in the Information dated 27th of October, 1927, and also all other sales and gallons tax, interest and penalties up to the 30th day of April, 1928, and it is understood that the action commenced by the Crown is to be discontinued without costs and that upon payment of the full amount of settlement of $260,000, your Department is to give us a full release of all claims up to the 30th day of April, 1928.

Yours truly,
Walkerville Brewery Limited.
(Sgd.) H. Radner.

The Commissioner of Excise in acknowledging the letter and cheque pointed out that the settlement did not go beyond the end of March, 1928, in that the records for April had not been completed and consequently no assessment for April had been made at the time.

Mr. Thistle mentioned in the letter was an officer of the appellant company but he died before the trial of this action, which did not commence until April 20th, 1936. There is nothing in the letter itself to indicate that the settlement was in any way subject to the condition which is now alleged.

The further payment of $60,000 that was to have been made within sixty days was not in fact made until October 13th, 1928. On August 20th, 1928, the appellant telegraphed the Minister of National Revenue:

Would appreciate extension of sixty days on balance owing on sales and manufacturers taxes wire reply collect.

The Commissioner of Excise replied the same day as follows:

Department regards terms of settlement reached with your company as being exceedingly liberal and is not prepared to grant any extension of time whatever for payment of sixty thousand dollars due ninth instant.

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Subsequently the Commissioner telegraphed the appellant on September 4th as follows:

Reference my wire twentieth ultimo regarding payment sixty thousand dollars stop unless Department hears from you relative to settlement by eighth instant legal proceedings for recovery of balance due will be proceeded with immediately thereafter.

And again on September 14th the Commissioner telegraphed the appellant:

As previously stated Department not prepared to grant delay of sixty days for payment of sixty thousand dollars balance sales tax stop Necessary legal action being proceeded with at once to collect this amount.

The $60,000 payment was finally made on October 13th, 1928, with the following letter from the appellant:

Oct. 13, 1928.

Minister of National Revenue,
Ottawa, Canada.

Dear Sir,—

We are enclosing herewith our cheque in the amount of $60,000 in full payment of all claims of your Department against this company in respect to sales and gallonage taxes, this payment being the balance of the $260,000 amount agreed to during the early part of the year.

Kindly acknowledge receipt of this settlement and oblige,

Yours very truly,
The Walkerville Brewery Limited.
(Sgd.) E. Thistle.

It is to be observed that this letter was signed by Mr. Thistle, with whom it is now alleged an arrangement for the conditional payment had been made. Here again there is nothing in the letter to indicate that the settlement had been made upon the condition now alleged by the appellant. The Hon. N. W. Rowell was counsel for the Government in the first action and in his evidence at the trial of this action he said that the Minister, shortly after the case had been fixed for trial, had informed him that certain proposals for settlement had been submitted and had asked him to look into and report upon certain matters in connection with the proposed settlement. Mr. Rowell said he went into the matter and approved and recommended a settlement for the lump sum of $260,000 for the period up to March 31st, 1928; that he never heard of any condition to the settlement and if there was any condition it was not submitted to him when he was asked to recommend a settlement.

The position taken by the appellant in this action was stated very plainly in the Information and in the appel-

lant's factum and was not departed from by the learned counsel for the appellant before us, that the alleged condition was made with the Minister prior to the settlement and, of course, prior to the payment of $200,000 under the settlement on June 7th, 1928. The letters to which we shall shortly refer between the Minister and Mr. Odette in August, 1928, are not relied upon as evidence of any agreement made at that time but as confirmation of the oral agreement alleged to have been made prior to June 7th, 1928, as a condition of the settlement. The appellant does not seek to obtain the repayment of the moneys upon any assurance or promise of the Minister subsequent to the settlement, but upon a promise which, it is said, formed a term or condition of the settlement of the first action at $260,000. It is not unnatural that there is always some suspicion attached to a claim based upon an alleged oral agreement set up as a term or condition of an agreement that had been put in writing, but evidence directed to prove such an oral agreement is, of course, admissible. We should not find it difficult as a matter of law to enforce against the Crown on a Petition of Right an oral condition to a settlement if it is firmly established in fact that the condition was made as part of the settlement and that the condition has been satisfied. Therefore we have carefully analyzed and examined the evidence tendered in proof of the alleged condition.

Mr. Odette, who gave evidence on behalf of the appellant, was at the time of the settlement the Member of the House of Commons for the district in which the appellant was carrying on its business. We quote from his evidence:

> Mr. Thistle, of the Walkerville Brewery, telephoned me at my office in Ottawa, the Parliament Buildings, and asked me to arrange an appointment. At the request of Mr. Thistle I arranged an appointment with Mr. Euler, Minister of National Revenue, and, at Mr. Thistle's request, I accompanied him to Mr. Euler's office and Mr. Thistle requested Mr. Euler to withhold the present claim until a similar claim against Carling's Brewery was settled. It was then before the Court. Mr. Euler declined to do that, he declined to withhold action; he was pressing for payment of the claim. If my recollection serves me rightly, Mr. Euler told Mr. Thistle that if payment was made the Department would waive the interest and penalties. Mr. Thistle asked Mr. Euler what the position would be if the court determined these taxes were not payable. Mr. Euler said if the court determined that these taxes were not payable then the amount paid could be refunded as the Department did not wish to collect from any one taxes that were not just.

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Q. Do you recall the final amount that was agreed upon between the Minister and Mr. Thistle; were you present?

A. I do not know about that.

Q. Were you familiar with the fact as to whether all of the payment that was agreed upon was made in one sum or otherwise?

A. I know it was not, because later on, after Parliament had adjourned, either Mr. Radner or Mr. Thistle telephoned me at Tilbury that the final payment on this claim was due and asked me if I would be good enough to write Mr. Euler and ask him to write me and confirm the understanding reached between the representative of the brewery and Mr. Euler when I was present.

While the exact date of the interview with the Minister is not given, it was admittedly earlier than June 7th, 1928, when the payment of $200,000 was made.

Mr. Odette was speaking at the trial in April, 1936, of an interview that had taken place eight years before. He was in no way personally concerned in the matter but was present, as he says, "more or less for the purpose of introducing the parties." In attempting to recall the details of the interview, he said very frankly, "if my recollection serves me rightly." He admitted that he was speaking "largely from the letters, as to the matter" and would have to go back to the letters to refresh his memory. Before we look at the letters themselves, it is to be observed that Mr. Odette's recollection was that Mr. Thistle asked the Minister what the position "would be" if the Court determined the taxes were not payable and that the Minister said that in that event the amount paid "could be refunded" as the Department did not wish to collect from any one taxes that were not just.

We now turn to the letters. On August 3rd, 1928, Mr. Odette wrote a personal letter to the Minister which was as follows:

Tilbury, Ontario,
August 3rd, 1928.

Personal.
Honourable W. D. Euler,
Minister of National Revenue,
Ottawa, Ontario.

Dear Mr. Euler:—

Confirming my conversation with you yesterday regarding payment of arrears of sales and gallonage taxes by the Walkerville Brewery Company, Walkerville, on which a final payment of $60,000 is due from the above Company, I believe on the 8th of this month. The President of the Company is anxious to know what position the Company will be in, in the event of the courts deciding that sales and gallonage taxes are not payable on exported goods.

I stated to him that your Department did not desire to collect taxes that were not justly due and that in the event of such an occurrence as above mentioned, or in the event of the Walkerville Brewery over-paying, that they would be in a position to file claim with your Department for refund.

I understand that this is your attitude in the matter, and I would thank you to drop me a line confirming same, so that I can phone the Walkerville Brewery Company previous to the 8th instant, so that their check may go forward to you promptly.

Your usual prompt attention will be appreciated. With kind regards, I am,

Yours very truly,

And on August 14th, 1928, the Minister, in a personal letter to Mr. Odette, replied as follows:

Minister of National Revenue
Canada

Ottawa, August 14, 1928.

Personal.
Mr. E. G. Odette, M.P.,
Tilbury, Ont.

Dear Mr. Odette,

Absence from Ottawa has prevented my replying earlier to your letter of the 3rd inst. with reference to arrears of Sales and Gallonage Taxes due by the Walkerville Brewery Company, Walkerville.

You are right in your understanding as to my attitude. We do not desire to collect any taxes not properly due the Crown, and if it can be shown that any overpayment has been made by the company in question, or if it is established that they were not liable for any tax that they may have paid, you can assure them that refund will be made.

Yours very truly,

(Sgd.) W. D. Euler.

Mr. Odette did not ask the Minister to confirm in writing some oral understanding or agreement that had been made prior to or at the time of the settlement. He wrote that the president of the appellant company "is anxious to know what position the company will be in" in the event of the courts deciding that the taxes were not payable. He states what he understands the Minister's "attitude" in the matter to be and, while he asks the Minister to confirm that understanding "so that" the appellant's "check may go forward to you promptly," the letter does not even suggest the then existence of an oral agreement by way of a condition to the settlement that had been made in June and under which $200,000 had already been paid. Nor does the Minister's reply even suggest that there had been, up to that time, any promise or assurance that in certain events the moneys would be refunded. Mr. Euler, who was the Minister

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at the time of the settlement in 1928 and was again a Minister of the Crown at the time of the trial of this action in 1936, was not called at the trial.

It is convenient at this point to refer to the letter that Mr. Thistle wrote on behalf of the appellant on January 9th, 1930, to the Department of National Revenue when there was a dispute as to the taxes for the month of April, 1928. In that letter Mr. Thistle advised the Department that the matter had been referred to the company's solicitor, Mr. Barnes of Windsor, and that the Department would hear from him. In a letter of Mr. Barnes to the Commissioner of Excise on January 6th, 1930, he said in part:

> It is our contention that the Department, having accepted the cheque so enclosed with the letter of June 7th, 1928, above mentioned and the further cheque of $60,000, which was sent on October 13th, 1928, cannot now take the position that the terms of settlement were not as set out in our client's letter of June 7th, 1928.

The appellant was at that time insisting that its letter of June 7th, 1928, be treated as setting out the terms of settlement. There was no suggestion that the settlement was subject to the condition now alleged.

Notwithstanding the letter of the Minister to Mr. Odette of August 14th (a copy of which Mr. Odette sent the appellant by letter dated August 17th), there is not a word in the subsequent letter of the appellant of October 13th (above set out) to the Minister enclosing the final cheque of $60,000 to indicate that the settlement had been made on the condition that the payments would be refunded if it were later established that the appellant had not been liable for the taxes claimed in the action.

The appellant has failed to establish its claim that the settlement at $260,000 was subject to the condition which it now alleges. The entire basis of this action is the existence of an arrangement or understanding made prior to or contemporaneous with the settlement as a condition for the repayment of the moneys. It was not contended that the $60,000 payment could be recovered on any other basis; that is, that it could be treated separately and recovered upon the letter of the Minister of August 14th. The settlement, of course, had been made in June and $200,000 on account had been paid at that time. Payment of the balance of $60,000, had it been withheld, could have been enforced under the settlement.

We do not overlook the fact that the Minister in his personal letter to Mr. Odette of August 14th, 1928, said that

> if it can be shown that any overpayment has been made by the company in question, or if it is established that they were not liable for any tax that they may have paid, you can assure them that refund will be made.

But the appellant does not seek to recover the moneys upon the basis of that assurance as an independent agreement. The learned counsel for the appellant no doubt fully recognized the difficulty there would have been in any such claim, in that the Minister had not authority to make any such agreement independent of the settlement, binding upon the Crown. The moneys paid became part of the Consolidated Revenue Fund of Canada and it would require a statute, or something of like force, to clothe the Minister of a Department with authority to agree to repay to a subject moneys voluntarily paid by the subject in settlement of an action brought by the Crown for payment of taxes alleged to have become due and payable. It may be useful to mention some of the authorities which we have considered: *Commercial Cable Co.* v. *Government of Newfoundland* (1); *Mackay* v. *Attorney-General for British Columbia* (2); *Auckland Harbour Board* v. *The King* (3); *Attorney-General* v. *Great Southern and Western Ry. Co. of Ireland* (4).

It is not for us to consider whether the appellant company has just cause for complaint against the Government outside a court of law—that is to say, assuming the facts to be the same as those in the *Carling* case (5), whether the Government is acting arbitrarily and is morally in the wrong in declining to implement the assurance of the Minister. That would be something altogether outside our province. All we have to determine as a court of law is whether there was an enforceable agreement made by the Minister binding upon the Crown to refund the moneys in question. The assurance given by the Minister in his letter to Mr. Odette, once it is determined that it was not confirmation of a condition to the original settlement, cannot be sued upon in a court of law as an independent agreement, for the reason that it was not competent for

(1) [1916] 2 A.C. 610.
(2) [1922] 1 A.C. 457.
(3) [1924] A.C. 318.
(4) [1925] A.C. 754.
(5) [1931] A.C. 435.

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the Minister to fetter the future executive action of the Government.

The appellant further contended in the action that in any event the payments had not been made voluntarily but by force of threats by the Minister and officers of the Department that unless payment were made the appellant's licence to carry on the trade or business of a brewer would be revoked and would not be renewed and the appellant would thereby be forced to discontinue its business as a brewer. It may well be that the appellant had some fear that if it did not settle the Government's action against it, the Government might not renew its licence, and there is evidence that the renewal of the licence in 1928 was held up for some little time. But the evidence does not establish any threats against the appellant or that there was any involuntary action on its part in entering into the settlement or in making the payments sought to be recovered.

In view of our conclusions, it is unnecessary for us to consider the question of fact whether the goods in this case were manufactured and sold for export as was proved in the *Carling* case (1).

The learned trial judge concluded:

> In the main I am satisfied that the goods in question were sold by the suppliant for export, that it saw the same were exported, and that in fact they were exported, within the meaning of the *Carling* case (1) * * * If, therefore, I had to dispose of this case solely upon the question of fact as to whether the goods were manufactured and sold for export, and were in fact exported, I would feel obliged to sustain the contention of the suppliant. If the suppliant were here being sued for the taxes in question, as in the *Carling* case (1), I would feel obliged to hold that the Crown must fail in its action.

Mr. Tilley made a powerful attack upon this finding of fact of the learned trial judge, but we do not find it necessary to examine all the evidence to ascertain whether we should come to the same conclusion. We have assumed, for the purpose of determining the legal question involved in the appeal, that the facts were favourable to the appellant.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McTague, Springsteen & McKeon.*

Solicitor for the respondent: *A. C. Hill.*

(1) [1931] A.C. 435.

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T. G. BRIGHT & COMPANY LTD. (DEFENDANT) ..... APPELLANT; * June 15, 16. * Dec. 12.

AND

SARAH JANE KERR, ADMINISTRATRIX OF THE ESTATE OF JOHN TODD KERR, DECEASED (PLAINTIFF) ..... RESPONDENT;

AND

WILBERT SINCLAIR AND LESLIE SINCLAIR (DEFENDANTS).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Master and servant—Principal and agent—Company manufacturing and selling wine in Ontario—Delivery of parcels to its customers by an individual—Motorcycle used by latter striking pedestrian—Question as to liability of the company—Relationship between the company and the individual—Liquor Control Act, Ont., and regulations—Question whether judgment taken at trial against individual precluded plaintiff from proceeding further against company.

Appellant was a company licensed to manufacture and sell wine throughout Ontario, and had a retail store on Yonge St., Toronto. Its deliveries up to 4 o'clock p.m. were made by a certain delivery service. In the evening one S. would telephone inquiring if there were parcels to deliver, and if so would call for them and make delivery (within the time prescribed by regulations under the *Liquor Control Act*), collecting payment and securing signatures to orders and receipts. He was paid a stipulated sum per parcel, payment being made weekly. While delivering parcels as aforesaid, the motorcycle which he was driving struck K. who died as the result. The question on this appeal was appellant's liability for damages by reason of the accident (in an action brought under the Ontario *Fatal Accidents Act*). At the trial, which was had with a jury, the trial judge, on motion at close of plaintiff's case, dismissed the action as against appellant. The Court of Appeal for Ontario (Middleton J.A. dissenting) ([1937] O.R. 205) set aside said dismissal and ordered a new trial between plaintiff and appellant, confined to the question of liability of appellant and assessment of damages. Appellant appealed to this Court.

Held: Appeal allowed and judgment at trial restored. (Duff C.J. and Davis J. dissenting).

Per Crocket J.: This was a clear case of casual or collateral negligence on the part of a private carrier for hire. In the operation of the motorcycle, S. was not appellant's servant within the meaning of the rule which makes a master liable for the acts of a servant in the performance of his duty as such—he was not subject to appellant's control or direction, he was entirely his own master; his negligence, therefore, cannot properly be attributed to appellant. Also, neither the agreement under which S. was entrusted with the custody of the wine for delivery, nor any of the regulations made under the *Liquor Control Act* imposed any responsibility upon appellant for the injury of third persons by the negligent operation of the motorcycle. It is

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

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only upon the basis of appellant's employment of S. to make this particular delivery by means of a motorcycle in itself involving such danger to third persons that the accident might reasonably have been foreseen that appellant could properly be fixed with responsibility for K.'s death. In that case appellant's responsibility would really rest upon its own direct negligence in employing S. to make the delivery by that means rather than upon the so-called doctrine of vicarious responsibility (*City of Saint John* v. *Donald,* [1926] S.C.R. 371, at 383-4); it cannot be said that the delivery of parcels on occasion by means of a hired motorcycle is inherently dangerous.

Per Kerwin J.: A person employing another is not liable for the latter's collateral negligence unless the relation of master and servant exists between them. It may be assumed that appellant knew that the delivery would be made by motorcycle, and that it therefore authorized delivery by that means. But, while appellant had the right to take the work out of S.'s hands, it had not the right to say that he was to continue the work and direct him during the continuance of it. S. was the agent of appellant so as to make appellant liable for anything done by S. with its authority; but appellant was not liable for S.'s negligence in driving the motorcycle, as that was a casual or collateral matter which appellant did not authorize expressly or by implication. Not being subject to appellant's control as to the manner of driving, S. was not its servant. There was no evidence of any authority in S. to drive negligently and there was, therefore, nothing to leave to the jury.

Hudson J. adopted the reasons of Middleton J.A. (dissenting) in the Court of Appeal ([1937] O.R. at 228-232).

Per Duff C.J. and Davis J. (dissenting): There was evidence on which a jury might reasonably find that, in the management of his motorcycle while driving it at the place and time in question, S. was acting in appellant's business in execution of his duty as its agent; that being so, plaintiff's case should have been submitted to the jury. The jury might not unreasonably find that in the circumstances in which the wine was placed in S.'s custody for delivery, the only practicable means of carriage was by some kind of motor vehicle; and, having regard to the practice, that on the occasion in question the goods were entrusted to and received by him on the tacit understanding that carriage would be effected by motorcycle; and that it was well understood that he must drive through the public streets. By force of the regulations made under the *Liquor Control Act,* S., who was not a common carrier within their meaning, could only lawfully be in possession of the parcels as appellant's agent; and a jury would be entitled to find as a fact that appellant's store manager was familiar with the purport of the regulations governing the sale of wine at the store, and, moreover, as a consequence, that S. was entrusted with the wine in the only capacity in which (not being a purchaser or approved carrier) he could lawfully be entrusted with it, namely, as appellant's agent. (Inclination expressed to the opinion that, under the principle stated in *In re Hallett's Estate,* 13 Ch. D. 696, at 727, it was not competent either to appellant or S. in an action of this character to deny that the wine was in fact entrusted to S. for carriage and delivery as appellant's agent). The parcels having been placed in S.'s custody as agent, obviously it was his duty as agent to take reasonable care for the safe carriage and delivery, and it would be clearly open to the jury to find that, as

incidental to that duty, he was under an obligation to his principal in respect of the management of the motorcycle; and it would be incumbent upon the trial judge to instruct them that if they thought S.'s duty as agent embraced the duty to manage his motorcycle in such a manner as not to risk the loss of the wine or any part of it, it was for them to say whether the management of the motorcycle generally was a matter incidental to the functions expressly entrusted to him.

The rule *respondeat superior*, and its ground, discussed, and authorities referred to. The rule does not rest upon any notion of imputed guilt or fault. The principal having the power of choice has selected the agent to perform in his place a class or classes of acts, and it is not unjust that he who has selected him and will have the benefit of his services if efficiently performed should bear the risk of his negligence in matters incidental to the doing of the acts.

The fact that the damages were assessed against S. (who did not appear and was not represented at the trial) and judgment taken against him did not preclude the plaintiff, in the special circumstances of this case [discussed by Rowell, C.J.O. below in [1937] O.R. at 223, 224], from proceeding further against appellant.

APPEAL by the defendant company from the judgment of the Court of Appeal for Ontario (1) allowing the plaintiff's appeal from the judgment of Honeywell Co. C.J. dismissing the action as against the defendant company.

The plaintiff was the widow of, and the administratrix of the estate of, John Todd Kerr, deceased, who died as the result of being struck, on March 20, 1936, on Avenue Road, Toronto, Ont., by a motorcycle owned by the defendant Leslie Sinclair and driven by the defendant Wilbert Sinclair, who at the time of the accident was delivering parcels of wine to customers of the defendant company, which was a duly incorporated company, licensed to manufacture and sell native wine throughout the province of Ontario and had a retail store on Yonge street, Toronto.

The action was brought under the *Fatal Accidents Act* (Ont.) on behalf of the plaintiff and her infant children to recover damages by reason of the death of the said deceased. The defendants Sinclair did not appear at the trial nor were they represented by counsel. At the trial, at the close of the plaintiff's case, on motion by counsel for the defendant company, the trial judge dismissed the action as against it. It was then agreed between counsel that the trial judge should dispose of the action as against the other defendants without reference to the jury. He fixed the damages at $12,000, and gave judgment against

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the defendants Sinclair for that sum. Upon appeal by the plaintiff to the Court of Appeal for Ontario from the dismissal of the action against the defendant company, the Court of Appeal (Middleton J.A. dissenting) allowed the appeal, set aside the judgment below, and ordered that a new trial be had between the plaintiff and the defendant company, at which trial the issues should be confined to the question of the liability of the defendant company for the negligence of the defendant Wilbert Sinclair and to the assessment of damages as against the defendants (1). Middleton J.A., dissenting, would dismiss the appeal. The defendant company appealed to the Supreme Court of Canada.

The defendant Wilbert Sinclair was not a common carrier within the meaning of the regulations made under the Ontario *Liquor Control Act.*

In the course of his reasons for judgment the trial judge stated as follows with regard to the facts:

This company [defendant company] had its regular delivery service during the day time, and after hours had its parcels delivered by various carriers. It was shown that the defendant Wilbert Sinclair had applied to the [defendant company] for the privilege of delivering parcels, and stated that he could deliver by motorcycle or by car. It was not shown that the [defendant company] made any stipulation as to how he was to deliver. Sinclair was not under any obligation to deliver. He would call up in the evening by telephone and ask if they had any parcels to deliver. If they had, he would come to their store, 223½ Yonge street, receive the parcels, and proceed to deliver them. With the parcels there went a bill on a form provided by the Liquor Control Board, which, among other things, required on delivery of the parcel the signature of the purchaser, the address, the driver's signature, and a line for entry of the method of delivery. On none of the forms was the method of delivery specified. There was no written agreement between the [defendant company] and the defendant Sinclair. The instructions, according to the evidence of the manager, were to take a parcel to the address, take the form or bill, and have it signed by the person getting it. On C.O.D. orders cash was to be received before turning over the parcel. The manager did not know that Sinclair did not have a licence. He was paid every Saturday 25 cents for delivering each parcel within Toronto, and 35 cents outside of Toronto. When he met with difficulty he would phone in for instructions. Sometimes the defendant Sinclair did not phone up, or did not come for parcels, and the [defendant company] had to obtain someone else to make the delivery. There was no control over Sinclair as to route or time. There was no specification as to how he was to deliver, whether by motorcycle, car or street car.

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In the course of his reasons for judgment in the Court of Appeal, Rowell, C.J.O., stated as follows with regard to the facts:

According to the evidence, the procedure adopted by the defendant company was as follows: an order was received by telephone and the name of the purchaser, his address and the quantity of wine required was entered upon the order form by Johnston or the clerk in the office who received the order. The order was then filled and ready for delivery. All deliveries up to four o'clock in the afternoon were made by Eddy's Delivery Service, but they made their last call at four o'clock, and orders received after that hour were delivered by the defendant Wilbert Sinclair, who called for the parcels or cartons at six or half past six o'clock in the evening. It was his duty, before delivering the wine to the purchaser, to secure the purchaser's signature to the original order, which must be forwarded by the company to the Liquor Control Board. He must also secure payment of the purchase price and a receipt for the wine on delivery. He could not deliver the wine without securing the signature to the original order, or without payment of the purchase price, and delivery had to be made within the time prescribed by the Regulations. If the residence of the purchaser was an apartment house, boarding house or rooming house or hotel, he must hunt out the purchaser and make delivery directly to him. If any difficulty arose in making delivery in accordance with his instructions, it was his duty to telephone to Mr. Johnston and receive special instructions and to act on those instructions. He was required to return to the company the following day the original order for purchase duly signed and the purchase price. Having regard to the time within which delivery must be made to comply with the regulations, it could only be made by motor-cycle or motor car, and it appears quite clear from the evidence that Johnston knew and approved of the use of the motor-cycle for delivery of the wine. Sinclair was paid twenty-five cents a carton for deliveries within the city limits and thirty-five cents outside the city, the payments being made weekly.

By the judgment now reported the appeal to this Court was allowed (with costs of both appeals) and the judgment of the trial judge restored. The Chief Justice and Davis J. dissented.

T. J. Agar K.C. for the appellant.

E. L. Haines for the respondent.

The judgment of the Chief Justice and Davis J. (dissenting) was delivered by

THE CHIEF JUSTICE.—I agree with the conclusion of the Court of Appeal and in substance with the reasoning of the Chief Justice of Ontario. The new trial ordered by the judgment of the Court of Appeal is limited to the issue of the responsibility of the appellants for the negligence of Wilbert Sinclair and the damages.

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The question now to be decided is whether there was evidence upon which a jury might reasonably find that, in the management of his motorcycle while driving it through the public streets on the evening in question on his way to make delivery of the parcels entrusted to him, Sinclair was acting in the business of the appellants in execution of his duty as their agent. If there was such evidence, the plaintiff's case ought to have been submitted to the jury.

The jury might not unreasonably find that in the circumstances in which the wine was placed in Sinclair's custody for delivery, the only practicable means of carriage was by some kind of motor vehicle; and, having regard to the practice, that on the particular occasion with which we are concerned, the goods were entrusted to Sinclair and received by him on the tacit understanding that carriage would be effected by motorcycle; and, moreover, that it was well understood he must drive through the public streets.

When Regulations numbered 57 to 62 are read with those numbered 113, 119 and 120, it appears that carriage of beer from a brewery or warehouse to the residence of a purchaser (except by a purchaser) is regulated in this sense, that the liquor must be carried by the brewer, by his agent or by a common carrier sanctioned by the Board, unless authority to make such carriage otherwise is given by the Board. These provisions with regard to the carriage of beer are, by force of s. 103, applicable to native wines.

By force of these regulations, Sinclair, who, admittedly, was not a common carrier within the meaning of the Regulations, could only lawfully be in possession of the parcels of wine he was carrying as agent of the appellants. I am inclined to think that, under the principle stated by Sir George Jessel in *Re Hallett* (1), it is not competent either to the appellants or to Sinclair in an action of this character to deny that the wine was in fact entrusted to Sinclair for carriage and delivery as the agent of the appellants:

> Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilized countries, than this, that

(1) *In re Hallett's Estate; Knatchbull* v. *Hallett*, (1880) 13 Ch. D. 696, at 727.

where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. A man who sells the goods of another as agent for the owner cannot prevent the owner adopting the sale, and deny that he acted as agent for the owner. It runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant it under the power. Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law.

In any case, a jury would be entitled to find as a fact that the manager of the appellants' store was familiar with the purport of the Regulations governing the sale of the wine at the store and, moreover, as a consequence, that Sinclair was entrusted with the wine in the only capacity in which (not being a purchaser or approved carrier) he could lawfully be entrusted with it, namely, as the agent of the appellants.

The parcels having been placed in Sinclair's custody as agent, obviously it was his duty as agent to take reasonable care for the safe carriage and delivery of the wine and it would be clearly open to the jury to find that, as incidental to that duty, he was under an obligation to his principal in respect of the management of the motorcycle; and it would be incumbent upon the trial judge to instruct them that if they thought Sinclair's duty as agent embraced the duty to manage his motorcycle in such a manner as not to risk the loss of the wine or any part of it, it was for them to say whether the management of the motorcycle generally was a matter incidental to the functions expressly entrusted to him.

It would appear to be necessary to make some reference to the ground upon which the responsibility of a principal for the acts of his agent rests.

Respondeat superior is a rule which does not rest upon any notion of imputed guilt or fault. The fallacy that it does was responsible for the difficulty that great lawyers of the last century felt (Bramwell B., for example) in admitting the liability of a corporation for the fraud of its agents. In *Hern* v. *Nichols* (1) the point in issue was the responsibility of a merchant for the deceit of his factor

(1) (circa 1700) 1 Salkeld 289.

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beyond the sea. Holt C.J. states the broad ground of responsibility thus:

> * * * for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger.

In *Hall* v. *Smith* (1), Best C.J. says:

> The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it.

The principal having the power of choice has selected the agent to perform in his place a class or classes of acts, and, to adapt the language of Henn Collins M.R. in *Hamlyn* v. *Houston* (2), it is not unjust that he who has selected him and will have the benefit of his services if efficiently performed should bear the risk of his negligence in "matters incidental to the doing of the acts, the performance of which has been entrusted to him."

The rule has been precisely explained in the House of Lords in two modern cases in which Story's statement of it has been adopted. In *Percy* v. *Corporation of the City of Glasgow* (3), Lord Haldane said:

> As was laid down by Story in a passage adopted in an earlier case by Blackburn J. and approved in this House in *Lloyd* v. *Grace, Smith & Co.* (4), "the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment,* although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them.'" The limitation is that "'the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any other matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit.'"

In *Lloyd* v. *Grace, Smith & Co.* (5) mentioned by Lord Haldane, these passages from Story were made part of the reasoning of Lord Macnaghten's judgment in which Lord Loreburn, Lord Atkinson and Lord Shaw concurred. They had previously been quoted by Lord Blackburn (Blackburn J. as he then was) with apparent approval in delivering the judgment of the Queen's Bench (Cock-

(1) (1824) 2 Bing. 156, at 160.
(2) [1903] 1 K.B. 81, at 85-86.
(3) [1922] 2 A.C. 299, at 306.
(4) [1912] A.C. 716, 737.
(5) [1912] A.C. 716.

burn, C.J., Blackburn, Mellor and Lush JJ.) (1). Story's statement of the law having been thus adopted and acted upon by the House of Lords, it is, I think, binding upon this Court (*Robins* v. *National Trust Co.*) (2).

An argument was addressed to us by the appellants based upon the allegation that Sinclair and the appellants being joint tortfeasors and the respondent, in default of appearance by Sinclair, having had the damage assessed against Sinclair and taken judgment against him, is precluded from proceeding further against the appellants. I agree with the learned Chief Justice of Ontario that, in the special circumstances of this case, the appellants cannot succeed on this ground.

The appeal should be dismissed with costs.

CROCKET J.—I agree with Middleton J.A. and also with my brother Kerwin that this is a clear case of casual or collateral negligence on the part of a private carrier for hire in the operation of the motorcycle which he used for the purpose of making delivery of the package of wine to the purchaser's residence, and that the driver, not being subject to the control or direction of the appellant in the operation of the motorcycle, was not its servant within the meaning of the rule which makes a master liable for the acts of a servant in the performance of his duty as such. Sinclair, to my mind, was entirely his own master as regards the operation of the motorcycle and his negligence, therefore, cannot properly be attributed to the appellant.

I am also of the opinion that neither the agreement, under which Sinclair was entrusted with the custody of the wine for delivery to the purchaser's residence, nor any of the regulations made under the provisions of the *Liquor Control Act* concerning the delivery of liquor or wine to private residences imposed any responsibility upon the appellant for the injury of third persons by the negligent operation of the motorcycle. It is only upon the basis of the appellant's employment of Sinclair to make this particular delivery by means of a motorcycle in itself involving such danger to third persons that the unfortunate

(1) *McGowan & Co.* v. *Dyer*, (1873) L.R. 8 Q.B. 141, at 145.

(2) [1927] A.C. 515, at 519.

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accident might reasonably have been foreseen that the appellant could properly be fixed with responsibility for the death of the intestate. In that case the appellant's responsibility would really rest upon its own direct negligence in employing Sinclair to make the delivery by that means rather than upon the so-called doctrine of vicarious responsibility. See judgment of Anglin, C.J., in *City of Saint John* v. *Donald* (1), at bottom of p. 383 and top of p. 384. For my part, I am not prepared to hold that the delivery of parcels on occasion by means of a hired motorcycle is inherently dangerous—any more so than their delivery by a hired motor car or motor truck. Accidents to strangers, of course, are always possible in the operation of either motor cars or motorcycles, and, indeed, in these days very probable if due care is not exercised by those in charge of them. I do not feel justified, however, in acceding to the suggestion that a merchant or any other person by the mere act of hiring a motor truck, motor car or motorcycle on occasion to make delivery of goods by such means assumes liability for any negligence of which the driver of the hired vehicle may be guilty.

In my opinion the learned County Court Judge (Honeywell) had no other recourse upon the undisputed facts than to dismiss, as he did, the action as against the appellant.

I would, therefore, allow the appeal and restore the trial judgment with costs throughout.

KERWIN J.—The facts are set out in the reasons for judgment of the members of the Court of Appeal for Ontario (2) and need not be repeated. The only question in this appeal, to my mind, is whether the relationship of master and servant existed between the appellant and Wilbert Sinclair whereby the former would be rendered liable for the collateral negligence of the latter.

Lord Blackburn in *Dalton* v. *Angus* (3) states:

> Ever since *Quarman* v. *Burnett* (4) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them.

Omitting all reference to circumstances where the employer owes a duty which he cannot avoid by hiring another, I

(1) [1926] S.C.R. 371.
(2) [1937] O.R. 205; [1937] 2 D.L.R. 153.
(3) (1881) 6 App. Cas. 740, at 829.
(4) (1840) 6 M. & W. 499.

do not read any of the decisions that are binding on this Court and that are usually cited for the purpose, as altering the law as thus set forth and in effect Pollock and Salmond in their books on Torts treat this statement to be the result of the cases.

In the Thirteenth Edition of Pollock, at page 82, the author points out that the rule being that a master is liable for the acts, neglects and defaults of his servants in the course of the service, it is necessary to define "servant," and states as to this point that "it is quite possible to do work for a man in the popular sense, and even to be his agent for some purposes, without being his servant." That part of the text which follows, and which I transcribe, was approved by McCardie J. in *Performing Rights Society* v. *Mitchell and Booker* (1):

> For the acts or omissions of such a one about the performance of his undertaking his employer is not liable to strangers, no more than the buyer of goods is liable to a person who may be injured by the careless handling of them by the seller or his men in the course of delivery.

To the same effect is the Eighth Edition of Salmond which at pages 88 and 89 draws the distinction between the case of a principal who is liable only for those acts of his agent which he expressly or impliedly authorized but which rule is subject, so far as here applicable, to an exception which governs the particular form of agency which exists in the case of master and servant.

In the case at bar it may be assumed that the appellant knew that the delivery of wine would be made by motorcycle and that it, therefore, authorized the delivery by that means. But while the appellant had the right to take the work out of Sinclair's hands, it had not the right to say that he was to continue the work and direct him during the continuance of it. In thus paraphrasing another extract from the judgment in the *Performing Rights* case (1), I have not overlooked the fact that McCardie J. was there considering the test to be applied in deciding whether a man is a servant or an independent contractor, but I think the test is also the proper one as to when a man is that particular class of agent defined as servant. Indeed it is but an elaboration of the definition given by Lord Justice Bramwell in *Yewens* v. *Noakes* (2), where

(1) [1924] 1 K.B. 762. (2) (1880) 6 Q.B.D. 530, at 532.

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he says, "a servant is a person subject to the command of his master as to the manner in which he shall do his work."

The matter is discussed in the Fourth Edition of Bevan on Negligence, at page 713, where the author, after quoting this definition, also gives the evidence of Lord Justice Bramwell taken before the First Committee of the House of Commons on Employers' Liability, and then continues:

> Once again, the distinction between a servant and an agent is the distinction between serving for and acting for. An agent as contrasted with a servant has a discretion as to the time and manner of performance, and sometimes as to acting or not acting.

In my judgment, Wilbert Sinclair was the agent of the appellant so as to make the latter liable for anything done by him with its authority. But the appellant is not liable for Sinclair's negligence in driving the motorcycle, as that was a casual or collateral matter which the appellant did not authorize expressly or by implication. Not being subject to the appellant's control as to the manner of driving, Sinclair was not its servant. There was no evidence of any authority in Sinclair to drive negligently and there was, therefore, nothing to leave to the jury. I would allow the appeal with costs in this Court and the Court of Appeal and restore the judgment at the trial.

HUDSON J.—I think this appeal should be allowed and the judgment at trial restored for the reasons given by Mr. Justice Middleton in the court below

Appeal allowed with costs.

Solicitors for the appellant: *Hughes, Agar & Thompson.*

Solicitor for the respondent: *T. B. Horkins.*

IN THE MATTER of the Estate of Frank Hamilton Mewburn, Deceased

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* Oct. 5.
* Dec. 12.

HELEN CHILTON MEWBURN ROBINSON ..... APPELLANT;

AND

THE ROYAL TRUST COMPANY (EXECUTOR AND TRUSTEE OF THE WILL OF SAID DECEASED)..... RESPONDENT.

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

Will—Construction—Gift of income for life with power to appoint by deed or will the inheritance of the principal—Right of beneficiary to exercise power by deed in own favour so as to acquire right to principal immediately.

A testator in his will, after certain specific gifts, directed that his trustee stand possessed of the residue of the estate upon trust for conversion and, after payment of debts, etc., to invest the residue and pay the income therefrom to the testator's wife during her life and upon her death (which occurred—subsequently to the testator's death) to pay a certain share thereof to a son (which was done), and to invest one-half of the residue in trust to pay the income therefrom to another son during his life (with power to pay him a limited sum from the principal) and upon his death his share (or so much thereof not received by him) was to "go and be disposed of as he may by deed or will appoint," with gift over in default of appointment. As to the remaining half of said residue the following provision (now in question) was made: to invest it in trust to pay the income therefrom to the testator's daughter during her lifetime "and upon her death said share to go and be disposed of as she may by deed or will appoint," and in default of such appointment (or so far as it should not apply), if she should die leaving issue then living, the share to go to her child or children then living, equally, to be paid to each on attaining 21 years of age, income in meantime to be applied for support, etc., during respective minorities; if she should die without leaving issue then living and without having made any such appointment as aforesaid, the share to go to the testator's two sons equally or to the survivor of them. The daughter demanded payment of the share covered by this provision, and the question of her rights thereunder came before the court.

Held: The daughter could exercise her said power of appointment by deed in her own favour so as to vest in her immediately her share of the residue of the estate and so as to entitle her to have the same transferred to her immediately.

Authorities referred to and discussed.

Judgment of the Appellate Division, Alberta, [1938] 2 W.W.R. 433, affirming judgment of Shepherd J., [1938] 2 W.W.R. 152, reversed.

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

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In re MEWBURN ESTATE.

ROBINSON *v.* THE ROYAL TRUST COMPANY.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Shepherd J. (2) answering in the negative a certain question submitted to the court on an application (upon originating notice of motion) by the executor of the will of Dr. F. H. Mewburn, late of Edmonton, Alberta, deceased, for an order determining the rights or interests of the present appellant, a beneficiary under the said will, and more particularly for an order determining the said question, which is hereinafter set out.

The said deceased died on January 29, 1929. By his will, made December 24, 1924, he appointed the present respondent executor and trustee thereof, and, after certain specific gifts, he directed that the trustee should stand possessed of all the residue of his property real and personal upon trust for conversion and, after payment of the testator's debts, etc., and certain payments by way of legacy, then upon trust for investment of the residue and to pay all the income therefrom to his wife during her life, and upon her death, (and after sale of residence, lots and furniture, in which his wife had been given only a life interest), from the proceeds of the investments (and of said sale)

as to one-third thereof after deducting the sum of [$5,000] which I have already advanced to my son Frank Hastings Hamilton Mewburn to pay the remainder of said one-third to him if then living or as he may by deed or will appoint

with gift over in default of appointment. (The said son, after his mother's death, was paid his share). The will then provided:

I further direct that as to the residue of my estate and investments my trustee shall invest * * * one-half thereof * * * in trust to pay the income therefrom * * * to my said son Arthur Fenwick Mewburn during his life with power * * * to pay and advance to him from time to time part of the principal but not more in all than [$10,000]. Upon the death of my said last mentioned son I direct that as to his share or so much thereof as he shall not have received the same shall go and be disposed of as he may by deed or will appoint

with gift over in default of appointment, alternatively according to whether said son died leaving a widow only, a widow and child or children, or a child or children only, living at the time of his death, or leaving no issue or widow then living.

(1) [1938] 2 W.W.R. 433; [1938] 3 D.L.R. 459.
(2) [1938] 2 W.W.R. 152.

Then came the provision now in question, which read as follows:

As to the remaining half of said residue I authorize and direct my trustee to invest, reinvest and keep the same invested in such securities as aforesaid in trust to pay the income therefrom yearly or oftener if convenient to my said daughter Helen Chilton Mewburn during her lifetime and upon her death said share to go and be disposed of as she may by deed or will appoint and in default of such appointment or so far as such appointment shall not apply if she should die leaving issue then living I direct that her said share shall go to her child or children then living and if more than one then equally among them to be paid to each of said children on attaining the age of twenty-one years the income in the meantime to be paid and applied for the support, maintenance and education of such child or children during their respective minorities. If my said daughter should die without leaving issue then living and without having made any such appointment as aforesaid her said share shall be divided equally between and added to the shares hereby respectively given to my said two sons or to the survivor of them.

The testator's widow died on March 23, 1937. A division of the residuary estate as at that date was made with the approval of all interested parties. The share belonging to the son, Frank Hastings Hamilton Mewburn, was paid to him. Separate trusts were set up with respect to the shares of the estate belonging to Arthur Fenwick Mewburn and the present appellant, Helen Chilton Mewburn Robinson (described in the will as Helen Chilton Mewburn), the trusts being administered by the executor.

On October 12, 1937, the present appellant wrote the trustee as follows: "I have decided to ask you to turn over to me all the stocks and bonds which have been allocated to me from the estate of my father, the late Dr. F. J. Mewburn."

The trustee thereupon applied to the court for advice and direction as aforesaid. (The other sons did not oppose the present appellant's claim. No question was raised in the appeal as to the formalities which are necessary to exercise the power of appointment or as to the sufficiency of the demand which the present appellant made on the trustee).

The question submitted was:

Can Helen Chilton Mewburn Robinson exercise the power of appointment vested in her by the said will, by deed in her own favour so as to vest in her immediately her share of the residue of the said estate and so as to entitle her to have the same transferred to her immediately?

Shepherd J. answered the question in the negative (1), and this was affirmed by the Appellate Division (Ford J.A.

(1) [1938] 2 W.W.R. 152.

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dissenting) (1), and appeal was brought to this Court. By the judgment of this Court, now reported, the appeal was allowed and the question answered in the affirmative.

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

H. G. Nolan K.C. for the respondent.

The judgment of the Chief Justice and Rinfret, Kerwin and Hudson JJ. was delivered by

KERWIN J.—We are asked to determine the following question, which arises in the interpretation of the will of the late Doctor F. H. Mewburn and in the administration of his estate:

Can Helen Chilton Mewburn Robinson exercise the power of appointment vested in her by the said will, by deed in her own favour so as to vest in her immediately her share of the residue of the said estate and so as to entitle her to have the same transferred to her immediately?

By his will, after several specific devises and bequests, the testator directs his trustees to stand possessed of the residue of his estate in trust to pay debts and funeral and testamentary expenses and certain other sums, and to pay the income to his wife during her life. Upon the latter's death (which has occurred) the trustees are to hand over one-third of the ultimate residue to a son, less the sum of five thousand dollars advanced by the testator to him. As to one-half of the ultimate residue, provision is made for another son, and then comes the part in question:

As to the remaining half of said residue I authorize and direct my trustee to invest, reinvest and keep the same invested in such securities as aforesaid in trust to pay the income therefrom yearly or oftener if convenient to my said daughter Helen Chilton Mewburn during her lifetime and upon her death said share to go and be disposed of as she may by deed or will appoint and in default of such appointment or so far as such appointment shall not apply if she should die leaving issue then living I direct that her said share shall go to her child or children then living and if more than one then equally among them to be paid to each of said children on attaining the age of twenty-one years the income in the meantime to be paid and applied for the support, maintenance and education of such child or children during their respective minorities. If my said daughter should die without leaving issue then living and without having made any such appointment as aforesaid her said share shall be divided equally between and added to the shares hereby respectively given to my said two sons or to the survivor of them.

It may be taken that the testator intended (1) that his daughter should enjoy the income for her life and (2) that she might direct where the corpus should go but that such

(1) [1938] 2 W.W.R. 433; [1938] 3 D.L.R. 459.

direction should take effect only upon her death. However, it is argued that because of her general power to appoint by deed there is a rule of law whereby, notwithstanding this expressed intention, the daughter is entitled to appoint the share in question to herself by deed and to call upon the trustees to transfer the corpus to her. The provision made by the testator whereby his daughter would be assured of an income for her life would thus be set at naught and she would be able to use the fund as she thought fit.

In *Barford* v. *Street* (1), Sir William Grant had to consider a will by which the residue of the testator's personal estate and all his real estate were given and devised to a trustee to pay the rents, issues, interests, dividends, and produce, to Mary Barford during the term of her natural life, and from and immediately after her decease upon trust to convey, etc., the whole of the residue to and among such person or persons, and in such proportions, and at such time or times, and in such manner, as Mary Barford in her lifetime should from time to time by any deed or will appoint; and in default of such appointment to pay and divide the estate among the children of Richard Barford, her father. Mary Barford executed a deed poll directing the trustee to convey and assign all the estate to her. In giving judgment, the Master of the Rolls said:

> What do you contend to be the nature and extent of her interest? An estate for life with an unqualified power of appointing the inheritance comprehends everything. What induced me at first to doubt was the indication of an intention in the Codicil, that the estate should remain in the trustee for the life of the Plaintiff, with powers to her, inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest. But I do not think, I can by inference from thence control the clear and express words, by which the power is given to the devisee to dispose of this estate in her lifetime by any deed or deeds, writing or writings, or by her last Will and Testatment. How can the Court say, that it is only by Will that she can appoint? By her interest she can convey her life estate: By this unlimited power she can appoint the inheritance. The whole equitable fee is thus subject to her present disposition. The consequence is, that the trustee must convey the legal fee according to the prayer of the Bill.

In *Irwin* v. *Farrer* (2), there was a legacy in trust to be laid out in stock; the trustees were to pay the dividends as they came due to A. for life and after her decease they were to pay the principal according to her appointment

(1) (1809) 16 Ves. Jr. 135. (2) (1812) 19 Ves. Jr. 86.

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by will or otherwise. A., conceiving herself, by the power so given, to be entitled to an absolute interest in the legacy, applied to the executors for payment, and, upon their declining, filed a bill. Upon the argument *Barford* v. *Street* (1) was cited and in a short judgment the Court of Exchequer declared that under the will the legatee had an absolute power of disposition over the whole fund; that the demand, by the bill, was a sufficient indication of her intention to take the whole for her own benefit; and the execution of a formal appointment in writing was not necessary.

In *Reith* v. *Seymour* (2), it was decided that, on the construction of the will in question, the widow took only an estate for life with a power of appointment, and that the sale by her of a sum of three per cent. stock, which constituted nearly the whole of the residue, and the investment of the proceeds in the purchase of long annuities in her own name, did not amount to an exercise of the power. The Master of the Rolls, Sir John Leach, distinguished the case of *Irwin* v. *Farrer* (3) but only on the ground that the sale and investment by the widow, in the case before him, was not equivalent to the demand by bill by the legatee in the earlier case.

In *Hughes* v. *Wells* (4), it was decided that a wife had no power to dispose of certain trust funds otherwise than by a perfect appointment. At page 767 the Vice-Chancellor, Sir George Turner, discussed the question as to whether the life estate, which he determined was the interest taken by the widow, coupled with such a power, was tantamount to absolute ownership, and determined that *Barford* v. *Street* (1) did not warrant a conclusion in the affirmative because, as he pointed out, in the *Barford* case the power had been exercised. He also referred to *Irwin* v. *Farrer* (3) and *Holloway* v. *Clarkson* (5), mentioning that in those cases no formalities were required in the execution of the powers and, as was observed by Sir John Leach in *Reith* v. *Seymour* (2) with reference to *Irwin* v. *Farrer* (3), it was required in the last mentioned case that the power should be exercised.

(1) (1809) 16 Ves. Jr. 135.
(2) (1828) 4 Russ. 263.
(3) (1812) 19 Ves. Jr. 86.
(4) (1852) 9 Hare 749.
(5) (1843) 2 Hare 521.

In *London Chartered Bank of Australia* v. *Lemprière* (1), their Lordships of the Judicial Committee had to consider whether, under the circumstances, by a general engagement (a letter to the Bank) a married woman had bound her separate estate for the repayment of the obligation. They had also to determine how far this obligation affected the corpus of a certain fund established under a settlement in which she had a limited interest only, with a power of appointment. The gift was to her for her separate use for life without any restraint on anticipation, with remainder as she should, notwithstanding her coverture, by deed or will appoint, with remainder to her executors and administrators. No appointment was made by her except by a will subsequent to the general engagement. It was held that there was an absolute gift to the sole and separate use of the woman. However, it will be noticed that the remainder was to her executors and administrators and it would seem that that was the determining factor on that branch of the case.

In the case at bar, there is no such remainder and the *Lemprière* case (1), therefore, does not touch the precise point we have to determine. Nor does the decision in *Meagher* v. *Meagher* (2) bear upon the matter, as the only question argued and determined in this Court was as to whether an interest in certain real and personal estate was given to the daughters of a testator as trustees or as individuals. But the reasons for the judgment of the Court of Appeal for Ontario, delivered by Sir William Meredith (3), are of interest as indicating the view of the Chief Justice of Ontario that, notwithstanding the intention of the testator that beneficiaries should take a life estate, that estate, when coupled with a general power of appointment (construed to include an appointment by deed), enabled the beneficiaries to exercise the power in their own favour and so become entitled to the whole property. The trial judge had decided that the following clause in the will in question gave the absolute interest to the beneficiaries:—

> To hold all my property in lots eight and nine in the third concession from the bay in the township of York, together with all stock, crops, furniture and other goods and chattels and personal property

(1) (1873) L.R. 4 P.C. 572. (2) (1916) 53 Can. S.C.R. 393.
(3) (1915) 34 Ont. L.R. 33.

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In re MEWBURN ESTATE.

ROBINSON *v.* THE ROYAL TRUST COMPANY.

Kerwin J.

thereon for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make, they my said daughters in the meantime to have all the rents and profits therefrom.

Sir William Meredith disagreed with this view because of the words "they my said daughters in the meantime to have all the rents and profits therefrom" and held that the daughters took a life interest with a general power of appointment. He observed, however, that this would make no practical difference since the daughters might exercise the power in their own favour and so become entitled to the whole property. He referred to the following quotation from the Second Edition of Farwell on Powers, page 8 (continued in the Third Edition at page 9):

> The donee of a general power may appoint to himself. (*Irwin* v. *Farrer*. (1)).

With reference to the case of *Irwin* v. *Farrer* (1), it is observed in Sugden on Powers, 8th edition, page 211:

> A power to appoint by will, *or otherwise,* of course authorizes an appointment by deed.

And in the same text book, at page 104, *Barford* v. *Street* (2) is referred to for the following proposition:

> A devise to A. for life, expressly, with remainder to such persons as he shall by deed or will, or otherwise, appoint, will of course not give him the absolute interest, although he may acquire it by the exercise of his power.

This extract is referred to in *Smith* v. *Smith* (3), by the Master of the Rolls who, dealing with the will there in question, concludes at page 525:

> It follows, therefore, that if John Graydon Smith had desired he might have acquired the absolute ownership in fee; but that, till he did so, he was merely tenant for life with power of appointment by will or deed.

In *Templeton* v. *Royal Trust Company* (4), the majority of the Manitoba Court of Appeal determined, notwithstanding the clear intention of the testator that only on the death of the life tenant should the corpus be distributed as he might direct, that, as the power of appointment was exercisable by deed, the life tenant could exercise it in that manner in his own favour so as to entitle him to have the corpus transferred by the trustee of the testator's will to him immediately.

Barford v. *Street* (2) is not mentioned in Jarman on Wills but in the Seventh Edition, at page 1160, after a

(1) (1812) 19 Ves. Jr. 86.
(2) (1809) 16 Ves. Jr. 135.
(3) (1887) 19 L.R. (Ireland) 514
(4) [1936] 2 W.W.R. 347.

consideration of a number of authorities, the result is stated to be as follows:

(1) A gift to A for life, with a power of appointment by deed or will, with a gift over away from A or his estate, or with no gift over, gives A entire dominion over the fund, and therefore if he applies to the Court for it the Court need not require a formal appointment of the fund, as his application to the Court is a sufficient intention to take the fund.

As authority for this proposition, the author cites *Irwin* v. *Farrer* (1).

In the present case, I conclude that the daughter's life interest, coupled with a power to appoint the corpus by deed, enables her so to appoint to anyone, including herself. The testator's manifest intention is contrary to the authority he conferred upon her. By giving his daughter a power to appoint by will only, he could have ensured that his wishes should be respected. If it be urged that in that event she would be unable to appoint by deed the corpus or part of it so as to assist a child, the same argument now advanced as to why she should not be authorized to deprive herself of the income, would apply. On principle as well as upon a consideration of the authorities referred to, she is able to exercise the power and disregard the testator's wishes.

The appeal should be allowed and the question answered in the affirmative. The costs of the appellant and the respondent Trust Company on the application to the judge of first instance were fixed by him and ordered to be paid out of the corpus, and this order as to costs should stand. The costs of all parties of the appeal to the Appellate Division of the Supreme Court of Alberta and of this appeal should be paid out of the same fund, those of the trustee as between solicitor and client.

CANNON J.—I would allow the appeal and answer the question in the affirmative. The order of the judge of first instance as to costs should stand and the costs of all parties of the appeal to the Appellate Division of the Supreme Court of Alberta and of this appeal should be paid out of the corpus, those of the trustee as between solicitor and client. *Appeal allowed.*

Solicitor for the appellant: *M. M. Porter.*

Solicitors for the respondent: *Bennett, Hannah, Nolan, Chambers & Might.*

(1) (1812) 19 Ves. Jr. 86.

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*Feb. 20.

CANADA RICE MILLS LIMITED

AND

HIS MAJESTY THE KING

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Special War Revenue Act—Liability for tax.

APPEAL by the defendant from the judgment of the Exchequer Court of Canada, Maclean J., President of the Court (1), holding the appellant liable for a balance of sales tax on rice and bags sold between the month of October, 1933 and the month of August, 1936, with penalties and interest, totalling $12,320.12.

The defendant, a manufacturer of rice and bags, sold its entire output during the period in question herein to the Canada Rice Sales Company, a partnership, the members of which were with one exception only, shareholders in defendant company, and in that instance, the partner represented a limited company which was a shareholder in defendant company. The partnership purchased from defendant at a price lower than the current wholesale price, and sold at the current wholesale price. The partners divided any profits accruing to the partnership in the proportion of their holdings in defendant company. The defendant was assessed for sales tax upon the selling price of The Canada Rice Sales Company. The Exchequer Court of Canada held that the Canada Rice Sales Company was not an independent trading unit or business enterprise and that the defendant was liable for the sales tax and penalty assessed on the selling price of The Canada Rice Sales Company.

On the appeal to the Supreme Court of Canada, after hearing argument for the appellant, and without calling on counsel for the respondent, the Court delivered judgment orally, dismissing the appeal with costs. The Chief Justice, speaking for the Court, said:

"It will not be necessary to call upon you, Mr. Varcoe.

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

(1) [1938] Ex. C.R. 257.

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"The real point is whether or not the partnership was carrying on business for the company. That is a question of fact and we are quite satisfied that the learned President of the Exchequer Court had ample evidence before him upon which to base his finding, and we agree with his finding, which, in effect, we take to be that the partnership was carrying on business for, and as the agent of, the company.

"The appeal will, accordingly, be dismissed with costs."

Appeal dismissed with costs.

Martin Griffin K.C. for the appellant.

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

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* May 4, 5
* Dec. 12.

THE CANADIAN BANK OF COMMERCE (PLAINTIFF) ..... APPELLANT;

AND

THE YORKSHIRE & CANADIAN TRUST LIMITED, AS ADMINISTRATOR OF THE ESTATE OF NELLIE GRACE SILK, DECEASED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Banks and banking—Choses in action—Vendors and purchasers—Assignment to bank of moneys payable under agreement of sale of land, as security for all existing and future indebtedness of the vendor to bank—Validity of assignment—Bank Act (Dom., 1934, c. 24), ss. 75 (2) (c), 79 (1) (b)—Inseverability of purchaser's obligation to pay (under agreement of sale) from vendor's obligation to convey—Rights of third persons having equities against assignor (vendor) in respect of the land.

One S., registered as owner of certain land in Vancouver, B.C., entered into an agreement for sale thereof, and subsequently, being indebted to the appellant bank in the sum of $500, executed and delivered to it, "as security for all existing and future indebtedness and liability" of S. to the bank, an assignment of "all moneys now or hereafter payable" to S. under said agreement for sale. The purchaser was notified thereof. The assignment was not registered. Subsequently the bank made further loans to S. Certain next of kin of S.'s wife, deceased, had claimed that said land had been purchased with her moneys and that the land and proceeds of sale thereof were held by S. in trust for her estate, and they sued and obtained judgment against S. in favour of their claim. Respondent company was appointed administrator of her estate (in place and stead of S.)

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

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and title to said land was registered in its name. It notified the bank (which had received no prior actual notice) of its claim that the moneys due under said agreement for sale were the property of said estate; and its claim, and the opposing claim of the bank under said assignment, came (by action and special case) before the court. The Court of Appeal for British Columbia (52 B.C.R. 438) held (reversing judgment of Fisher J., 52 B.C.R. 16) that the assignment to the bank was in contravention of the *Bank Act* (Dom., 1934, c. 24), s. 75 (2) (*c*) (prohibiting a bank, except as authorized by the Act, from lending upon the security of lands), unless it could be said to come within s. 79 (1) (*b*) (empowering a bank to take, by way of additional security for debts contracted to it in the course of its business, the rights of vendors under agreements for the sale of property); that it did not come within s. 79 (1) (*b*) except with respect to the indebtedness of $500 for which it was taken as additional security, but of which sum the bank had later received payment; that a bank cannot take such an assignment as security for an anticipated future indebtedness; and in respect to which it purported to be security for any future indebtedness the assignment was invalid. The bank appealed.

Held: The bank had no right, under the assignment, to any moneys now in question payable under the agreement of sale.

Per The Chief Justice: The assignment could not take effect in virtue of said s. 79 (1) (*b*). That enactment is a special provision dealing with a particular case and declares the law with regard to that case.

Per Crocket and Kerwin JJ.: The assignment was invalid under said s. 75 (2) (*c*); the obligation of the purchaser to pay the purchase price under the agreement of sale being inseparable from the vendor's obligation to convey the land.

Per Davis J.: The instrument taken by the bank was an invalid assignment; the legal *chose in action* which the bank sought to obtain (merely the debt of the purchaser) could not in point of law be separated from the assignor's obligation to convey upon payment of the debt. (As to a vendor's interest, reference made to *Simpson* v. *Smyth*, 2 U.C. Jur. 162, at 193, and *Parke* v. *Riley*, 3 U.C. E. & A. Rep. 215, at 231-2).

Per Hudson J.: Under said ss. 75 (2) (*c*) and 79 (1) (*b*), the assignment was invalid in respect of all advances subsequent to its making. Further, in so far as the purchaser's covenant for payment in the agreement of sale could be assignable at all, the assignee would take subject to all existing equities (authorities referred to, including *Cockell* v. *Taylor*, 15 Beav. 103, at 118, *In re Morgan*, 18 Ch. D. 93, at 103); the assignor was a trustee in respect of the land and of any proceeds of sale thereof, and the bank took subject to this trust, and there was nothing operating against respondent in the nature of an estoppel nor any rights acquired by the bank through a priority of registration; in this view the assignment was never a good assignment as against respondent's equitable right to the proceeds.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1) reversing the judgment of Fisher J. (2) answering in favour of the plain-

(1) 52 B.C.R. 438; [1938] 1 W.W.R. 530; [1938] 2 D.L.R. 285.
(2) 52 B.C.R. 16; [1937] 2 W.W.R. 474.

tiff two questions (hereinafter set out) arising out of a special case stated, in the action, for the opinion of the court.

On March 8, 1928, one Nellie Grace Silk purchased, with funds forming part of her separate estate, certain land (in question) in the city of Vancouver, British Columbia, for $19,000. The said land was registered in the land registry office at Vancouver in the names of said Nellie Grace Silk and her husband, George Baillie Silk, as joint tenants.

On October 20, 1928, said Nellie Grace Silk died, and on December 11, 1928, letters of administration to her estate were granted to said George Baillie Silk.

On March 22, 1929, Silk caused an application to be made in the land registry office to register the title to said land in himself as surviving joint tenant, and title was so registered.

[Paragraph 5 of special case, referred to in question 2 *infra*]: On June 14, 1929, Silk entered into an agreement for sale of said land to Nanson, Rothwell & Co. Ltd. [hereinafter called the purchaser] for $30,000; and $7,665 became due and payable on July 1, 1936, together with one year's interest amounting to $229.75 under the terms of said agreement, as amended by an agreement dated April 28, 1933.

On June 26, 1929, Silk was notified by two of the next of kin of said Nellie Grace Silk, deceased, that they claimed that said land had been purchased with her funds and that the land and proceeds of sale thereof were the property of her estate, and were held by him in trust for said estate.

[Paragraph 7 of special case, referred to in question 1 *infra*]: On July 23, 1929, Silk, being indebted to the plaintiff bank, and in anticipation of future loans, executed and delivered to it an assignment of the moneys owing under said agreement for sale, which assignment read as follows:

As security for all existing and future indebtedness and liability of the undersigned to The Canadian Bank of Commerce, all moneys now or hereafter payable to the undersigned under a certain Agreement for Sale, *re* Lot 18, Block 31, District Lot 541, Group 1, N.W.D., dated the 14th June, 1929, made between George Baillie Silk and Nanson, Rothwell & Co. Ltd. are hereby assigned to the said Bank, and the Bank is authorized to collect and give receipts therefor. Should any of the said moneys be received by or for the undersigned the same shall be received as trustee for the Bank and shall be paid over to or accounted for by the

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undersigned to the Bank. Dated at Vancouver, B.C., this 23rd day of July, 1929.

On July 24, 1929, notice of said assignment was given to the purchaser by the plaintiff.

The plaintiff made no search at the land registry office to ascertain whether Silk was registered therein as owner of said property, and did not attempt to register its assignment of the moneys owing under said agreement for sale.

At the time of execution of said assignment, Silk was indebted to plaintiff in the sum of $500. Plaintiff made further loans to Silk after that date, and at the date of the commencement of this action the total amount of indebtedness of Silk to plaintiff was (including certain liabilities as endorser) $6,758.90.

On September 18, 1929, the purchaser paid to plaintiff $5,000, $3,500 of which was applied against the loans made by plaintiff to Silk and the balance, $1,500, was deposited in Silk's current account with plaintiff. On June 23, 1930, the purchaser paid to plaintiff $4,338.92, $4,000 of which was applied against the loans made by plaintiff to Silk and the balance, $338.92, was deposited in Silk's current account with plaintiff.

On August 22, 1929, an action was commenced by the said two of the next of kin of said Nellie Grace Silk, deceased, against Silk in the Supreme Court of British Columbia and on the same date a *lis pendens* in said action was filed in the land registry office on behalf of said two next of kin. On May 20, 1930, the latter obtained a judgment against Silk by which (*inter alia*) it was ordered and adjudged that said property was purchased with the moneys of said deceased and was the property of her estate and was held by Silk in trust for her estate.

On June 27, 1930, defendant (the present respondent) was appointed administrator of the estate of said deceased in the place and stead of Silk, and on October 21, 1930, the title to said property was registered in the name of defendant as administrator.

On December 1, 1930, plaintiff received actual notice of defendant's claim that the moneys due under said agreement for sale were the property of said deceased's estate, and on April 8, 1931, defendant received notice that said money was claimed by plaintiff under the said assignment, and it was agreed between the parties hereto that since

the said dates their respective claims should be allowed to stand without prejudice to the rights of either party.

[Paragraph 17 of special case, referred to in question 2 *infra*]: On June 19, 1935, defendant received the sum of $574.87 from the purchaser, being 2½ years' interest owing on said agreement for sale, which said money was paid to defendant without prejudice to plaintiff's position, and was to be held by defendant until the legal ownership of the said money had been determined.

The questions for the opinion of the court were:

1. Is the assignment referred to in paragraph 7 hereof a good and valid assignment as against the defendant, as personal representative of the estate of Nellie Grace Silk, deceased, and/or its predecessor in office?

2. Should the sums of $7,665 and $229.95 referred to in paragraph 5 hereof and the sum of $574.87 referred to in paragraph 17 hereof be paid to the plaintiff, or should the sums of $7,665 and $229.95 referred to in paragraph 5 be paid to the defendant?

Fisher J. (1) answered the first question "yes" and, in answer to the second question, held that the sums therein mentioned should be paid to the plaintiff. His judgment was set aside by the Court of Appeal (McPhillips J.A. dissenting) (2), which held that the assignment in question was valid in respect of the sum of $500 advanced by plaintiff to Silk prior to the date of said assignment (but payment whereof was received by plaintiff in September, 1929), but that in respect of subsequent advances by plaintiff to Silk it was invalid; and that the sums of $7,665 and $229.95 mentioned in question 2 should be paid to defendant. Its judgment was based upon the ground that unless the assignment in question can be said to come within s. 79 (1) (*b*) of the *Bank Act* (Dom., 1934, c. 24) it is in contravention of s. 75 (2) (*c*) of that Act; that it does not come within s. 79 (1) (*b*) except with respect to the indebtedness of $500 for which debt the assignment was made and taken as additional security; that the bank may take an assignment of the rights of a vendor under an agreement for sale of property as additional security for debts contracted to the bank in the course of its business, but that the bank cannot take such an assignment as security for an anticipated future indebtedness.

(1) 52 B.C.R. 16; [1937] 2 W.W.R. 474.

(2) 52 B.C.R. 438; [1938] 1 W.W.R. 530; [1938] 2 D.L.R. 285.

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Said sections of the *Bank Act* read as follows:

Sec. 75 (2) (*c*):

2. Except as authorized by this Act, the bank shall not either directly or indirectly,

* * *

(*c*) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements, or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise.

Sec. 79 (1) (*b*):

79. The bank may take, hold and dispose of, by way of additional security for debts or liabilities contracted to the bank in the course of its business,

* * *

(*b*) the rights of vendors or purchasers under agreements for the sale or purchase of real and personal, immovable and movable property.

The plaintiff appealed to this Court.

Gordon R. Munnoch K.C. for the appellant.

J. V. Clyne and *John W. H. Rowley* for the respondent.

THE CHIEF JUSTICE.—I concur with the view of Mr. Justice Sloan (1) that the assignment here in question cannot take effect in virtue of section 79 (1) (*b*) of the *Bank Act*.

That enactment, in my opinion, is a special provision dealing with a particular case and declares the law with regard to that case.

The appeal should be dismissed with costs.

CROCKET, J.—I agree that the assignment which the appellant took from Silk as the vendor of the land in question was invalid under subs. 2 (*c*) of s. 75 of the *Bank Act*, the obligation of the purchaser to pay the purchase price under the agreement of sale being contingent upon and inseparable from the vendor's obligation to convey the land.

The appeal should be dismissed with costs.

DAVIS, J.—The facts are fully set out in the special case settled by the parties.

On or about March 8th, 1928, real property in the city of Vancouver known as the Howe street property was

(1) In the Court of Appeal: 52 B.C.R. 438; [1938] 1 W.W.R. 530; [1938] 2 D.L.R. 285.

purchased with the moneys of Nellie Grace Silk and conveyed to her and her husband, George Baillie Silk, as joint tenants. On October 20th, 1928, Nellie Grace Silk died and letters of administration were granted to her husband, George Baillie Silk, on December 11th, 1928. On March 22nd, 1929, the said George Baillie Silk caused the title to the said property to be registered in his name as surviving joint tenant. On June 14th, 1929, the said George Baillie Silk entered into an agreement for sale of the said property to Nanson, Rothwell & Company, Limited. On June 26th, 1929, the said George Baillie Silk was notified by two of the next of kin of his deceased wife that they claimed that the said property was held by him in trust for the heirs at law of Nellie Grace Silk, deceased, but no notice of this contention was then given to the appellant bank.

On July 23rd, 1929, the said George Baillie Silk, being indebted to the appellant bank in the sum of $500, executed and delivered an assignment to it of all moneys then or thereafter payable to him under the said agreement for sale, which assignment is as follows:

> As security for all existing and future indebtedness and liability of the undersigned to The Canadian Bank of Commerce, all moneys now or hereafter payable to the undersigned under a certain Agreement for Sale, *re* Lot 18, Block 31, District Lot 541, Group 1, N.W.D., dated the 14th June day of . . . . 1929, made between George Baillie Silk and Nanson, Rothwell & Co. Ltd. are hereby assigned to the said Bank, and the Bank is authorized to collect and give receipts therefor. Should any of the said moneys be received by or for the undersigned the same shall be received as trustee for the Bank and shall be paid over to or accounted for by the undersigned to the Bank.
>
> Dated at Vancouver, this 23rd day of July, 1929.
>
> "G. B. Silk."

Notice in writing of the said assignment was duly given to Nanson, Rothwell & Company Limited. Subsequently, the appellant bank made substantial advances to the said George Baillie Silk relying upon the said assignment as security therefor and also relied upon the said assignment for moneys advanced to three other persons respectively upon their promissory notes endorsed by the said Silk. When this action was commenced, the total liability of the said Silk to the appellant bank in respect of direct loans and in respect of his said endorsements aggregated $6,758.90.

By a judgment delivered on May 20th, 1930, in an action commenced by two of the heirs at law of Nellie

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Grace Silk, deceased, against the said George Baillie Silk for a declaration, *inter alia*, that the Howe street property formed part of the estate of the said deceased and did not belong to the said George Baillie Silk by survivorship, it was determined that the Howe street property was held by the said George Baillie Silk in trust for the estate of Nellie Grace Silk, deceased. The parties hereto admit the validity of that judgment and further admit the findings of fact contained in the reasons for the judgment.

On June 27th, 1930, the respondent was appointed Administrator of the estate of the said Nellie Grace Silk, deceased, in the place and stead of the said George Baillie Silk, and on October 21st, 1930, the title to the Howe street property was registered in the name of the respondent as Administrator.

On December 1st, 1930, the appellant bank was notified by the respondent that the moneys due under the said agreement for sale were claimed by it as Administrator of the estate of Nellie Grace Silk, deceased. The appellant bank had no prior notice of any claim adverse to its rights under the aforesaid assignment given to it by the said George Baillie Silk.

On July 1st, 1936, the sum of $7,665 became due and payable under the said agreement for sale by Nanson, Rothwell & Company Limited, together with interest amounting to $229.95. On June 19th, 1935, the respondent had received the sum of $574.87 from the said Nanson, Rothwell & Company Limited, which said money was paid to the respondent without prejudice to the appellant's rights, and pending the determination of this action.

The contest in this action between the appellant bank and the respondent trust company arises from their respective claims to the balance owing under the agreement for sale by Nanson, Rothwell & Company, Limited. The bank claims the fund by reason of the assignment; the trust company as Administrator resists this contention and raises two objections to the bank's claim. The first objection is that the assignment to the bank was not an absolute but an equitable assignment by way of charge only and is therefore postponed to the prior equity represented by the trust company as Administrator of the estate of Nellie Grace Silk. The second objection is that the assignment is contrary to *The Bank Act* and in consequence void.

The learned trial judge found in favour of the Bank (1). Upon appeal, the Court of Appeal for British Columbia (2) reversed that judgment, except as to the $500 advanced by the bank to George Baillie Silk on the 15th day of July, 1929, and ordered that the sums of $7,665 and $229.95 referred to in the special case should be paid to the trust company. The bank now appeals to this Court.

Much of the argument before us was directed to the question whether or not the assignment to the bank was an absolute assignment or an equitable assignment by way of charge only. The learned trial judge considered that question and discussed it at length in his reasons for judgment, coming to the conclusion that the instrument did not purport to be by way of charge only and was an absolute assignment of the debt. The Court of Appeal found it unnecessary to consider that question because that Court came to the conclusion, in its view of the relevant sections of *The Bank Act*, that a bank may take an assignment of the rights of a vendor under an agreement for sale of property as additional security for debts contracted to the bank in the course of its business but that a bank cannot take such an assignment as security for an anticipated future indebtedness. Upon that ground the Court of Appeal held that the assignment to the bank was valid in so far as it was taken as additional security for payment of the debt contracted at the time (i.e., the $500) but invalid in so far as it purported to be security for any future indebtedness. The bank having received payment of the $500 debt, it was held to have no claim now under the assignment upon any of the moneys still owing by Nanson, Rothwell & Company Limited under the agreement for sale.

Section 75 (2) (*c*) of *The Bank Act* (ch. 24 of the Statutes of Canada, 1934) prohibits the bank, except as authorized by the Act, from either directly or indirectly lending money or making advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property. By section 79 (1) (*b*) the bank may, however, take, hold, and dispose of by way of additional security for debts or liabilities contracted to the

(1) 52 B.C.R. 16; [1937] 2 W.W.R. 474.
(2) 52 B.C.R. 438; [1938] 1 W.W.R. 530; [1938] 2 D.L.R. 285.

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bank in the course of its business, the rights of vendors or purchasers under agreements for the sale or purchase of real and personal, immovable and movable property.

The only indebtedness of Silk to the bank at the date of the delivery of the assignment in question was the sum of $500. The assignment is now sought to be enforced by the bank in respect of subsequent advances.

Counsel for the bank argues that if it is to be implied that an assignment by a vendor of a debt for unpaid purchase money necessarily carries with it the vendor's interest in the lands, that intention is negatived in this case because of the statutory incapacity of the bank, by virtue of sec. 75 (2) (*c*), to lend money or make advances upon the security of land. Further, that by virtue of sec. 79 (1) (*b*), a bank may only take the rights of a vendor in an agreement for the sale of land by way of additional security for debts or liabilities contracted to the bank in the course of its business. Therefore, the submission on behalf of the bank is that the assignment in question is not affected by the provisions of either sec. 75 or sec. 79 of *The Bank Act* because the assignment was an assignment of moneys only—separated from any right enforceable against any interest in the land—and that it was competent to the bank to take and hold the said assignment as security for the debts and liabilities of Silk to the bank whether incurred before or after the assignment was taken.

In my opinion, the appeal can be disposed of upon one point. The obligation of a vendor upon payment is to convey the property to the purchaser; and the debt of a purchaser under an agreement for the sale of land cannot be separated from the equitable obligation of the vendor to convey upon payment. The bank did not put itself in the position of being able to convey upon payment of the debt; it did not acquire from its customer, the vendor, the title to the property which he was bound in equity to convey to his purchaser upon payment of the purchase money. The effect of the separation was to place the debt in the hands of the bank while the title to the property remained in the hands of the assignor. The legal *chose in action* which the bank sought to obtain by assignment could not in point of law be separated from the assignor's obligation to convey upon payment of the debt. A vendor does not in substance remain the owner of the land but

only in form as a means of compelling payment of the debt secured upon it, which is the owner's only valuable interest in the land, to adopt and adapt the language of the Chief Justice of Upper Canada, Sir John Beverley Robinson, in *Simpson* v. *Smyth* (1), dealing with the rights of a mortgagee, which language was relied upon by Vice-Chancellor Mowat in his valuable judgment (though dissenting) in *Parke* v. *Riley* (2), where that great judge said:

> Every word of this (that is, the language of Chief Justice Robinson) is as applicable to the case of a vendor who has not conveyed, as to a mortgagee. Like a mortgagee, he has a right to retain the legal estate so long only as the debt for the land remains unpaid. His real interest in it is the debt due—nothing more; and the effect of the sale, if permitted, would not be to pass to the purchaser the right of suing at law for the debt, any more than in case of a formal mortgage. In a word, in whatever sense the language of the learned judge is correct in reference to the case to which he was alluding, it is equally correct as to the case here.

The instrument upon which the bank rests its claim is, in my opinion, an invalid assignment and for this reason the appeal must be dismissed with costs. There having been no cross appeal, that part of the order of the Court appealed from which declared that the assignment was valid in so far as the sum of $500 advanced by the bank to Silk on July 15th, 1929, was secured, cannot in this appeal be set aside but no harm will be done because the $500 was repaid as early as September, 1929.

KERWIN, J.—Although the argument before us covered a wide field, in my opinion the appellant must fail because what it did was in violation of subsection 2, clause (*c*) of section 75 of *The Bank Act*. By this enactment a bank shall not either directly or indirectly lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property.

After having made a loan of five hundred dollars to one Silk (which loan was later paid off and no question arises as to it), the appellant took from him a document reading as follows:

> As security for all existing and future indebtedness and liability of the undersigned to The Canadian Bank of Commerce, all moneys now or hereafter payable to the undersigned under a certain Agreement for Sale, *re* Lot 18, Block 31, District Lot 541, Group 1, N.W.D., dated the 14th

(1) (1846) 2 U.C. Jur. 162 at 193.

(2) (1866) 3 U.C. E. & A. Rep. 215, at 231-232.

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June, 1929, made between George Baillie Silk and Nanson, Rothwell & Co. Ltd. are hereby assigned to the said Bank, and the Bank is authorized to collect and give receipts therefor. Should any of the said moneys be received by or for the undersigned the same shall be received as trustee for the Bank and shall be paid over to or accounted for by the undersigned to the Bank.

Dated at Vancouver, B.C., this 23rd day of July, 1929.

The only argument addressed to us on the point was that this document was a mere assignment of the moneys due under the agreement for sale of the lands mentioned and was not an assignment of all the rights of Silk as vendor under that agreement. It was urged that the vendor's right under the purchaser's covenant in the agreement, to receive the purchase moneys, was severable from the duty which the vendor was under to give title to the purchaser upon payment of the full consideration, but in my view that contention is not sound. The purchaser's covenant to pay cannot be divorced from his right to secure, and the vendor's duty to convey, the lands upon payment of the purchase price. The agreement bound the vendor to convey upon payment of the purchase price, and in accepting the assignment of the moneys due under the covenant for payment in the agreement the Bank certainly indirectly, if not directly, lent money, after the taking of the assignment, upon the security of lands.

I would dismiss the appeal with costs.

HUDSON, J.—This is an appeal from a judgment of the Court of Appeal of British Columbia (1), which allowed an appeal by the respondents from a judgment of Mr. Justice Fisher (2). The controversy is in respect of the moneys payable by a purchaser under an agreement to purchase lands in the City of Vancouver. The appellant bank claims under an assignment from a man named Silk, in the following terms:

AS SECURITY for all existing and future indebtedness and liability of the undersigned to THE CANADIAN BANK OF COMMERCE, all moneys now or hereafter payable to the undersigned, under a certain Agreement for Sale, *re* Lot 18, Block 31, District Lot 541, Group 1, N.W.D., dated the 14th June day of . . . . 1929, made between George Baillie Silk and Nanson, Rothwell & Co. Ltd. are hereby assigned to the said Bank, and the Bank is authorized to collect and give receipts therefor. Should any of the said moneys be received by or for the

(1) 52 B.C.R. 438; [1938] 1 W.W.R. 530; [1938] 2 D.L.R. 285.
(2) 52 B.C.R. 16; [1937] 2 W.W.R. 474.

undersigned the same shall be received as trustee for the Bank and shall be paid over to or accounted for by the undersigned to the Bank.

DATED at Vancouver, this 23rd day of July, 1929.

"G. B. Silk."

At the time when this assignment was given to the Bank, there was also given them by Silk a duplicate original of the agreement for sale. Silk was the registered owner of the land in question at the time he made the agreement of sale and remained so until after the assignment to the Bank. Silk was indebted to the Bank in the sum of $500 when he made the assignment; this amount was afterwards repaid but subsequent advances were made to him by the Bank, so that in the autumn of 1929 and at the time of the commencement of this action the amount of his indebtedness to the Bank was $5,477.67, in addition to certain liabilities as endorser in respect of loans to others aggregating $1,281.23.

The defendant is the administrator of the estate of Nellie Grace Silk, wife of the above mentioned Silk, who died in October, 1928. On the 26th of June, 1929, two of the next-of-kin of Mrs. Silk notified Silk that they claimed the property in question had been purchased with funds of the late Mrs. Silk and that the proceeds were the property of her estate. On the 22nd of August, 1929, they commenced an action against Silk to enforce this claim and they filed a *lis pendens* in the proper registry office. Subsequently, on the 20th of May, 1930, they obtained a judgment against Silk, declaring that the properties covered by this agreement of sale and other property

were purchased with the moneys of the above named Nellie Grace Silk, deceased, and are the property of her estate and in so far as any portions thereof are held in the name of the Defendant, they are so held by him in trust for the said estate together with any other properties or investments which were purchased by him with the moneys received by him from the said Nellie Grace Silk and which are held by him or by any one on his behalf.

Then, on the 27th of June, 1930, the defendant company was appointed administrator and became the registered owner of the property in question.

Although, as above mentioned, a *lis pendens* had been filed as early as August, 1929, the appellant Bank did not have actual notice of the claim set up by the next-of-kin, now represented by the respondent, until the 1st Decem-

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ber, 1930, before which date they had made the advances above referred to.

In this action, the appellant Bank asks for a declaration of ownership of the moneys owing by the purchasers under the agreement of sale, and for a declaration that the assignment to them is a good and valid assignment and for payment of a sum of $574.87.

A special case setting out the facts was submitted and two questions left for the opinion of the Court:

1. Is the assignment referred to in paragraph 7 hereof a good and valid assignment as against the Defendant, as personal representative of the Estate of Nellie Grace Silk, deceased and/or its predecessor in office?

2. Should the sums of $7,665 and $229.95 referred to in paragraph 5 hereof and the sum of $574.87 referred to in paragraph 17 hereof be paid to the Plaintiff, or should the sums of $7,665 and $229.95 referred to in paragraph 5 be paid to the Defendant?

The learned trial judge answered the first question in the affirmative and the second question, that the sums should be paid to the plaintiff. The Court of Appeal took another view and held that the assignment to the appellant was invalid under the provisions of the *Bank Act,* except as to the sum of $500 advanced prior to the assignment and subsequently repaid.

The assignment purports to assign all moneys now or hereafter payable to Silk under the agreement of sale mentioned, but the agreement of sale does more than create an obligation on the part of the purchasers. There is a corresponding obligation on the part of the vendor to give title at the time when the purchase money is paid, and the purchaser would be under no obligation to pay his purchase money until the vendor was in a position to give him title. In this instance the obligation was constant because under the terms of the agreement of sale the purchaser had the privilege of paying off the balance of the purchase price at any time. The Bank is here met with the formidable difficulty that the respondent now holds the legal title to the estate.

The reciprocal obligations of vendors and purchasers in this respect are succinctly stated in Dart on Vendors and Purchasers, 8th Edition, at page 265:

> From the time the owner of an estate enters into a binding agreement for its sale, he holds the same in trust for the purchaser, subject to payment of the purchase-money: but the relationship thus created does not entail all the obligations of an ordinary trusteeship. The vendor is not a mere dormant trustee; he is a trustee having a personal and

substantial interest in the property, a right to protect, and an active right to assert that interest, if anything is done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsists, but subject to the paramount right of the vendor to protect his own interest as vendor of the property. When the title has been accepted and the purchase-money paid, this paramount right of the vendor ceases, and the trusteeship subsists without qualification; but, as from the date of the contract, the relationship is throughout that of trustee and *cestui que trust*.

This statement of Dart is supported in numerous decisions of the highest authority.

In *Rose* v. *Watson* (1), Lord Westbury says:

> When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate.

Shaw v. *Foster* (2) and *Peck* v. *Sun Life Assurance Company* (3).

In *Royal Trust Company* v. *Kennedy* (4), it was stated by Mr. Justice Newcombe as follows:

> The chief end of the agreement between the parties, and the reason for which it was called into being, was the sale and purchase of the lands described; and, while the purchaser had covenanted to pay the purchase money with interest as provided, the vendor had, in like manner agreed, on payment of the purchase money, to convey and assure the premises to the purchaser by good and sufficient deed in fee simple. The terms are therefore dependent.

For this reason the obligation of the purchaser cannot be treated in any sense as negotiable and the Bank could not get any better title than Silk himself had unless by way of estoppel or because of the registry laws. There was no registration of the Bank's assignment and, indeed if there had been, their position would have been even more vulnerable because of section 75 of the *Bank Act*. In the Court of Appeal Mr. Justice Sloan, speaking on behalf of the majority of the Court, disposed of the matter there on the basis that the instrument in question was invalid under the provisions of sections 75 and 79 of the *Bank Act*, in respect of all advances subsequent to the making of the assignment, and that the Bank had no right to take such

(1) (1864) 10 H.L. Cas. 672, at 678.
(2) (1872) L.R. 5 H.L. 321.
(3) (1905) 11 B.C.R. 215.
(4) [1930] S.C.R. 602, at 609.

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assignment as security for an anticipated future indebtedness.

I agree with Mr. Justice Sloan in his interpretation of the provisions of the *Bank Act* in so far as they apply to this case, but I also think that there is a more fundamental difficulty in the way of the Bank's success. As has already been stated, the purchaser's covenant for payment in an agreement for sale such as this is not a negotiable security. It is a *chose in action* and, in so far as it is assignable at all, the assignee takes subject to all existing equities. The assignor had no right to assign something that he did not own.

The law in support of this position is clearly stated in numerous cases.

In *Cockell* v. *Taylor* (1), Sir John Romilly said:

> The rule relative to the equities which attach on a *chose in action* has been discussed and established in many cases. It has not been disputed, nor can it be doubted, that the purchaser of a *chose in action* does not stand in the situation of a purchaser of real estate for valuable consideration without notice of any prior title, but that the purchaser of a *chose in action* takes the thing bought subject to all the prior claims upon it. If, therefore, the share of the Plaintiff Collett in the fund in Court had been charged with a sum to another person unknown to Taylor, Taylor would have taken this interest in the fund subject to that charge.

In re Morgan (2). Where a lease was surrendered by an executor and a new lease, including additional property, was taken by him in his own name and at an increased rent and was deposited by him as security for money advanced to him, it was held that the *cestuis que trust* had priority over the equity mortgage. Jessel, M.R., said at p. 103:

> This being the position of the matter, he was a trustee of the new lease. In 1879 he borrowed in his own name, for his own use in carrying on the business, a sum of money from the Appellant, and he deposited the lease with him. It is true that the Appellant had no notice that Pillgrem was not the lawful owner of the property comprised in the lease. If he had inquired into the landlord's title he would have got no notice. He was therefore a purchaser without notice, who did not get the legal title, therefore he must take the lease subject to prior equities, that is, to the trust on which it was held.

In White and Tudor's L.C. 9th Edition, Vol. I, page 138:

> Where though the assignor purports to assign a right, no right is in fact vested in him at the date of the alleged assignment, manifestly the assignee can obtain no title though he gives value and has no notice of the invalidity of the right assigned. Thus if a satisfied bond or a bond void at law or in equity be assigned, the assignee can neither enforce

(1) (1852) 15 Beavan 103, at 118. (2) (1881) 18 Ch. Div. 93.

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the bond nor rely upon it as a defence. Further if the transaction out of which the right assigned arises is liable to be set aside as against the assignor by reason of fraud, misrepresentation, or other ground of relief, the assignee acquires only a defeasible title and the relief which could be obtained against the assignor can be obtained against the assignee.

and at page 139:

Where a *cestui que trust* is indebted to the estate by reason of his having profited by a breach of trust, an assignee for value of his beneficial interest will take it, subject to the equity of making good the breach of trust by which the assignor has profited (*Priddy* v. *Rose*) (1).

See also *Montreal Trust Company* v. *Richardson* (2).

In the present case the assignor Silk was a trustee for his wife in respect of the land and in respect of any proceeds that might be derived from the sale thereof. He had no right to alienate these moneys to others. The Bank took subject to this trust and there is nothing operating against the respondent in the nature of an estoppel nor any rights acquired by the Bank through a priority of registration. If this view is correct, the assignment was never a good and valid assignment as against the respondent's equitable right to the proceeds and the declaration as contained in the judgment of the Court of Appeal to that effect should be struck out. This, however, does not affect the practical result and, therefore, I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Davis & Co.*

Solicitors for the respondent: *Macrae, Duncan & Clyne.*

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* Feb. 27.
* March 21.

HARRY RICHLER .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

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

Criminal law—Evidence—Charge of receiving stolen goods—Explanation by accused—Good faith—Lack of knowledge of goods being stolen—Whether explanation by accused is a reasonable one—Discharge by the Crown as to onus of proving accused's guilt—Duty of trial judge.

The appellant was charged with the offence of receiving stolen goods and was found guilty. At the trial, the appellant and some other witnesses were heard in support of appellant's explanation that he had bought these goods in good faith and without any knowledge that

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

(1) (1817) 3 Mer. 86.

(2) (1921) 62 Can. S.C.R. 617.

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they were stolen effects. The appellant appealed to the appellate court on the ground that his explanation was a reasonable one, that the Crown had failed to discharge the onus of proving beyond a reasonable doubt the accused's guilt and that the explanation was equally plausible as to his innocence or to guilt. The majority of the appellate court affirmed the conviction, one judge dissenting on the ground that there was no evidence upon which the appellant could be convicted.

Held, that the appeal should be dismissed. The question to which it was the duty of the trial judge to apply his mind was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true; or, in other words, whether the Crown had discharged the onus of satisfying the trial judge beyond a reasonable doubt that the explanation of the appellant could not be accepted as a reasonable one and that he was guilty.—*Rex* v. *Schama* (11 C.A.R. 45); *Rex* v. *Searle* (51 C.C.C. 128) and *Re Ketteringham* (19 C.C.C. 159) ref. and app.—Under all the circumstances of the case, it cannot be held that there was no evidence that the explanation offered by the appellant was one that the trial judge might not find could not reasonably be accepted as true.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming (Pratte (*ad hoc*) J. dissenting) the conviction of the appellant for the offence, under section 399 of the Criminal Code, of receiving or retaining in his possession stolen goods knowing them to be stolen. By the judgment now reported the appeal to this Court was dismissed.

Lucien H. Gendron K.C. for the appellant.

John Crankshaw K.C. for the respondent.

The judgment of the Chief Justice and Rinfret, Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—The proper direction on the trial of an accused charged under section 399 of the Criminal Code with receiving or retaining in his possession stolen goods, knowing them to be stolen, is explained in three judgments to which our attention was called by Mr. Gendron.

In the *Schama* case (1), the Lord Chief Justice explained the rule as follows:—

Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that

(1) (1914) 11 C.A.R. 45, at 49.

the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt.

This passage was applied by the Appellate Division of Alberta in a judgment delivered by Harvey C.J. in *Rex* v. *Searle* (1).

In the *Ketteringham* case (2), Avory J. said:

> The question which should have been left to the jury was simply: "Did the appellant receive the goods in such circumstances that he must then have known them to have been stolen?" The question, however, which was left was whether the jury thought that the account given by the appellant's son in evidence of the manner in which he became possessed of the goods could be accepted. The jury should have been told not only that they could acquit, but that they ought to acquit, the appellant if they were satisfied that his explanation was consistent with his innocence.

The question, therefore, to which it was the duty of the learned trial judge to apply his mind was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true; or, to put it in other words, whether the Crown had discharged the onus of satisfying the learned trial judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty.

The dissenting judge did not put his dissent on the ground that the trial judge had misdirected himself on any point of law, or that he had not applied his mind to the precise question which it was his duty, as indicated in what has just been said, to determine. He dissented on the ground that there was no evidence upon which the accused could be convicted and I assume that to mean that there was in point of law no evidence to support a verdict of guilty. After considering all the circumstances, I am unable to agree with this view; in other words, I am not satisfied that there is no evidence that the explanation

(1) (1929) 51 C.C.C. 128 at 131. (2) (1926) 19 C.A.R. 159, at 160.

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offered was one that the trial judge might not find could not reasonably be accepted as true.

The appeal must be dismissed.

CANNON, J.—I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: *Gendron, Monette & Gauthier.*
Solicitor for the respondent: *Jacques Fournier.*

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* June 17, 20
1939
* April 5.

IN THE MATTER OF A REFERENCE AS TO WHETHER THE TERM "INDIANS" IN HEAD 24 OF SECTION 91 OF THE BRITISH NORTH AMERICA ACT, 1867, INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Constitutional law—Statute—"Indians"—"Eskimo"—Whether Eskimo are Indians within head no. 24 of s. 91 of the B.N.A. Act.

Eskimo inhabitants of the province of Quebec are "Indians" within the contemplation of head no. 24 ("Indians and Lands Reserved for Indians") of section 91 of the *British North America Act.*

REFERENCE by Order of His Excellency the Governor General in Council (P.C. 867, dated April 2, 1935) of the following question hereinafter set out to the Supreme Court of Canada for hearing and consideration pursuant to section 55 of the *Supreme Court Act,* R.S.C., 1927, c. 35.

The order of reference recited:

The Committee of the Privy Council have had before them a report, dated April 1, 1935, from the Minister of Justice, representing that under the terms of the *British North America Act,* 1867, section 91 "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated," and that among these subjects is number "24. Indians, and Lands reserved for the Indians."

The Minister states that in parts of the province of Quebec there are Eskimo inhabitants, and

That a controversy has arisen between the Dominion Government and the Government of the province of Quebec in relation to the question whether the legislative and executive power of the Dominion Government under the above provision of the *British North America Act,* 1867, extends to the Eskimo inhabitants of the province of Quebec.

The Committee, on the recommendation of the Minister of Justice, advise that Your Excellency may be pleased, in the exercise of the powers

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

conferred by section 55 of the *Supreme Court Act,* to refer to the Supreme Court of Canada for hearing and consideration the following question:

Does the term "Indians," as used in head 24 of section 91 of the *British North America Act,* 1867, include Eskimo inhabitants of the Province of Quebec?

The answer of the Court to the question was in the affirmative.

J. McGregor Stewart K.C. and *C. P. Plaxton K.C.* for the Attorney-General of Canada.

Auguste Désilets K.C. and *C. A. Séguin K.C.* for the Attorney-General of Quebec.

The judgment of the Chief Justice and Davis and Hudson JJ. (Crocket J. concurring) was delivered by

THE CHIEF JUSTICE.—The reference with which we are concerned arises out of a controversy between the Dominion and the province of Quebec touching the question whether the Eskimo inhabitants of that province are "Indians" within the contemplation of head no. 24 of section 91 of the *British North America Act* which is in these words, "Indians and Lands Reserved for Indians"; and under the reference we are to pronounce upon that question.

Among the inhabitants of the three provinces, Nova Scotia, New Brunswick and Canada that, by the immediate operation of the *British North America Act,* became subject to the constitutional enactments of that statute there were few, if any, Eskimo. But the *British North America Act* contemplated the eventual admission into the Union of other parts of British North America as is explicitly declared in the preamble and for which provision is made by section 146 thereof.

The Eskimo population of Quebec inhabits (in the northern part of the province) a territory that in 1867 formed part of Rupert's Land and the question we have to determine is whether these Eskimo, whose ancestors were aborigines of Rupert's Land in 1867 and at the time of its annexation to Canada, are Indians in the sense mentioned.

In 1867 the Eskimo population of what is now Canada, then between four and five thousand in number, occupied, as at the present time, the northern littoral of the continent from Alaska to, and including part of, the Labrador

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coast, within the territories under the control of the Hudson's Bay Company, that is to say, in Rupert's Land and the North-Western Territory which, under the authority given by section 146 of the *British North America Act*, were acquired by Canada in 1871. In addition to these Eskimo in Rupert's Land and the North-Western Territory, there were some hundreds of them on that part of the coast of Labrador (east of Hudson Strait) which formed part of, and was subject to the Government of, Newfoundland.

The *British North America Act* is a statute dealing with British North America and, in determining the meaning of the words "Indians" in the statute, we have to consider the meaning of that term as applied to the inhabitants of British North America. In 1867 more than half of the Indian population of British North America were within the boundaries of Rupert's Land and the North-Western Territory; and of the Eskimo population nearly ninety per cent. were within those boundaries. It is, therefore, important to consult the reliable sources of information as to the use of the term "Indian" in relation to the Eskimo in those territories. Fortunately, there is evidence of the most authoritative character furnished by the Hudson's Bay Company itself.

It will be recalled that the Hudson's Bay Company, besides being a trading company, possessed considerable powers of government and administration. Some years before the passing of the *British North America Act*, complaints having been made as to the manner in which these responsibilities had been discharged, a committee of the House of Commons in 1856 and 1857 investigated the affairs of the Company. Among the matters which naturally engaged the attention of the Committee was the Company's relations with and conduct towards the aborigines; and for the information of the Committee a census was prepared and produced before it by the officers of the Company showing the Indian populations under its rule throughout the whole of the North American continent. This census was accompanied by a map showing the "locations" of the various tribes and was included in the Report of the Committee; and was made an appendix to the Committee's Report which was printed and published by the order of the House of Commons. It is indisputable that in the census and in the map

the "esquimaux" fall under the general designation "Indians" and that, indeed, in these documents, "Indians" is used as synonymous with "aborigines." The map bears this description:

An Aboriginal Map of North America denoting the boundaries and locations of various Indian Tribes.

Among these "Indian Tribes" the Eskimo are shown inhabiting the northern littoral of the continent from Labrador to Russian America. In the margin of the map are tables. Two are of great significance. The first of these is headed "Statement of the Indian Tribes of the Hudsons Bay Territories." The tribes "East of the Rocky Mountains" are given as "Blackfeet and Sioux groups comprising eight tribes, Algonquins comprising twelve tribes" and "Esquimaux."

The second is headed "Indian Nations once dwelling East of the Mississippi." The list is as follows:

Algonquin	
Dahcotah or Sioux	
Huron Iroquois	
Catawba	(extinct)
Cherokee	
Uchee	(extinct)
Natches	(extinct)
Mobilian	
Esquimaux	
Kolooch	
Athabascan	
Sioux	
Algonquin	
Iroquois	

The census concludes with a summary which is in these words:

The Indian Races shown in detail in the foregoing census may be classified as follows:

Thickwood Indians on the east side of the Rocky Mountains	35,000
The Plain Tribes (Blackfeet, etc.)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indian in British Oregon and on the North West Coast	80,000
Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls	158,000

As already observed, the appointment of the Committee was due in part at all events to representations made to

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the Imperial Government respecting the conduct of the Hudson's Bay Company towards the Indians and the condition of the Indian population was one of the subjects with which the Committee was principally concerned. They were also concerned with representations made by the Government of Canada urging the desirability of transferring to Canada all the territories of the Company, at least as far west as the Rocky Mountains. Chief Justice Draper was present at the sittings of the Committee representing the Government of Canada. The Committee, as is well known, reported in favour of the cession to Canada of the districts of the Red River and the Saskatchewan River.

Seven years later, the scheme of Confederation, propounded in the Quebec Resolutions of October 10th, 1864, included a declaration that provision should be made

> for the admission into the Union on equitable terms of Newfoundland, the North-West Territory, British Columbia, and Vancouver.

This declaration, was renewed in the Resolutions of the London Conference in December, 1866, and in the *British North America Act* specific provision was made, as we have seen, in section 146 for the acquisition of Rupert's Land as well as the North-West Territory and, in 1868, a statute of the Imperial Parliament conferred upon the Queen the necessary powers as respects Rupert's Land.

The *British North America Act* came into force on the 1st of July, 1867, and, in December of that year, a joint address to Her Majesty was voted by the Senate and House of Commons of Canada praying that authority might be granted to the Parliament of Canada to legislate for the future welfare and good government of these regions and expressing the willingness of that Parliament to assume the duties and obligations of government and legislation as regards those territories. In the Resolution of the Senate expressing the willingness of that body to concur in the joint address is this paragraph:

> Resolved that upon the transference of the Territories in question to the Canadian Government, it will be the duty of the Government to make adequate provisions for the protection of the Indian Tribes, whose interest and well being are involved in the transfer.

By Order in Council of the 23rd of June, 1870, it was ordered that from and after the 15th of July, 1870, the North West Territory and Rupert's Land should be admitted into, and become part of, the Dominion of Canada and that, from that date, the Parliament of Canada should

have full power and authority to legislate for the future welfare and good government of the territory. As regards Rupert's Land, such authority had already been conferred upon the Parliament of Canada by section 5 of the *Rupert's Land Act* of 1868.

The vast territories which by these transactions became part of the Dominion of Canada and were brought under the jurisdiction of the Parliament of Canada were inhabited largely, indeed almost entirely, by aborigines. It appears to me to be a consideration of great weight in determining the meaning of the word "Indians" in the *British North America Act* that, as we have seen, the Eskimo were recognized as an Indian tribe by the officials of the Hudson's Bay Company which, in 1867, as already observed, exercised powers of government and administration over this great tract; and that, moreover, this employment of the term "Indians" is evidenced in a most unequivocal way by documents prepared by those officials and produced before the Select Committee of the House of Commons which were included in the Report of that Committee which, again, as already mentioned, was printed and published by the order of the House. It is quite clear from the material before us that this Report was the principal source of information as regards the aborigines in those territories until some years after Confederation.

I turn now to the Eskimo inhabiting the coast of Labrador beyond the confines of the Hudson's Bay territories and within the boundaries and under the government of Newfoundland. As regards these, the evidence appears to be conclusive that, for a period beginning about 1760 and extending down to a time subsequent to the passing of the *British North America Act,* they were, by governors, commanders-in-chief of the navy and other naval officers, ecclesiastics, missionaries and traders who came into contact with them, known and classified as Indians.

First, of the official documents. In 1762, General Murray, then Governor of Quebec, who afterwards became first Governor of Canada, in an official report of the state of the government of Quebec, deals under the sixth heading with "Indian nations residing within the government." He introduces discussion with this sentence:

> In order to discuss this point more clearly I shall first take notice of the Savages on the North shore of the River St. Laurence from the

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Ocean upwards, and then of such as inhabit the South side of the same River, as far as the present limits of the Government extend on either side of it.

In the first and second paragraphs he deals with "Savages" on the North Shore and he says: "The first to be met with on this side are the Esquimaux." In the second paragraph he deals with the Montagnais who inhabited a "vast tract" of country from Labrador to the Saguenay.

It is clear that here the Eskimo are classified under the generic term Indian. They are called "Savages," it is true, but so are the Montagnais and so also the Hurons settled at Jeune Lorette. It is useful to note that he speaks in the first paragraph of the Esquimaux as "the wildest and most untamable of any" and mentions that they are "emphatically styled by the other Nations, Savages."

Then there are two reports to His Majesty by the Lords of Trade. The first, dated June 8th, 1763, discusses the trade carried on by the French on the coast of Labrador. It is said that they carried on

an extensive trade with the Esquimaux Indians in Oyl, Furs, & ca. (in which they allowed Your Majesty's Subjects no Share).

In the second, dated the 16th of April, 1765, in dealing with complaints on the part of the Court of France respecting the French fishery on the coast of Newfoundland and in the Gulf of St. Lawrence, their observations on these complaints are based upon information furnished by Commodore Palliser who had been entrusted with the superintendency of the Newfoundland fishery and the government of the island. In this report, this sentence occurs:

The sixth and last head of complaint contained in the French Ambassador's letter is, that a captain of a certain French vessel was forbid by your Majesty's Governor from having commerce with the Eskimaux Indians;

and upon that it is observed that the Governor "is to be commended for having forbid the subjects of France to trade or treat with these Indians." "These Indians" are spoken of as "inhabitants * * * who are under the protection of and dependent upon your Majesty."

Then there is a series of proclamations by successive Governors and Commanders-in-Chief in Newfoundland, the first of which was that of Sir Hugh Palliser of the 1st of July, 1964. The Proclamation recites,

*** * * Advantages would arise to His Majesty's Trading Subjects if a Friendly Intercourse could be Established with the Esquemeaux**

Indians, Inhabiting the Coast of Labrador * * *

and that the Government

has taken measures for bringing about a friendly communication between the said Indians and His Majesty's subjects.

All His Majesty's subjects are strictly enjoined "to treat them in the most civil and friendly manner."

The next is a Proclamation by the same Governor dated the 8th of April, 1765, which recites the desirability of

friendly intercourse with the Indians on the Coast of Labrador

and that

attempts hitherto made for that purpose have proved ineffectual, especially with the Esquimaux in the Northern Ports without the Straits of Belle Isle

and strictly enjoins and requires

all His Majesty's subjects who meet with any of the said Indians to treat them in a most civil and friendly manner.

On the 10th of April, 1772, Governor Shuldham in a Proclamation of that date requires

all His Majesty's subjects coming upon the coast of Labrador to act towards the Esquimaux Indians in a manner agreeable to the Proclamation issued at St. John's the 8th day of July 1769 respecting the savages inhabiting the coast of Labrador.

In this Proclamation it should be noted that "Esquimaux savages" and "Esquimaux Indians" are used as convertible expressions.

In 1774, the boundaries of Quebec were extended, and the northeastern coast of Labrador and the Eskimo population therein came under the jurisdiction of the Governor of Quebec and remained so until 1809. Nevertheless, the Governor and Commander-in-Chief of Newfoundland, who at the date was Admiral Edwards, acting under the authority of that Order in Council of the 9th of March, 1774, took measures to protect the missionaries of the Unitas Fratrum and their settlements on the coast of Labrador from molestation or disturbance and, on May 14th, 1779, Admiral Edwards issued a Proclamation requiring

all His Majesty's subjects coming upon the Coast of Labrador to act towards the Esquimaux Indians justly, humanely and agreeably to these laws, by which His Majesty's subjects are bound.

Here again it is to be observed that the words "savages" and "Indians" are used as equivalents.

A further Proclamation by Admiral Edwards on January 30th, 1781, employs the same phrases, the Eskimo being described as "Esquimaux savages" and as "Esquimaux Indians."

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On May 15th, 1774, Governor Campbell, as Governor and Commander-in-Chief, issued a Proclamation in terms identical with that of 1781.

On the 3rd of December, 1821, a Proclamation was issued by Governor Hamilton as Governor and Commander-in-Chief of Newfoundland (now again including the Labrador coast) relating to a "fourth settlement" by the Moravian missionaries requiring all His Majesty's subjects "to act towards the missionaries and the Esquimaux Indians justly and humanely."

There are other official documents. In a report in 1798 by Captain Crofton, addressed to Admiral Waldegrave, Governor and Commander-in-Chief of Newfoundland, the phrase "Esquimaux Indians" occurs several times and the Eskimo are plainly treated as coming under the designation "Indians."

A report to Lord Dorchester, Governor and Commander-in-Chief of Quebec, Nova Scotia, New Brunswick and their dependencies, in 1788, upon an application by George Cartwright for a grant of land at Touktoke Bay on the coast of Labrador by a special Committee of the Council appointed to consider the same refers to the applicant's exertions in

> securing friendly intercourse with the Eskimaux Indians and his success in bringing about a friendly intercourse between that nation and the Mountaineers.

Evidence as to subsequent official usage is adduced in a letter of 1824 from the Advocate General of Canada to the Assistant Civil Secretary on some matter of a criminal prosecution in which "Esquimaux Indians" are concerned; and in a report of 1869 by Judge Pinsent of the Court of Labrador to the Governor of Newfoundland in which this sentence occurs:

> In this number about 300 Indians and half-breeds of the Esquimaux and Mountaineer races are included.

Reports from missionaries and clergymen are significant. I refer particularly to two. There is a communication in 1821 by the Unitas Fratrum sent to Admiral Hamilton, Governor and Commander-in-Chief of Newfoundland and Labrador, on a visit by H.M.S. *Clinker* to their settlements. In this the Eskimo are mentioned as "Esquimaux Indians" and "Esquimaux Tribes" and the report concludes with a table giving the numbers of "Esquimaux Indians who have embraced the Christian religion" at the various stations.

In 1849, a report from the Bishop of Newfoundland was printed and published in London for the Society for the Propagation of the Gospel by the Bishop of London with a prefatory letter and seems to have been put into circulation through Rivingtons and other booksellers. Extracts from this report, which describes a visit to Labrador, are produced in the Quebec case, and as these passages exemplify in a remarkable way the use of the term Indian, as designating the Eskimo inhabitants of Labrador as well as other classes of Indians there, it is right, I think, to reproduce them in full:

p.17.—At St. Francis Harbour, where we next stopped, we celebrated the Lord's Supper, as there were several members of the Church from Newfoundland fishing in the neighbourhood; and the agent and his lady also communicated, (Mr. and Mrs. Saunders). Several Esquimaux Indians were here admitted into the Church, and married. One of them afterwards accompanied us as pilot to Sandwich Bay.

I was obliged very reluctantly to leave the Church ship at St. Francis Harbour (the wind blowing in), and proceeded in a boat twenty-five miles to the Venison Islands, where I remained three days on shore, before the *Hank* could join us, and, with Mr. Hoyles, was very kindly entertained by Mr. Howe, Messrs. Slade's agent. Here all the females are either Esquimaux or mountaineer Indians, or descended from them. With the exception of Mrs. Saunders, there is not an Englishwoman on the coast, from Battle Harbour to Sandwich Bay; all, or nearly all, are Indians (Esquimaux or mountaineer), or half Indians, and of course the children are the same mixed race.

p. 40.—Wednesday, August 2.—The wind blew so strong last night, with heavy rain, that our captain, who was on shore, could not return to the ship. I had intended to proceed this morning, but, partly on account of the high sea, and partly because there was yet work to be done here, I was persuaded to delay my departure. I went on shore with my Chaplains after breakfast; and while I remained at the house of Mr. Ellis, the merchant of Newfoundland, they visited an Englishman, who was married, or united, to a poor Indian woman, an Esquimaux, and who we understood, had children to be baptized.

p. 49.—Mr. Bendle also informed us of the character &c., of the Indians who dwell in or resort to his neighbourhood. There are three distinct tribes—the Micmacs, Mountaineers and Esquimaux. The first two are generally Roman Catholics, but the Esquimaux owe their instruction and conversion to the Moravian Missionaries. These Missionaries (on the Labrador coast) have four stations and establishments, the nearest about 400 miles to the north of Battle Harbour, and the most distant nearly 400 miles farther, or 800 from this place. There are three families of the Moravians at each of their stations, who live together in a stone house, and have large trading concerns in fish, &c., with the Esquimaux.

p. 63.—Tuesday, August 15.—The wind came round again to the westward this morning, but was very light. We got under way at ten o'clock, and did not reach the Seal Islands till five. Mr. Howe kindly furnished a pilot. Here, as in every other harbour, are several vessels from Newfoundland. Messrs. Hunt also keep a small "crew" here;

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that is, a few men dwelling together to prosecute the fishery in the summer and kill seals in the winter. Five Englishmen remained together here last winter, who killed 500 seals. In the first three months of the year they are in the woods, to cut timber and firewood. Besides this crew, the only residents are Indians (Esquimaux) and half Indians, who live together, crowded in two huts, with an Englishman who has taken one of the half Indian women as his wife. Guided by the skipper of Mr. Hunt's crew, we visited these Indians. Nearly all (twenty out of twenty-three) crowded together in one small hut, with our two guides, Messrs. Harvey and Hoyles, and myself. A strange group, or crowd, we were. Indians will compress into the smallest possible compass; but still we were brought into painfully close proximity.

p. 68.—A few years ago the Esquimaux women, generaly wore a cloak, or cope, of seal-skin, with the hair outwards, the tail hanging down behind, and the flippers on their arms; but now all rejoice in European dresses, shawls and gowns of many colours. The only remains of Indian dress is the sealskin boot, which even the smallest children wear; it is of great use in the snow, being quite impervious to wet. In the race of mixed blood, or Anglo-Esquimaux, the Indian characteristics very much disappear, and the children are both lively and comely.

p. 69.—The afternoon service commenced soon after three o'clock, and was not concluded till seven o'clock, in consequence of the numbers to be christened and added to the Church. I admitted six adults myself, who were able to answer for themselves; three were Esquimaux. All made the proper answers correctly and seriously, and not the least so the poor Indians.

Having regard to the well established usage of designating the Esquimaux of Labrador as Indians or Esquimaux Indians, evidenced by the Proclamations of the Governors of Newfoundland, and other official and unofficial documents, one finds little difficulty in appreciating the significance of the phraseology of the correspondence, in 1879, between Sir John A. Macdonald and Sir Hector Langevin on the subject of the Eskimo on the north shore of the St. Lawrence. The phrase "Esquimaux Indians" is employed in this correspondence as it had been employed for a hundred years in official and other documents to designate the Labrador Esquimaux. In 1882, three years after the date of this correspondence, the sale of intoxicating liquors to "Esquimaux Indians" was prohibited by an Act of the Legislature of Newfoundland.

Newfoundland, including the territory inhabited by these Labrador Eskimo was, as already pointed out, one of the British North American colonies the union of which with Canada was contemplated by the *British North America Act*. Thus it appears that, through all the territories of British North America in which there were Eskimo, the term "Indian" was employed by well established usage as including these as well as the other aborigines; and I

repeat the *British North America Act*, in so far as it deals with the subject of Indians, must, in my opinion, be taken to contemplate the Indians of British North America as a whole.

As against this evidence, the Dominion appeals to the Royal Proclamation of 1763 as furnishing the clue to the true meaning and application of the term "Indians" in section 91. The Indians therein referred to are said to be the same type of aborigines as are described in that Proclamation as "the several nations or tribes of Indian with whom We are connected and who live under Our protection."

First, it is said that the terms "nation" and "tribe" are not employed in relation to the Eskimo. That is a proposition which finds no support in the documents produced dealing with the Labrador Eskimo; and, as regards the Eskimo inhabiting the Hudson's Bay Company's territories, they, as already pointed out, are (in the tables in the margin of the Hudson's Bay Company's aboriginal map) included in the statement of "Indian tribes" in those territories and they are in the list of "Indian nations" once dwelling east of the Mississippi.

Then it is said they were never "connected" with the British Crown or "under the protection" of the Crown. I find some difficulty in affirming that the Eskimo and other Indians ruled by the Hudson's Bay Company, under either charter or licence from the Crown, were never under the protection of the Crown, and in understanding how, especially in view of the Proclamations cited, that can be affirmed of the Esquimaux of northeastern Labrador. I cannot give my adherence to the principle of interpretation of the *British North America Act* which, in face of the ample evidence of the broad denotation of the term "Indian" as employed to designate the aborigines of Labrador and the Hudson's Bay territories as evidenced by the documents referred to, would impose upon that term in the *British North America Act* a narrower interpretation by reference to the recitals of and the events leading up to the Proclamation of 1763. For analogous reasons I am unable to accept the list of Indian tribes attached to the instructions to Sir Guy Carleton as controlling the scope of the term "Indians" in the *British North America Act*. Here it may be observed parenthetically that if this list of tribes does not include Eskimo, as

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apparently it does not, neither does it appear to include the Montagnais Indians inhabiting the north shore of the St. Lawrence east of the Saguenay or the Blackfeet or the Cree or the Indians of the Pacific Coast.

Another argument advanced by counsel for the Crown is based upon the supposed contrast between the language used in Articles 31 and 32 of the Instructions to Sir Guy Carleton and that used in relation to the Eskimo in Article 37. It has already been pointed out that, in the official documents relating to the Labrador Eskimo, the words "savages" and "Indians" are used convertibly; that in General Murray's Report in 1762 the Montagnais, the Hurons and the Eskimo are all spoken of as "savages"; and in Article 31 of Sir Guy Carleton's Instructions, the term "savages" is applied to the Indians of Illinois, the straits of Detroit, Michilimackinac and Gaspe; and, in Article 32, the term "savages" is applied to the Indians affected by the Royal Proclamation in 1763 and within the scope of the plan of 1764. I can find nothing in the language of these instructions which militates against the inference which, as already explained, seems to me to arise from the documents mentioned above having relation to the Labrador Eskimo.

Nor do I think that the fact that British policy in relation to the Indians, as evidenced in the Instructions to Sir Guy Carleton and the Royal Proclamation of 1763, did not contemplate the Eskimo (along with many other tribes and nations of British North American aborigines) as within the scope of that policy is either conclusive or very useful in determining the question before us. For that purpose, for construing the term "Indians" in the *British North America Act* in order to ascertain the scope of the provisions of that Act defining the powers of the Parliament of Canada, the Report of the Select Committee of the House of Commons in 1857 and the documents relating to the Labrador Eskimo are, in my opinion, far more trustworthy guides.

Nor can I agree that the context (in head no. 24) has the effect of restricting the term "Indians." If "Indians" standing alone in its application to British North America denotes the aborigines, then the fact that there were aborigines for whom lands had not been reserved seems

to afford no good reason for limiting the scope of the term "Indians" itself.

For these reasons I think the question referred to us should be answered in the affirmative.

CANNON, J. (Crocket J. concurring).—The question referred to us for hearing and consideration pursuant to section 55 of the *Supreme Court Act* is:

Does the term "Indians" as used in head 24 of section 91 of the *British North America Act*, 1867, include Eskimo inhabitants of the province of Quebec?

I answer the question in the affirmative.

In the evidence given by Sir George Simpson before the Select Committee of the Hudson Bay Company, it appears that in 1857, the Eskimos were included amongst the so-called Indian races classified in the census prepared by the Company and the report of the Committee must have been known to the legislature at Westminster in 1867.

The correspondence between Sir John Macdonald and Sir Hector Langevin with reference to the relief to be given to the Montagnais and Eskimo Indians of the Lower St. Lawrence would show that these two Fathers of the Confederation always understood that the English word "Indians" was to be construed and translated as "sauvages" which admittedly did include *all* the aborigines living within the territories in North America under British authority, whether Imperial, Colonial, or subject to the administrative powers of the Hudson Bay Company.

I do not insist on these two points which have been well treated by my brother Kerwin with whom I agree. I would like to add the following considerations.

As to the exact meaning of the word "Indians" at the time of Confederation, I believe that we have in the official documents "respecting the Proposed Union of the British North American Provinces" presented to both Houses of Parliament of the United Kingdom, on the 8th of February, 1867, all we need to form an opinion of the significance of this word and its scope.

In the English Text of the Report of the Resolutions adopted at a Conference of Delegates from the provinces of Canada, Nova Scotia and New Brunswick, and the Colonies of Newfoundland and Prince Edward Island, held

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at the City of Quebec, October 10, 1864, as the Basis of a proposed Confederation of those Provinces and Colonies, Resolution 29 reads as follows:

The General Parliament shall have power to make Laws for the peace, welfare and good Government of the Federated Provinces (saving the Sovereignty of England), and especially Laws respecting the following subjects:

1.
2.
3.
* * * *

29. Indians and Lands Reserved for the Indians.

The official French translation of this resolution, as I find it in "Débats Parlementaires sur la Question de la Confédération des Provinces de l'Amérique Britannique du Nord, imprimés par Ordre de la Législature par Hunter, Rose et Lemieux, Imprimeurs, Parlementaires, 1865," follows:

29. Le parlement général aura le pouvoir de faire des lois pour la paix, le bien-être et le bon gouvernement des provinces fédérées (sans toutefois, pouvoir porter atteinte à la souveraineté de l'Angleterre), et en particulier sur les sujets suivants:

1.
2.
3.
* * * *

29. Les *Sauvages* et les terres réservées pour les Sauvages.

The petition to the Queen passed on the 13th of March, 1865, by the Legislature reproduces, as to this sub-paragraph, word for word the Quebec resolutions, and the French translation also gives to the General Parliament under Section 29,—"Les Sauvages et les terres réservées pour les Sauvages."

This, I think, disposes of the very able argument on behalf of the Dominion that the word "Indians" in the *British North America Act* must be taken in a restricted sense. The Upper and Lower Houses of Upper and Lower Canada petitioners to the Queen, understood that the English word "Indians" was equivalent to or equated the French word "Sauvages" and included all the present and future aborigines native subjects of the proposed Confederation of British North America, which at the time was intended to include Newfoundland.

The official French version of the *British North America Act* also translates "Indians" by "Sauvages." See Statut du Canada, 1er Parlement, 31 Victoria, 1867-1868, Imprimé

par Malcolm Cameron, Imprimeur de Sa Très Excellente Majesté la Reine—Ottawa, 1867, page 24, section 91, sous-paragraphe 24.

CROCKET, J.—I am of opinion that the question referred to us should be answered in the affirmative for the reasons stated by my Lord the Chief Justice and my brothers Cannon and Kerwin.

KERWIN, J. (Cannon and Crocket JJ. concurring)—The question should be answered in the affirmative. In my opinion, when the Imperial Parliament enacted that there should be confided to the Dominion Parliament power to deal with "Indians and lands reserved for the Indians," the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation. The fact that there were no Eskimos within the boundaries of the provinces that first constituted the Dominion is beside the point as provision was made by the *British North America Act* to include the greater part, if not all, of the territory belonging to the Hudson's Bay Company. And whether the Eskimos as now known emigrated directly from Asia or inhabited the interior of America (originally coming from Asia) and subsequently migrated north, matters not, however interesting it may be to follow the opinions of those who have devoted time and study to that question.

From the date of the visit of Champlain to this country in 1625 when he discovered "une nation de sauvages qui habitent ces pays, qui s'appellent Exquimaux," and of Radisson who in an account of his travels and experiences refers to "Indians called Esquimos"; through the reports of the missionaries and the correspondence between France and New France, the Indians are referred to as "sauvages" and the Eskimos as "sauvages esquimaux." Later we find by referring to such books as might be expected to be known to the Fathers of Confederation and to the British Parliament statements indicating that the Eskimo was considered as one of the Indian tribes. The following is a partial list of such books:—

1855.—Webster's American Dictionary of the English language defines the Esquimaux: "A nation of Indians inhabiting the northwestern parts of North America."

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1855.—Adrien Guibert in his Geographical Dictionary, classifies the Eskimos among the Indians of America.

1856.—In "The Indian Races of North and South America," Charles de Wolf Brownell, an American author, speaks of the Esquimaux Indians and devotes a chapter to the study of their manners and personal appearance.

1857.—In the "Gazetteer of the world," published in London by A. Fullerton & Co., the Eskimos are dealt with as Indians, who are the aboriginal people of the New Continent; mentions are made of Eskimos in opposition to "common Indian" and to "other Indians."

1857.—In an Imperial Blue Book is a Report from the Select Committee on the Hudson's Bay Company in which the Eskimos are enumerated among the Indians, are classified with the Indian races and are shown on a map denoting the boundaries and locations of various Indian tribes.

1857.—In the evidence given before a Select Committee of the House of Commons (Imperial), appointed to consider the state of the British Possessions in North America, Sir George Simpson, Governor of the territories of the Hudson's Bay Company, includes the Eskimos in the Indian population.

1869.—In an "Esquisse sur le Nord-Ouest de l'Amérique" by Mgr. Taché, Bishop of St. Boniface, Manitoba, reference is made to the aboriginal tribes being called Indians (Sauvages) and the Esquimaux are dealt with at length as one of the five linguistic Indian families.

A word should be added as to Webster's Dictionary. Counsel for the Dominion pointed out that in the 1913 edition of Webster's New International Dictionary, as well as the 1923, 1925, and 1927 editions, "Indian" is defined as being "a member of any of the aboriginal American stocks excepting the Eskimauan." However, in the earlier 1855 edition, then known as The American Dictionary of the English Language, appears the following:—

"Indian", A. General name of any native of the Indies;; as an East Indian or West Indian. It is particularly applied to any native of the American continent.

In the 1865 edition of what had then become the Dictionary of the English Language, "Indians" were defined as

Indians are the aboriginal inhabitants of America so called originally from the idea on the part of Columbus and the early navigators of the identity of America with India.

It was only in the 1913, 1923 and 1927 editions that the earlier definition was departed from while in the 1934 edition of Webster's International Dictionary, "Indian" is defined as follows:—

Indian. 5. A member of the aboriginal American race; an American, or Red, Indian; an Amerind * * * About 75 linguistic families or stocks are recognized in North America, and about 75 more in South America and the West Indies. Some stocks comprise many tribes speaking distinct, but related, languages. The 16 stocks listed below occupied more than half the area of the continent and comprised a large majority of the Indians at the time of the discovery of North America, Algonquian, Athapascan, *Eskimauan,* Iroquoian, Mayan, Muskhegean, Siouian, and Uto-Aztocan.

It is true that in the New English (Oxford) Dictionary, volume 5, under the heading "Indian" appears the following:—

A. * * *

2. Belonging or relating to the race of original inhabitants of America and the West Indies.

B. * * *

2. A member of any of the aboriginal races of America or the West Indies; an American Indian.

The Eskimos, in the extreme north, are usually excluded from the term; as are sometimes the Patagonians and Fuegians in the extreme south.

There are also a few other publications to which our attention has been called where "Indians" and "Esquimaux" are differentiated but the majority of authoritative publications, and particularly those that one would expect to be in common use in 1867, adopt the interpretation that the term "Indians" includes all the aborigines of the territory subsequently included in the Dominion.

As pointed out in a memorandum of November 1st, 1918, by the Deputy Superintendent General of Indian Affairs to the Minister, the Eskimos had never been mentioned in any legislation up to that time but by chapter 47 of 14-15 George V, assented to July, 1924, section 4 of *The Indian Act,* Chapter 81, R.S.C., 1906, was amended by adding thereto the following subsection:—

(2) The Superintendent General of Indian Affairs shall have charge of Eskimo affairs.

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This was afterwards repealed and even if the repeal had never occurred perhaps no argument could be adduced from the provisions of the amending statute but it is significant that in 1879 a letter from the Very Reverend Edmond Langevin to the Postmaster General of Canada, referring to the necessitous condition of "the Montagnais and Esquimaux Indians on the north coast of the St. Lawrence below the Saguenay" was sent by the addressee to Sir John A. Macdonald as Superintendent General of Indian Affairs with the following covering letter:—

Ottawa, 20 January, 1879.

My dear Sir John,

The enclosed letter from the Very Reverend Edmond Langevin, Vicar General of Rimouski, calls my attention to the position of the Montagnais and Esquimaux Indians on the north coast of the St. Lawrence, below the Saguenay. He says that the amount that used to be given to these Indians was seventy eight cents a head, and that now it is only thirty eight cents. These poor people are starving they can't cultivate the land, which in that region is hardly cultivable, and have had no provision made for them by the Government, and he requires on their behalf that we should come to their help. Will you kindly see that they are treated as well as we treat the Indians of our new territories. Of course I leave the whole matter in yours hands.

Yours truly,
Hector L. Langevin.

Right Honble Sir John A. Macdonald, K.C.B., Ottawa.

The matter referred to was commented upon by the Deputy Superintendent General of Indian Affairs in the following report:—

To the Right Hon. Sir John A. Macdonald, K.C.B.
Supt. General of Indian Affairs

Ottawa, 24 jany, 1879.

With reference to the letter of the 20th Instant (placed herewith) from the Honourable Hector Langevin, enclosing a letter of the 13th Instant, from the Very Reverend Edmond Langevin, of Rimouski, in the province of Quebec, relative to the insufficient relief given to the Montagnais and Esquimaux Indians of the Lower St. Lawrence, the undersigned has the honor to report that frequent representations to the same effect have been made to the Department and that last year he endeavoured to induce the then Superintendent General of Indian Affairs to ask Parliament for a larger grant, but that when the proposed estimates for the year 1878-79 were submitted to Council for revision, the proposed increase of $2,000 to the Parliamentary Grant for these Indians was struck out.

The present Government has however sanctioned the Supplementary Estimates for 1878-9 which will be submitted to Parliament at the approaching Session being anticipated by granting the said sum of $2,000.00, and the undersigned has moreover increased the grant for those Indians by that amount in the proposed estimates for the year 1879-80,

with the hope that the Government will sanction and Parliament confirm the same.

All respectfully submitted,

L. Van Koughnet,
Deputy Supt. General of Indian Affairs.

That so soon after Confederation the position of Eskimos should be treated in this manner is significant. It not only more than counter-balances any reference made later as to the Department's attitude but, to my mind, is conclusive as to what was in the minds of those responsible for the drafting of the Resolutions leading to the passing of the *British North America Act*, at that time and shortly thereafter.

Special attention should also be paid to the report of the Select Committee on the Hudson's Bay Company to the Houses of Parliament of Great Britain and Ireland, presented in 1857. As appears from the Imperial Blue Books on Affairs Relating to Canada, the Committee reported:—

> It is a matter of great difficulty to obtain reliable information respecting the Indian population, their migratory habits, and the vast extent of country over which they are spread, misleading the calculations, and rendering it almost impracticable to prepare a satisfactory census. The following estimates have been compiled with great care, from a mass of documents and the actual personal knowledge of several of the Company's officers, tested by comparison with published statements, especially those presented to Government in 1846 by Messrs. Warre and Vavasour, and those of Colonel Lefroy, R.A., contained in a paper read before the Canadian Institute.

The estimates referred to are headed "Establishments of the Hudson's Bay Company in 1856 and number of Indians frequenting them." After a long list of the names of the posts and localities and of the number of Indians frequenting each post is appended the following:

Add Whites and half breeds in Hudson's Bay Territory, not included	6,000
Add Esquimaux not enumerated	4,000
Total	158,960

The *Indian Races* shown in detail in the foregoing Census may be classified as follows:—

Thickwood Indians on the east side of the Rocky Mountains	35,000
The Plain Tribes (Blackfeet, &c)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indian in British Oregon and on the Northwest Coast..	80,000
Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls	158,000

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REFERENCE AS TO WHETHER "INDIANS" IN S. 91 (24) OF THE B.N.A. ACT INCLUDES ESKIMO INHABITANTS OF THE PROVINCE OF QUEBEC.

Kerwin J.

The Esquimaux, it will be seen, are included among the Indian races and this is based apparently upon the evidence of Sir George Simpson, which had been taken before the Committee. Questions 1062 and 1472, together with the answers, are as follows:—

1062. Mr. GREGSON: What mode have you of ascertaining of the population of the Indians? We have lists of the Indians belonging to various posts; we have compared and checked them with the report of the Government officers who went to Vancouver's Island some years ago, as regards the tribes to the west of the mountains, and with Colonel Lefroy's lists, as regards those on the east side, and we have arrived at this estimate of the population.

1472. Mr. ROEBUCK: Will you state the total?—The Indians, east of the mountains, 55,000; West of the mountains, 80,000; Esquimaux, 4,000.

While counsel for the Dominion sought to draw from the answer to Question 1472 the inference that Sir George Simpson had not treated the Esquimaux as one of the Indian tribes, I think the answer is not susceptible of that interpretation and it is certainly not the one that the Committee adopted.

After considering the reports of missionaries, explorers, agents, cartographers and geographers, included in the cases submitted on behalf of the Dominion and province of Quebec, I do not believe anything further may be usefully added. The weight of opinion favours the construction which I have indicated is the proper one of head 24 of section 91 of the *British North America Act* but the deciding factor, in my view, is the manner in which the subject was considered in Canada and in England at or about the date of the passing of the Act.

The question referred was answered in the affirmative.

THE PETER BIRTWISTLE TRUST.....APPELLANT; 1938

* June 14,15.
* Dec. 19.

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Liability for assessment—Income War Tax Act (R.S.C., 1927, c. 97, as amended), ss. 11 (2), 4 (e), 55, 56—"Income accumulating in trust for the benefit of unascertained persons or persons with contingent interests"—"Charitable institution"—Liability for interest prior to date of assessment—Costs.

B. of London, Ontario, on May 27, 1918, made a deed of settlement of real and personal properties to a trust company in Ontario, for management, administration, etc. At the end of 21 years after B.'s death the trustee was to pay the whole fund with accumulations thereon to the Municipal Council of the Town of Colne in Lancashire, England, "to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council." B. died on April 19, 1927. The trust company made yearly income returns for each of the years 1919 to 1934 respectively to the Dominion Government on the form to be filed by trustees. No assessment was made until February 21, 1936, when assessments for income tax were made for all those years, interest being added. Liability to pay the tax was disputed. Sec. 11 (2) of the *Income War Tax Act* (R.S.C., 1927, c. 97, as amended) provides that "income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee * * *."

Held (reversing judgment of Maclean J., [1938] Ex. C.R. 95) (Kerwin J. dissenting): The income in question was not within said s. 11 (2) and was not taxable.

Per The Chief Justice, Crocket and Davis JJ.: The fund was created for a purpose—to be used "for the benefit of the aged and deserving poor," a class, in the town of Colne (a purpose not improbably to be satisfied by building and maintaining some institution)—not, either as to capital or income, for any particular person or persons. What the settlor established was an arrangement or undertaking for promoting a defined public or social object without reference to the property appropriated for the purpose becoming vested at any time in any particular person or persons. No particular person will ever acquire a right to demand and receive the beneficial interest in the income from the fund or in any part thereof. Therefore s. 11 (2) (the only section suggested as under which the accumulating income is taxable) does not apply. (*Holden* v. *Minister of National Revenue*, [1933] A.C. 526, distinguished).

Per Hudson J.: The persons intended under s. 11 (2) are persons who might become entitled to specific portions of the fund, and not a

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

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general class who would ultimately get the benefits of the fund in the way of charitable assistance.

Per Kerwin J. (dissenting): Under the agreement between the settlor and the trustee the real beneficiaries of the trust are the aged and deserving poor of Colne. The members of the class who will benefit are unascertained persons within the meaning of s. 11 (2). As to further contentions against the assessments: The income is not exempt as being "income of a charitable institution" within s. 4 (*e*) of the Act. Interest prior to date of assessment is payable under the Act (s. 55); s. 66 of the Act (considered in conjunction with other sections) does not leave it to the court's discretion whether interest should be exacted; it is merely an enactment establishing the exclusive jurisdiction of the Exchequer Court to deal with the dispute. The question of costs stands in a different position; the appeal should be dismissed without costs.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing (without costs) an appeal from the decision of the Minister of National Revenue confirming assessments for income tax. The material facts and circumstances of the case are sufficiently stated in the judgments now reported and are indicated in the above head-note. The appeal to this Court was allowed and the judgment appealed from and the assessments in question were set aside, with costs to the appellant throughout. Kerwin J. dissented.

S. Casey Wood K.C. and *G. M. Jarvis* for the appellant.

John Jennings K.C. and *J. R. Tolmie* for the respondent.

The judgment of the Chief Justice and Crocket and Davis JJ. was delivered by

DAVIS, J.—On the 27th day of May, 1918, Peter Birtwistle, of the city of London, in the province of Ontario, made a deed of settlement of certain real and personal properties to The Trusts & Guarantee Company, Limited, of the city of Toronto, in the said province, as trustee upon the terms and conditions therein set forth. This settlement superseded an earlier settlement of the 20th of October, 1916, with respect to a sum of $100,000, the investments of which were covered, together with additional property, by the settlement of the 27th of May, 1918. The Trust Company was to administer and manage the trust subject to the directions and control of the

(1) [1938] Ex. C.R. 95.

settlor during his lifetime and after his death in its absolute discretion with the usual powers of administration and management of the trust fund. The fund was to be held and accumulated until the expiration of 21 years after the death of the settlor, at which date the trustee was to pay the whole of the then fund to the Municipal Council of the town of Colne in Lancashire, England, to be used by the said Council for the benefit of the aged and deserving poor of the said town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council. The exact words of the provision are as follows:

> The Trustee shall pay the whole of the Investment Account, together with accumulations thereon, to the Municipal Council of the Town of Colne in Lancashire, England, at the end of the period of twenty-one years after the death of the Settlor, to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council, save and except and the Settlor hereby declares it to be his wish that the said Council should in so far as possible or convenient, leave any of the said fund which is not required for immediate distribution to be held by the Trustee hereunder and invested by the Trustee under an arrangement similar to that comprised in this indenture, the Settlor believing that it will be advantageous for the Council to retain this colonial investment which the Settlor considers likely to return a better rate of interest than can be readily obtained in England.

Peter Birtwistle died on April 19th, 1927; the fund with accumulations would therefore become payable to the Council of the town of Colne on April 19th, 1948. At December 31st, 1936, the fund amounted to $572,767.88 and it was estimated by the general manager of the Trust Company that if the trust were continued to the expiration of the twenty-one years from the date of death, the fund would then amount to approximately one million dollars. The fund has been earning approximately $25,000 a year. The town of Colne became desirous of terminating the trust and receiving immediate payment of the fund; the first intimation was a letter from the town clerk to the trustee of the 5th of September, 1933. Subsequently the question was raised in proceedings taken in the Supreme Court of Ontario for approval of a proposed compromise whereby substantial amounts were to be paid over to the town of Colne at that time. Rose, C.J., refused to approve the proposed agreement (1).

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The Trust Company each year (1919 to 1934 inclusive) reported to the Dominion Government on the regular form required to be filed by trustees, executors, administrators, assignees, receivers and persons acting in a fiduciary capacity, known as Form T-3, the amount of the income received. The purpose of this return is for information and not for taxation at the source. The amount of the income was set out opposite the printed words "Income accumulating in hands of Trustees" and by way of information there were written in under the printed heading "Name and address of Beneficiary" on the form, the words "Income accrues to the Municipal Council of Colne, England, for the benefit of aged and deserving poor."

No assessment for income taxation in respect of the accumulating income from this fund was made by the Dominion of Canada under the *Income War Tax Act, 1917,* and amendments (now R.S.C., 1927, ch. 97) during any of the years 1919 to 1934 inclusive until February 21st, 1936, when assessments were made for all these years at the one time. To the normal tax were added surtaxes and interest aggregating $36,053.25. Of this sum $8,794.45 was interest alone. It is rather obvious that the litigation in the Ontario courts in 1935 attracted the taxing officials of the Dominion to endeavour to collect an income tax from this fund. The trust company denied that it was liable to pay a Dominion income tax on the income from the fund. The assessments were actually made against "The Peter Birtwistle Trust" but no objection was taken by the trust company to this error; obviously the fund itself could not be assessed.

Speaking broadly (apart from non-residents) the Dominion income tax legislation does not contemplate taxation at its source but imposes the tax upon the persons or corporations who receive the income. A beneficiary under a will, for instance, receives his income from the estate intact; he is directly assessed by the Dominion upon the sum which he receives. The executor is required to make a return of the income received by him from the estate and to state the names and addresses of the beneficiaries entitled to that income. But there is a section in the *Income War Tax Act,* 11 (2), which provides that where income is accumulating in trust for the benefit of unascertained persons or persons with con-

tingent interests that income shall be taxable in the hands of the trustee. The original enactment was by sec. 4 of ch. 49 of the Statutes of Canada, 1920, and read as follows:

Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person.

By sec. 16 of the 1920 statute, this section was deemed to have come into force at the commencement of the 1917 taxation period. The original enactment remained in force until 1927 when it was reproduced verbatim as sec. 11 (2) of the Revised Statutes of 1927, ch. 97. The section remained in force until 1934, when by ch. 55, sec. 7, of the Statutes of 1934, the section was repealed and the following substituted therefor:

11. (2) Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of a person other than a corporation, provided that he shall not be entitled to the exemptions provided by paragraphs (*c*), (*d*), (*e*) and (*i*) of subsection one of section five of this Act.

By sec. 18 of the 1934 statute this new section was made applicable to income of the 1933 taxation period and to all subsequent periods. In 1936 by ch. 38, sec. 10, of the Statutes of that year the section was further amended but without any bearing on the question at issue in this appeal.

Section 2 of the *Income War Tax Act* as it was in 1936 contained the following definitions:

(*h*) "Person" includes any body corporate and politic and any association or other body, and the heirs, executors, administrators and curators or other legal representatives of such person, according to the law of that part of Canada to which the context extends;

(*k*) "taxpayer" means any person paying, liable to pay, or believed by the Minister to be liable to pay, any tax imposed by this Act.

The *Colne Corporation Act, 1933* (being Imperial statute 23 and 24 George V, ch. 35) by sec. 140 empowers the Corporation of Colne to accept, hold and administer any gift of property, whether real or personal, for any public purpose connected with the borough.

It may be convenient to mention here that sec. 4 of the *Income War Tax Act,* so far as relevant, provides:

The following incomes shall not be liable to taxation hereunder:—

(*e*) the income of any religious, charitable, agricultural and educational institution, board of trade and chamber of commerce.

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It was contended that upon a proper construction, the exemptions of subsection (*e*) must be confined territorially to institutions that are within Canada, but it is not necessary, in the view I take of the appeal, to put a construction upon the subsection.

Section 11 (2), which is a charging section, contemplates income that will vest in and ultimately pass to persons for the time being unascertainable, such, for instance, as unborn issue, or to persons whose rights are for the time being merely contingent interests. The statute is dealing generally with income of persons or corporations. The trust fund with which we are dealing is not intended to pass, either capital or income, to any particular person or persons; the fund was created for a purpose, not for any particular person or persons. The purpose was that the fund should be used "for the benefit of the aged and deserving poor" of the town of Colne. It was an arrangement or undertaking established by the settlor for promoting a defined public or social object without reference to the property appropriated for the purpose becoming vested at any time in any particular person or persons. Aged and deserving poor cannot be regarded otherwise than as a class in the community; to regard them otherwise is to destroy the character of what is obviously a charitable trust. No particular person will ever acquire a right to demand and receive the beneficial interest in the income from the fund, or in any part thereof. The population of the town of Colne is said to be about 25,000 and it is inconceivable that when the town in 1948 receives approximately a million dollars it will distribute it, or any substantial part of it, among particular persons; the purpose of the settlor will not improbably be satisfied by the erection and maintenance of a hospital or a home or some such institution that will serve the needs of the aged and deserving poor of the town. If I understood counsel aright during the argument, that was the sort of use to which the town intended to put the money when it sought in 1935 to obtain from the Ontario court payment over to it of the fund, or substantial portions of it.

The particular section in question, sec. 11 (2), was considered by the Privy Council in *Holden* v. *The Minis-*

ter of National Revenue (1), and in the judgment of their Lordships delivered by Lord Tomlin the section was said to be a true charging section and fixed the trustee of the accumulating income with liability for the tax. But the accumulating income in that case would, by force of the will of the testator there in question, inevitably become payable as of right at a future date to particular persons who would become entitled to compel payment of such income to themselves. The point in issue now before us did not arise for consideration in that case.

Under the trust that is before us the income is not being accumulated for persons presently unascertainable or for persons with merely contingent interests within the meaning of sec. 11 (2). It is being accumulated for a purpose—and the purpose is to make provision for the benefit of the aged and deserving poor of the town of Colne. It is not suggested that the accumulating income is taxable except under sec. 11 (2), and as that section does not apply, the income of the fund in the hands of the trust company was never taxable under the statute.

The appeal should be allowed and the judgment appealed from and the assessments in question set aside, with costs to the appellant throughout.

KERWIN, J. (dissenting)—Under the agreement of May 27th, 1918, between the settlor, Peter Birtwistle, and the trustee, The Trusts and Guarantee Company, Limited, the distinction between the borough of Colne and the council of the borough is not maintained. By clause 2 (*b*) the trustee is to pay the whole of the investment account provided for by the agreement, together with accumulations, to the Municipal Council of the Town of Colne at the end of the period of twenty-one years after the death of the settlor

to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council.

On the other hand, under the latter part of clause (*d*) of paragraph 2,

the Settlor hereby expressly relinquishes and surrenders to the Trustee and the Municipality of Colne all the said income in excess of the amount thereof necessary to cover his expenses of living,

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and under clause (*g*) it is provided that:—

> Upon the payment over to the Municipality of Colne at the expiration of the period hereinafter determined, together with interest at the rate and in the manner guaranteed hereunder, the securities held by the Trustee in respect of the said Investment Account shall become the property of the Trustee freed from the terms of the trusts hereby created in reference to the said account without any formal assignment or release from the Settlor or the Council of the Municipality of Colne.

I have mentioned the terminology of the agreement in this one respect in order to draw attention to what appears to me to be another inexactitude. Clause 3 of the agreement provides:

> The Trustee shall render to the Settlor regular statements in such form as may be required quarterly during the life of the Settlor and thereafter on similar dates to the beneficiaries of the estate.

A careful reading of the agreement leaves no doubt in my mind that there is but one trust with two successive trustees and that the real beneficiaries of the trust are the aged and deserving poor of Colne.

This becomes of importance in considering both main grounds of appeal. The first is whether the members of the class who will benefit are unascertained persons within the meaning of subsection 2 of section 11 of the *Income War Tax Act:*

> Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of a person other than a corporation.

It has been determined in *Holden* v. *Minister of National Revenue* (1) that this is a true charging section, and in my opinion the question whether such members are unascertained persons within the ambit of that provision should be answered in the affirmative. Until the period of distribution arrives the recipients of the settlor's bounty are unascertainable.

The second ground raised by the appellant is that the income is income of a charitable institution within the meaning of those words as used in section 4 (*e*) of the Act, and therefore exempt from taxation. What has already been said disposes of the suggestion that the income is income of anyone other than the unascertainable aged and deserving poor of Colne and I do not find any assistance in the English cases referred to, which deal with

(1) [1933] A.C. 526.

statutes expressed in terms totally unlike the enactment under consideration.

It has also been urged that in any event no interest is payable upon the tax prior to the date of assessment. Commencing with the year 1919, the trustee furnished annual returns under the Act, and under the heading "Name and Address of Beneficiary" inserted "Income accrues to the Municipal Council of Colne, England, for the benefit of aged and deserving poor." No assessment was made until 1936,—apparently in consequence of the publicity occasioned by the report of a decision of the Supreme Court of Ontario (1), given on an application made by the trustee for approval of a proposed agreement between it and the Mayor, Aldermen and Burgesses of the Borough of Colne. The assessment was then made for the years 1919 to 1934 inclusive and included interest at the statutory rate from the times each annual tax was payable.

Interest is provided for by sections 48, 49 and 54, and section 55 enacts:—

> Notwithstanding any prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefor and the Minister may at any time assess, re-assess or make additional assessments upon any person for tax, interest and penalties.

It is suggested that in applying the provisions of these sections a difficulty arises by virtue of section 66:—

> Subject to the provisions of this Act, the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty or as to costs as to the said Court may seem right and proper.

It is contended that this provision leaves it to the Court's discretion whether interest should be exacted from the taxpayer.

The suggested difficulty disappears, however, when section 66 is considered in conjunction with the sections dealing with the rights of a party assessed who objects to the amount at which he has been assessed for income tax or who considers that he is not liable to taxation. By section 58 such a person may serve a notice of appeal upon the Minister of National Revenue who shall then "duly consider the same and shall affirm or amend the assessment appealed against and shall notify the appel-

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lant of his decision by registered post" (section 59). If the appellant is dissatisfied with the Minister's decision, he may notify the Minister that he desires his appeal to be set down for trial, and furnish a statement of facts (section 60). The Minister is to reply thereto (section 62) and transmit to the Exchequer Court certain documents and the matter is thereupon deemed to be an action in that Court (section 63). Section 65 provides for the Court permitting any fact or statutory provision not set out in the notice of appeal or notice of dissatisfaction to be pleaded or referred to and empowers the Court to refer the matter back to the Minister for further consideration. Then comes section 66 already quoted.

In my opinion, this section is merely an enactment establishing the exclusive jurisdiction of the Exchequer Court to deal with the dispute. The power of the Court to make any order as to payment "of any tax, interest or penalty" is similar to the power conferred upon the Minister by section 55 to "assess, re-assess or make additional assessments upon any person for tax, interest and penalties." In any event the opening words of section 66, "Subject to the provisions of this Act," make it evident, I think, that the Court has no power to disregard the plain provisions of the Act imposing upon the taxpayer a liability for interest. The question of costs stands in a different position and there appears to be nothing in the Act to prevent the Court withholding costs from the Minister of National Revenue when successful, and, as a matter of fact, that is what was done by the President of the Exchequer Court in the present case.

I would dismiss the appeal without costs.

HUDSON, J.—The charging section of the *Income War Tax Act* applicable to this case, if any, is section 11 (2), and after much hesitation I have come to the conclusion that income accumulated in the trust here is not for the benefit of unascertained persons within the meaning of that section. I think that the persons there intended are persons who might become entitled to specific portions of the fund, and not a general class who would ultimately get the benefits of the fund in the way of charitable assistance.

For this reason I think that the appeal should be allowed and the judgment appealed from and assessment set aside.

Appeal allowed with costs.

Solicitors for the appellant: *Wood & Jarvis.*

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

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Hudson J.

PRUDENTIAL EXCHANGE COMPANY LTD. (PLAINTIFF) ..... APPELLANT;

AND

SHERMAN EDWARDS (DEFENDANT) RESPONDENT.

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* May 3, 4.
* Dec. 19.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Gaming—Speculations on grain exchange—Right to recover on promissory notes given by speculator for amounts advanced to enable him to meet marginal requirements—Nature of the speculating transactions—Intentions, Knowledge, of parties—Legality or illegality of the transactions or advances—Cr. Code, ss. 231, 69—Evidence—Onus of proof—Authority of judgments in decided cases—Dicta.

Defendant, a farmer near Lang, Sask., speculated in grain futures on the Winnipeg Grain Exchange. His speculations were carried on through plaintiff, a company doing a general banking business and operating a grain elevator at Lang. Defendant gave verbal orders to plaintiff's manager to buy or sell for future delivery, which orders plaintiff transmitted to Winnipeg brokers who carried them out on the Exchange, and forwarded to plaintiff "confirmation memoranda," which stated (*inter alia*) that "all transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor." A by-law of the Exchange provided that "under all contracts of sale of grain for future delivery the actual receipt and delivery of the property and payment therefor is contemplated and may be enforced." Purchase and sale slips showing details of each transaction were also sent to plaintiff. Plaintiff received a share of the brokers' commission but had no other interest in the transactions. The trades were carried on margin. Plaintiff sent moneys for margins and charged them to defendant. In the beginning of 1930 defendant had not sufficient money to his credit with plaintiff to meet margin requirements and thereafter plaintiff advanced him money therefor, taking his promissory notes for the amounts, which notes were later discharged and replaced by other notes, on which plaintiff sued. The trial judge held that, upon the evidence, defendant was gaming in futures on the rise and fall in grain prices without any intention of actually dealing in the commodity itself, that plaintiff should be charged with knowledge of his real purpose, which was an illegal purpose, and aided

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

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and abetted him therein by purposely providing the money for margining his account from time to time as required, that under the combined effect of ss. 231 and 69 of the *Criminal Code* the parties were principals in the commission of the offence and plaintiff could not recover. His judgment was affirmed by the Court of Appeal for Saskatchewan (with variation as to costs), [1938] 1 W.W.R. 22. Plaintiff appealed.

Held: Plaintiff was entitled to recover. The contracts entered into for defendant were binding, calling for delivery and payment, and were so intended and understood by the parties thereto; and hence were not gaming or wagering transactions within the law nor illegal within s. 231 of the *Cr. Code* (the construction and effect of s. 231 discussed), even though defendant may have intended, through the machinery of the Grain Exchange, to "close" his transactions by turning over the fulfilment of his obligations to others by buying or selling grain (by legally binding contracts) before his time for fulfilment. Plaintiff's advances were to enable defendant to carry out binding obligations undertaken on his behalf, and were not for an illegal purpose.

Ironmonger v. *Dyne*, 44 T.L.R. 497; *Forget* v. *Ostigny*, [1895] A.C. 318; *Thacker* v. *Hardy*, 4 Q.B.D. 685; *Franklin* v. *Dawson*, 29 T.L.R. 479; and *Woodward* v. *Wolfe*, 155 L.T.R. 619, cited.

Held, further, *per* The Chief Justice (Davis J. concurring): Even assuming that there was illegality in defendant's intention to "close" a transaction in manner aforesaid, and even assuming that the Winnipeg brokers (who financed the transactions, i.e., carried them on margin) were through knowledge thereof *particeps criminis* (which was not shown), yet the repayment of said brokers' loans (loans made to finance the transactions as aforesaid) was not in itself an illegal act within s. 69 or s. 231 of the *Cr. Code* (the illegal act, if any, consisted in the purchase or sale), and an advance for the purpose of such repayment (as the advances by plaintiff for the purpose of replenishing defendant's margin) may be recoverable and the debt thereby created may constitute good consideration for a promissory note. The burden of establishing illegality was on defendant. In order to charge plaintiff with aiding and abetting under s. 69, *Cr. Code*, it was for him to show that the advances in respect of which the notes were given were made in such circumstances as to constitute aiding and abetting a specific illegal purchase or sale, and this was not shown.

Per The Chief Justice (Davis J. concurring): *Beamish* v. *Richardson*, 49 Can. S.C.R. 595, and *Maloof* v. *Bickell*, 59 Can. S.C.R. 429, discussed and explained. *Beamish* v. *Richardson* was not a decision (nor, indeed, was *Maloof* v. *Bickell*) upon the construction and effect of s. 231, *Cr. Code*, though opinions thereon were expressed. Misconceptions by provincial courts with regard to the effect of *Beamish* v. *Richardson* pointed out. Opinions expressed in that case touching the construction or effect of s. 231 formed no part of the *ratio decidendi*, and, however valuable and weighty as opinions, they are not of binding authority (*Davidson* v. *McRobb*, [1918] A.C. 304, at 322; *Cornelius* v. *Phillips*, [1918] A.C. 199, at 211; *Leeds Industrial* v. *Slack*, [1924] A.C. 851, at 864; *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee*, [1913]

1 K.B. 612, at 623-4). Further, the evidence in the present case (discussed) does not bring the facts of this case within the opinions expressed in *Beamish* v. *Richardson* (as touching the application of s. 231) with regard to the facts there in question.

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APPEAL by the plaintiff from the judgment of the Court of Appeal for Saskatchewan (1) dismissing (except in the matter of costs) its appeal from the judgment of Taylor J. The action was brought to recover on certain promissory notes given by defendant to plaintiff and alternatively to recover for money lent by plaintiff to defendant. The defendant, a farmer near Lang, Saskatchewan, speculated in grain futures on the Winnipeg Grain Exchange. The plaintiff was a company doing a general banking business and operating a grain elevator at Lang, and did defendant's banking and financial business and handled most of his grain through its elevator. The defendant's grain speculations were carried on through the plaintiff, verbal orders by defendant to plaintiff's manager being transmitted by plaintiff to Winnipeg brokers who carried them out on the Winnipeg Grain Exchange. The notes sued on were given by the defendant in place of over-due notes (which were discharged) which (except as to the sum of $1,350 hereinafter mentioned) had been given by defendant to plaintiff for loans made to meet defendant's marginal requirements. The trial judge, Taylor J., held that, upon the evidence, defendant was gaming in futures on the rise and fall in grain prices without any intention of actually dealing in the commodity itself, and plaintiff should be charged with knowledge of his real purpose, which was an illegal purpose, and aided and abetted defendant therein by purposely providing the money for margining his account from time to time as it was required, that under the combined effect of ss. 231 and 69 of the *Criminal Code*, the parties were principals in the commission of the offence and plaintiff could not recover (except, under the alternative claim for money lent, the sum of $1,350, found to have been advanced independently of the grain trading, with interest). His judgment was affirmed by the Court of Appeal for Saskatchewan (with a variation as to costs) (1). The material facts of the case sufficiently appear in the

(1) [1938] 1 W.W.R. 22; [1938] 1 D.L.R. 218.

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judgments now reported and are also dealt with at length in the judgment appealed from (1). By the judgment now reported the plaintiff's appeal to this Court was allowed with costs throughout.

G. W. Forbes K.C. for the appellant.

W. G. Ross K.C. for the respondent.

THE CHIEF JUSTICE.—There is no evidence that any of the transactions with which we are concerned were not real transactions giving rise to legal obligations on both sides. Indeed, the evidence is all the other way. The respondent (Edwards) himself so states and the one rule of the Winnipeg Grain Exchange which is before us, under which the transactions were carried out, is explicit that the actual receipt and delivery of the property is contemplated and may be enforced.

Of all the transactions of Edwards from 1912 or 1913 to 1931 there appears to have been only one which was carried through by the Winnipeg brokers (Reliance Grain Company) to the date of delivery, and in that case he was required to make payment and did make payment and receive delivery. To use the language of the Chief Justice of Canada in *Maloof* v. *Bickell* (2): "they were * * * *bona fide* transactions made for good consideration on the" Winnipeg Grain Exchange; and

there was no evidence of any express, implied or tacit understanding that the contracts so made were not enforceable or that any loss or gain in reference to the price of the commodities contracted for should be paid by a settlement of differences.

This is really not disputed as regards the contracts themselves as effected on the Grain Exchange by the Reliance Grain Co., but it applies equally to the transactions as between the appellants (the Prudential Company) and Edwards. Edwards, indeed, does not deny that he understood quite well that if he did not, as respects a purchase for example, sell before the date of delivery he would be obliged to accept delivery and pay the price agreed upon. There is not the slightest evidence of any sort of understanding that he could escape his obligation by a mere settlement of differences. In truth, neither the trial judge

(1) [1938] 1 W.W.R. 22; [1938] 1 D.L.R. 218.
(2) (1919) 59 Can. S.C.R. 429 at 430.

nor the Court of Appeal has found that any such understanding existed, and it is very clear to me that no such finding could be justified on the evidence.

The view of the Court of Appeal, as well as of the trial judge, is that the issue between the parties is determined by the fact that Edwards, whose evidence in this respect has been accepted by the learned trial judge, says he did not in any case intend to make or accept delivery, and, by the additional fact found by the trial judge that the Prudential Company were aware of this. These findings are based upon the evidence of Edwards and it is important to understand what he means by delivery. This he explains, and he makes it quite clear, that, by delivery, he means delivery of the commodity in kind at a terminal elevator and that, as to the acceptance of delivery, the cardinal feature is the actual payment of the full price. He says clearly enough that he intended neither of these things. This is, of course, not in the least degree inconsistent with his evidence that he intended that every transaction entered into on the Exchange by the Reliance Grain Company in Winnipeg should be, and was as he understood, a real transaction—a bargain involving legal and enforceable obligations to deliver or accept delivery and pay. His evidence really amounts to this: that his intention in the case of a purchase was to "close" the transaction by a sale. There is no evidence as to the practice on the Grain Exchange excepting that afforded by the one rule before us, viz., that

> Under all contracts of sale of grain for future delivery the actual receipt and delivery of the property and payment therefor is contemplated and may be enforced.

There is nothing to show, for example, that the Grain Exchange provides machinery for setting off the obligations on one contract against the obligations of another and thereby extinguishing them.

The evidence is equally consistent with a totally different procedure: a procedure by which, through some form of novation, the obligation of the customer is assumed by a third party whom the creditor is, by the rules of the Exchange, bound to accept as his debtor in lieu of the customer. Novation is obviously contemplated and provided for by the confirmation memorandum which is in these terms:

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We have made the following transactions for your account and risk, under the by-laws, rules, regulations and customs of the Winnipeg Grain Exchange and also those of the Winnipeg Grain and Produce Exchange Clearing Association.

All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor. On all marginal business we reserve the right to close transaction when margins are running out without further notice. We also reserve the privilege of substituting other responsible parties as principals with you in these transactions at any time until closed, in accordance with the rules of the Winnipeg Grain Exchange, where the transactions are made, and to clear all transactions through clearing associations from day to day in accordance with the usage prevailing at the time.

This trade has been, or may be, cleared through the said clearing association, and on being so cleared, we will be the only persons responsible for the carrying out of this trade or trades, and furthermore we will be the only persons against whom you will have any recourse for the fulfilment thereof.

There is no evidence of the nature of the proceedings in the clearing house; none that any one of the transactions was actually cleared through the clearing house.

It is plain that these transactions were neither gaming nor wagering transactions within the language of the law. Edwards in every instance incurred an enforceable legal obligation to carry out the sale or purchase, an obligation which he must perform by actual payment or delivery or satisfy or transfer by entering into another equally binding and enforceable obligation. Such transactions are not wagering or gaming transactions. *Ironmonger* v. *Dyne* (1).

The consideration for the promissory notes sued upon, as we shall see presently, was the discharge of overdue promissory notes given by Edwards to the Prudential Company partly in consideration of moneys advanced to Edwards and remitted to the Reliance Grain Company in order to replenish Edwards' margin account with them.

The Court of Appeal, as well as the trial judge, have held that, since Edwards did not in any of his purchases or sales intend to accept or make delivery, he was in each case guilty of an offence under s. 231 of the *Criminal Code,* and that the Prudential Company, being aware of his intentions, cannot recover in respect of the advances made. It will be necessary to consider whether the notes sued on, assuming Edwards to be right in his contention as to the construction and application of the statute, were given for an illegal consideration or for no consideration. Before

(1) (1928) 44 T.L.R. 497.

coming to this question, it is convenient first to discuss the effect of s. 231 of the *Criminal Code*.

The Court of Appeal and the trial judge, in deciding in favour of Edwards, conceived themselves to be following what is spoken of as a decision of this Court in *Beamish* v. *Richardson* (1) on the construction of that section. In truth, there was no decision in *Beamish* v. *Richardson* (1) touching the construction or effect of that section. Opinions were expressed, but, as I shall presently explain in detail, they form no part of the *ratio decidendi* and, however valuable and weighty as opinions, they are not in any way binding upon us and cannot relieve us from the duty of forming and giving effect to our own views.

In considering s. 231, it is essential to read that section in light of the title and preamble of the statute in which it was originally enacted (51 Vict., ch. 42):

> An Act respecting Gaming in Stocks and Merchandise.
>
> Whereas gaming and wagering on the rise and fall in value of stocks and merchandise are detrimental to commercial and public morality, and places affording facilities for such gaming and wagering, commonly called bucket shops, are being established; and it is expedient to prevent such gaming and wagering, to punish the persons engaged in them, and to prohibit and punish the opening and maintaining of places therefor, and the frequenting thereof: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

and also of sections 232 and 233 which reproduce sections of the same statute in a slightly modified form.

When s. 231 is read with sections 232 and 233 in light of the preamble and title of the parent statute, I think, on a true construction of it, it does not contemplate transactions such as those disclosed by the evidence before us; transactions, that is to say, in which there is a binding legal obligation on the one side to deliver and on the other side to pay, and in which these obligations are enforceable and intended to be enforceable in point of law.

I think this result is not affected by the fact that one of the parties intends to take advantage of the machinery of the stock exchange or commodity exchange on which the transactions are effected to sell, in the case of a purchase, for example, before the date of delivery, by a real sale legally binding and enforceable between himself and the purchaser. It is true that in such a case it can rightly be

(1) (1914) 49 Can. S.C.R. 595.

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said that the customer has no intention of making delivery personally or by his agent, but it does not necessarily follow that actual delivery is not contemplated or that the customer has no intention that actual delivery shall be made.

There is no evidence before us in this record to show that actual delivery was not made in any single transaction with which we are directly concerned; the evidence goes no farther than this: Edwards says he did not accept delivery except in one case which occurred prior to these transactions. He does not even negative delivery to the Reliance Grain Company in Winnipeg. I do not think a purchase of commodities for future delivery is brought within the section by reason of the fact that the purchaser intends to make a profit by the rise of the market price by selling before the arrival of the date of delivery and that, by arrangement between him and the seller, delivery is to be made to the sub-purchaser and payment made by him. Such a transaction may not improperly be described as speculating in many circumstances but nobody would think of describing it as wagering or gaming and it most assuredly is neither wagering or gaming within the meaning of the law. We should, I think, be wresting the statute from its purpose if we construed it as applying to such dealings.

Nor do I think the statute applies, to put the case in its simplest form, where the transaction contemplates delivery and payment and the enforceability of the obligations to deliver and pay, merely because one of the parties intends to make use of the machinery of an exchange in such a way as to discharge his obligation to deliver by the acquisition of a converse obligation to deliver to him and the setting off of these obligations one against the other; provided always that the converse obligation is equally real and equally enforceable in point of law.

It is, perhaps, proper to say that I see no reason to change the views I expressed in *Beamish* v. *Richardson* (1) and *Maloof* v. *Bickell* (2) (*supra*) touching the construction and effect of section 231, *Cr. C.*

Strictly, it is unnecessary to consider this last hypothesis in the case before us. The progress of the transactions through the machinery of the Grain Exchange is not traced.

(1) (1914) 49 Can. S.C.R. 595. (2) (1919) 59 Can. S.C.R. 429.

The machinery of the Exchange itself, as already observed, is not explained to us. We are left entirely in the dark with regard to it. The evidence again, as already observed, is entirely consistent with the hypothesis that in every case the obligation to pay or to deliver was performed by a substituted debtor. The evidence discloses no knowledge on the respondent's part of the actual procedure or proceedings on the Exchange. It is capable of the interpretation that to "close" a transaction merely meant he was relieved of his personal obligation to pay or to deliver as the case might be. The precise means by which that was effected, under the rules of the Exchange, whether by novation or otherwise, obviously did not concern him. His evidence is strictly limited to his own personal intentions. He knew quite well at the time of the transactions now in question, from his own experience, that if he gave an order for the purchase of future wheat and did not sell before the maturity of the contract he would be called upon to accept delivery and to pay the full price.

My conclusion, therefore, is that the respondent has failed to establish the illegality of these transactions and that on that ground his defence fails.

There is another ground upon which I am inclined to think the respondent fails. I think the proper conclusion from the evidence is that the consideration for the notes sued on was the discharge of the existing overdue notes, some of which were given in consideration of advances made by the appellants to the respondent and paid to the Winnipeg brokers in order to replenish Edwards' margin. The Winnipeg brokers, the Reliance Grain Company, were financing Edwards' transactions on the Winnipeg Grain Exchange. In other words, they were carrying these transactions on margin. Now, the evidence does not show, as counsel for the Prudential Company points out, that the advances in question were made to finance purchases or sales about to be made or thereafter to be made. They were made in part repayment of loans by the Reliance Grain Company in respect of transactions already entered into.

Assuming a purchase and a subsequent fall in the market price, a consequent shortage of margin and an advance for the purpose of replenishing the same by the Prudential

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Company to Edwards by way of remittance to the Reliance Grain Company; and assuming illegality in the sense found in the courts below, namely, illegality consisting in the intention of the respondent to close the transaction by a converse sale on the Exchange and not to carry it through by acceptance of delivery and payment; was there anything illegal in the payment to the Reliance Grain Company? There is no finding that they were *particeps criminis* and, on the evidence before us, I do not see how such a finding could be sustained.

But, apart from this, assuming knowledge ought to be imputed to the Reliance Grain Company and that they were *particeps criminis,* it does not follow that repayment of the loan by Edwards was an illegal act. The illegal act, if any, consisted in the purchase. The loan to enable the purchase to be made with knowledge of its illegality we may assume would have constituted the brokers aiders and abettors. It does not follow that repayment of the loan even on that assumption was an illegal act. The learned trial judge finds that there was an agreement on the part of the Prudential Company to make advances to replenish margins. The finding, if pertinent, must amount to this: that the Prudential Company had agreed for some valid consideration, in the case of a given purchase, for example, that they would make the advances necessary to maintain Edwards' margin with the Reliance Grain Company. That seems to me, with great respect, to be very improbable, and I can find no satisfactory evidence to support it. The Court of Appeal have not expressed their concurrence in this finding.

The onus is on Edwards in the strict sense to prove illegality; that is to say, the burden of establishing illegality is on him. If the evidence leaves the point in doubt he fails on that issue.

In order to charge the Prudential Company with aiding and abetting under s. 69, aiding and abetting a specific offence must be proved. It is necessary, therefore, to find the particular sale or sales, purchase or purchases, entered into by the respondent in violation of s. 231, in respect of which the offence of aiding and abetting is to be established. You cannot, under the *Criminal Code,* charge aiding and abetting in the abstract. You must prove the particular offence and then connect the alleged aider and

abettor with that offence. You must, that is to say, show that the advances in respect of which the discharged notes were given were made in such circumstances as to constitute aiding and abetting a specific illegal purchase or sale.

Assuming knowledge of illegality on the part of the Reliance Grain Company, and consequent illegality in the loan by them to enable the intended purchase to be made, I know no authority for the proposition that the repayment of such a loan in whole or in part would necessarily be illegal, or that an advance for the purpose of repaying such a loan would not be recoverable or that the debt thereby created would not constitute good consideration for a promissory note.

I think, if I may say so, that the Court of Appeal have overlooked the circumstance that these advances by the Prudential Company were for repaying loans by the Reliance Grain Company and, I may add, I think they must have overlooked the fact that there is no finding of complicity between the Reliance Grain Company and the client Edwards.

To sum up on this point. The respondent's case is that the notes, the discharge of which constituted the consideration for the notes sued on, were given for an illegal consideration; for a debt created by advances made by the Prudential Company to enable him to replenish his margin with the Reliance Grain Company. The onus is upon him to establish this case.

I am not satisfied that he has established the alleged illegality. He has not established the alleged illegality, first, because he has not shown that any of the advances were made in order to enable him to make an illegal sale or purchase; second, because the repayment of a broker's loan made in order to effect an illegal sale or purchase, even if known to be so by him, is not in itself an illegal act within section 69 or section 231 of the *Criminal Code;* and, third, there is not sufficient evidence of knowledge by the brokers of the illegality of Edwards' conduct, and, consequently, no foundation for the proposition that the loan by the brokers was an illegal act within these sections.

On these grounds I think the appeal should succeed.

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It seems to be desirable, however, to say a word with regard to two cases, *Beamish* v. *Richardson* (1) and *Maloof* v. *Bickell* (2), which have been the subject of discussion in the courts of Manitoba, Saskatchewan and Alberta.

I have already observed that *Beamish* v. *Richardson* (1) was not a decision, nor indeed, was *Maloof* v. *Bickell* (2), upon the construction or effect of s. 231 of the *Criminal Code*. The Court of Appeal for Saskatchewan came to the conclusion that what was said in the judgments of three members of the Court in the first mentioned case was binding on them and, as already observed, they speak of these opinions as a decision. These opinions have also been discussed in judgments in the Courts of Appeal for Manitoba and Alberta.

The practical question which a provincial court of appeal has to consider when confronted with deliberate and considered opinions in judgments delivered in this Court which do not form part of the *ratio decidendi* may, no doubt, be an embarrassing one. I am addressing myself to the effect of these opinions, not from the point of view of the provincial court, but strictly from the point of view of the judges of this Court.

First, as regards *Beamish* v. *Richardson* (1). There was a great deal of evidence before this Court in that case as to the nature of the proceedings on the Grain Exchange and in the Clearing House and there were marked differences of opinion as to the effect of that evidence.

Two members of the Court, Mr. Justice Idington and Mr. Justice Brodeur, expressed the view that the facts as disclosed in the evidence brought the case within s. 231. One member of the court expressed an opinion as to the construction of s. 231 which was a fully considered and definitive opinion as to the statute, but he did not rest his judgment on that ground because, as he said, it was unnecessary to do so in view of the fact that he was proceeding upon another ground, but also, as seems clear from his language, because he was not deciding that the facts had been established which, in his view of the statute, would make it applicable.

Plainly, it was no part of the *ratio* of the decision.

(1) (1914) 49 Can. S.C.R. 595. (2) (1919) 59 Can. S.C.R. 429.

The law on this point is well known and well understood but, in view of what was said in the Court of Appeal, I quote one or two passages in the numerous deliverances that might be cited on the subject. In *Davidson* v. *McRobb* (1), Lord Dunedin said:

My Lords, I apprehend that the dicta of noble Lords in this House, while always of great weight, are not of binding authority and to be accepted against one's own individual opinion, unless they can be shown to express a legal proposition which is a necessary step to the judgment which the House pronounces in the case.

In *Cornelius* v. *Phillips* (2), Lord Haldane said:

* * * dicta by judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding.

Again, in *Leeds Industrial Co-operative Society, Ltd.* v. *Slack* (3), Lord Dunedin said:

My Lords, if a decision is binding, there is an end of it. But if you have only to do with dicta, though such dicta may well serve to help you to form your own opinion, I cannot see that they ought to overrule it. It is a different question when a practice follows on dicta. A practice it might not be right to disturb, but then it is the practice and not the dicta that forms the binding authority. Further, the present case seems to be the last in which such a course ought to be followed, because Lindley L.J., sitting in the Court of Appeal with A. L. Smith and Davey L. JJ., distinctly stated in *Martin* v. *Price* (4) that the question was still an open one.

In my view I respectfully think that the Master of the Rolls and Warrington L.J. ought not to have confined themselves to the question of whether the dicta in *Dreyfus* (5) were carefully considered—their conclusion is one with which I cordially agree—but ought to have considered whether their own opinions or the dicta in *Dreyfus* (5) were right, and if they thought that their view was right, to have said so and let a higher Court, if it was so minded, go back to *Dreyfus* (5).

In *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee* (6), Farwell L.J. said:

It is the decision of the House only that binds the Court; the opinions of individual Law Lords are valuable in assisting us to form our own judgments, but are of no binding authority; for example, if a decision of the Exchequer Chamber were criticized unfavourably in the House of Lords, it would remain binding on us unless it were expressly overruled. The House of Lords by its order can declare the law to be entirely different from anything that it has been supposed to be for years, but no opinion of individual peers, however eminent and however numerous, can have this effect.

(1) [1918] A.C. 304, at 322.
(2) [1918] A.C. 199, at 211.
(3) [1924] A.C. 851, at 864.
(4) [1894] 1 Ch. 276.
(5) (1889) 43 Ch. D. 316.
(6) [1913] 1 K.B. 612, at 623-624.

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In *Maloof* v. *Bickell*, Mr. Justice Kelly (1), who tried the case, held that the customer had no intention of making or accepting delivery of the commodity and the Toronto brokers who would forward their orders to their correspondents in Chicago for execution on the Chicago Board of Trade had knowledge of this fact. The pertinent passage in his judgment reads:

> I would have great difficulty in coming to the conclusion that either plaintiff or defendants in the present transaction contemplated or had any intention of making or receiving an actual delivery. The plaintiff, a man with no suggestion of experience in actual grain deliveries, and operating as he did operate in his numerous transactions preceding these, clearly had no such intention; and it would be very surprising if defendants expected ever to be called upon to make or accept actual delivery. In none of plaintiff's numerous purchases and sales with defendants did any actual delivery take place; nor were such even hinted at. The circumstances clearly lead to the conclusion that defendants knew plaintiff did not intend or expect actual delivery to be made or accepted.

On this finding he held, in deference to the opinions expressed in *Beamish* v. *Richardson* (2), that the transaction was illegal by force of s. 231. In the Court of Appeal (3), reasons for judgment were given by Mr. Justice Ferguson with whom two out of three of his colleagues concurred. He swept aside the findings of the trial judge, holding

> There is no evidence * * * that the plaintiff * * * had no intention or was not able or willing to perform the contracts.

He adds:

> It does not seem to me that there is evidence on which it can be found that the defendants * * * had any notice or knowledge that the principals to the contracts negotiated by them or through their instrumentality had not *bona fide* intentions to make or accept delivery of the commodities.

Mr. Justice Ferguson distinguished the facts in *Beamish* v. *Richardson* (4) from the facts in *Maloof* v. *Bickell*. The actual relation between the broker and the client in the earlier case, he declared, was that of vendor and purchaser and he added that the broker "in addition to his commission for acting as broker, benefited or lost according to the rise or fall of the market"; this he thought was one of the grounds on which the majority of this Court

(1) Reported shortly in 13 O.W.N. 4.
(2) (1914) 49 Can. S.C.R. 595.
(3) Reported shortly in 14 O.W.N. 289.
(4) (1914) 49 Can. S.C.R. 595.

had proceeded. With great respect, this was a misapprehension. No suggestion was made in the judgments of this Court that the brokers stood in the relation of vendors to their client or that they were concerned in the profit or loss from the rise or fall of the market. That, it is quite plain, is one main ground of distinction upon which he proceeds, but there are other grounds which he sums up in these two paragraphs:

The commission evidence establishes that the contracts entered into were real *bona fide* transactions made for good consideration on the Chicago Board of Trade through reputable brokers, and there is no evidence of any express, implied or tacit understanding that the contracts so made in Chicago were not enforceable or should not be enforceable or that any loss or gain in reference to the price of the commodities contracted for should be paid by a settlement of differences.

This is not a case of fictitious transactions such as were under consideration in *Pearson* v. *Carpenter* (1) but is a case of real transactions such as were found and considered in *Forget* v. *Ostigny* (2); *Buitenlandsche Bankvereeniging* v. *Hildesheim* (3); and the defendants were not vendors to their clients as was the case in *Beamish* v. *Richardson* (4). See also 27 Hals. pp. 258-260.

The last element of the sentence, I repeat, was penned in error. But, except as regards that, on appeal to this Court, two judges of this Court concurred in the reasoning of these paragraphs. On page 430, the Chief Justice says:

The other finding, reversing the trial judge, was that the transactions in question were not within the prohibitions of s. 231 of the Criminal Code; that they were on the contrary *bona fide* transactions made for good consideration on the Chicago Board of Trade; and that there was no evidence of any express, implied or tacit understanding that the contracts so made were not enforceable or that any loss or gain in reference to the price of the commodities contracted for should be paid by a settlement of differences. *Nelson* v. *Baird* (5). In other words, that the purchase and sale of the wheat in question at the times and in the manner in which it was bought and sold were *bona fide* transactions authorized by the plaintiff and were not illegal gambling transactions within the provisions of s. 231 of the Criminal Code. See *Forget* v. *Ostigny* (6).

At p. 442, Mr. Justice Mignault says:

The learned trial judge dismissed the appellant's action and the respondents' counter-claim for $156.62 on the ground that the transactions in question amounted to gambling transactions, prohibited as such by article 231 of the Criminal Code. The Appellate Division, on the contrary, decided that they were real purchases and sales under the authority of *Forget* v. *Ostigny* (6), and similar cases. In this I agree, but I think, for the reasons stated above, that the appellant's appeal here fails.

(1) (1904) 35 Can. S.C.R. 380.
(2) [1895] A.C. 318.
(3) (1903) 19 Times L.R. 641.
(4) (1914) 49 Can. S.C.R. 595.
(5) (1915) 25 Man. R. 244; 22 D.L.R. 132.
(6) [1895] A.C. 318.

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I should not like to be misunderstood as suggesting that in *Maloof* v. *Bickell* (1), either Mr. Justice Idington, Mr. Justice Anglin or Mr. Justice Brodeur had any intention of withdrawing their opinions expressed in *Beamish* v. *Richardson* (2). I am quite sure they had no such intention. On the other hand, the passages quoted from the judgments of the Chief Justice and Mr. Justice Mignault seem to indicate what they regard as the true badges of illegality under s. 231.

The Court of Appeal for Saskatchewan appears to have proceeded upon the view that the facts disclosed by the evidence in that case bring the case within the opinions of the majority of the judges in *Beamish* v. *Richardson* (2) as touching the application of s. 231. With great respect, I should, I think, refer to what appears to be a serious misconception by the Court of Appeal as to the effect of the evidence.

The judgment states that the confirmation shows the transactions had passed through the clearing house. I can find no such statement in the confirmation note; nor, as already observed, can I find any evidence in the record that any of the transactions in question passed or did not pass through the clearing house. With great respect, I am unable to agree that the evidence brings the facts of this case within the opinions mentioned. As to the facts, Mr. Justice Anglin says (3):

> I incline to think the evidence discloses that neither the plaintiffs nor the defendant at any time contemplated that delivery of the grain sold should be made or taken under the agreements purporting to be contracts for the sale of such grain which the defendant authorized and the plaintiffs made. The intent always was to meet the obligation to deliver by an off-set of a contract to purchase a like quantity of grain—to adjust the differences between the selling and the buying prices and by thus dealing in such differences to make gain or profit by an anticipated fall in the price of the merchandise.

The plaintiffs and the defendant in *Beamish* v. *Richardson* (2) were the brokers, who were the principals on the Exchange, and the customer. As to the Winnipeg brokers who executed the respondent's orders on the Exchange, there is no evidence, as we have already seen, of any such intent as that which Mr. Justice Anglin was inclined to ascribe to the brokers in the former case. As to the evi-

(1) (1919) 59 Can. S.C.R. 429. (2) (1914) 49 Can. S.C.R. 595.
(3) 49 Can. S.C.R. at 619.

dence of the customer, I have pointed out what that amounts to and, I repeat, it falls very far short of establishing the proposition that neither the customer nor the broker who executed his orders contemplated the delivery of the grain should be made or taken under the contracts. Still less does it establish an intent always to meet the obligation to deliver by an offset of a contract to purchase a like quantity. As already pointed out, the evidence of the respondent is entirely too vague to support a finding of fact that he had any definite idea as to the *modus operandi* by which his transactions would be closed and we are left equally in the dark as to the procedure by which they were in fact.

Turning to the Judgment of Mr. Justice Idington. It rests, as regards the application of the statute, upon the evidence as to the procedure on the Exchange and the evidence of the actual dealings between the parties. With him, one fact that he finds established is cardinal, viz., that in all the dealings by the brokers on behalf of the customer, not one pound of any commodity was ever delivered; a finding, curiously enough, which corresponds precisely with the finding of Mr. Justice Kelly in *Maloof* v. *Bickell* (1) and which the Court of Appeal for Ontario considered to be of no significance whatever.

It may be, for all I know, that evidence of the same character as that on which Mr. Justice Idington proceeds, evidence, for example, showing in detail the course of procedure in the clearing house and the proceedings actually followed in the transactions under consideration, could have been adduced in this case, but the onus, as I have said, was on the respondent and, as regards this procedure, we are left in ignorance and it may be that since *Beamish* v. *Richardson* (2) the procedure has undergone radical changes.

I have had an opportunity of reading the judgments of my brothers Davis and Hudson and I agree with their reasons.

The appeal should be allowed with costs throughout and judgment should be entered for the appellant for the principal of the notes sued upon with interest at the proper rate or rates; with liberty to the respondent, if so advised,

(1) See *supra*, p. 148. (2) (1914) 49 Can. S.C.R. 595.

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to have a reference to the Local Registrar of the Court of King's Bench for the Judicial District of Regina to ascertain and settle the exact figures if the parties cannot agree; costs of the reference to be costs in the cause.

CROCKET, J.—I concur in the judgments of both my Lord the Chief Justice and my brothers Davis and Hudson, that in the circumstances disclosed by the evidence in this case the appeal should be allowed with costs throughout and judgment entered for the appellant for the principal of the notes sued upon with interest at the proper rate or rates, and with liberty to the respondent to have a reference to the Local Registrar of the Court of King's Bench for the Judicial District of Regina, to ascertain and settle the exact figures, if the parties cannot agree, on the terms stated in the judgment of the learned Chief Justice.

DAVIS, J.—This is an action on several promissory notes, for different amounts, all payable on demand. The defence is that the notes were given in settlement of an account for moneys loaned for illegal purposes, i.e., gambling in grain futures contrary to sec. 231 of the *Criminal Code*. As the learned trial judge said,

> The defendant had his gamble and now seeks to unload his loss on the private banking concern now in liquidation which he alleges knowingly loaned him the money for margining his trades in futures.

The conclusion of the trial judge was that the respondent (defendant) was merely gambling in futures on the rise and fall in the prices of grain without any intention of actually dealing in the commodity itself and that the evidence was sufficient to charge the appellant (plaintiff) with knowledge of the respondent's real purpose and on the facts of the case the learned trial judge found that the appellant aided and abetted the respondent in his illegal purpose by purposely providing the money for margining his account from time to time as it was required, and that the combined effect of sec. 231 and sec. 69 of the *Criminal Code* made the parties principals in the commission of the offence. The trial judge's further conclusion was that Steidl, the appellant's former manager, knew full well that the respondent never had the remotest intention of doing anything but gamble on the market.

> It was known that when he (i.e., the respondent) sold for future delivery twenty thousand bushels of this now, ten thousand bushels of

another future, etc., etc., in the trades so privately and roughly recorded by Steidl, that he had no grain nor expectation of having grain to make delivery, and that when he bought for future delivery he would have no more use for the commodity he agreed to take in the future than he would have for a carload of plugged nickels. Steidl knew he was gaming on the market and not dealing in the commodities in which he was gaming and was an active aid and abettor therein.

The total amount sued for was $9,623.90 with interest. The trial judge found that, independently of the grain trading, the appellant had properly advanced to the respondent three sums, aggregating $1,350. For this sum with interest the appellant was given judgment against the respondent but otherwise the action was dismissed. Both parties appealed to the Court of Appeal for Saskatchewan, which Court affirmed the trial judgment with some variations as to the disposition of costs (1). The plaintiff appeals.

It is with the greatest respect that I find myself unable to accept the judgment of the careful and experienced trial judge, Mr. Justice Taylor, confirmed as it has been by the Court of Appeal for Saskatchewan. The learned trial judge found that it was quite clear upon the respondent's evidence "that the trades were actually executed from time to time on the Exchange." The respondent's evidence indeed made it plain that in every case, whether he bought or sold, he "wanted a real sale to be made or a real purchase to be made on the Winnipeg Grain Exchange for future delivery."

The respondent dealt and intended to deal in grain futures on the Winnipeg Grain Exchange and the appellant acted as his broker, carrying his accounts on margin and dealing through a Winnipeg broker who had a seat on the Exchange. While the records of the transactions as between the appellant and respondent were loosely kept, there cannot be the slightest doubt that had the price of grain gone up when the respondent thought it was going up, or had it gone down when the respondent thought it was going down, and resulted in a money profit on trading, the respondent would very gladly have taken the profit. But it is plain that his marginal trading was on the whole unsuccessful and that he suffered substantial loss. Now he says, when confronted with a demand for payment of his promissory notes covering an adverse balance, that it

(1) [1938] 1 W.W.R. 22; [1938] 1 D.L.R. 218.

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was mere gambling of a criminal nature that he was engaged in and that the appellant was a party with him in this unlawful course of conduct and he contends that he is not bound to pay. But he knew that his transactions were being carried out in the regular course on the Winnipeg Grain Exchange and he intended that they should be. In one sense it is true, in most marginal trading on a stock market, that the customer does not expect to be called upon to make physical delivery of share certificates representing the shares that he has sold or to take physical delivery and make payment in full for the shares which he has bought. When a marginal trader sells either short or long he probably seldom visualizes the obligation to take or to give delivery—he is so hopeful of a rising or a falling market in the particular stock or commodity in which he is trading that he expects within a short time to be able to close his account and take out a money profit. But the legal obligation is always there and he knows perfectly well that it is there. If a customer who deals on a recognized stock exchange could, every time he loses heavily by the stock going the opposite way from that which he expected, turn round and say that he never intended to have any real transactions in the stock or commodities but was merely gambling in breach of the *Criminal Code*, it would be quite impossible to carry on the business of a well regulated public stock exchange which renders its own peculiar public service. Here, the respondent admits that he wanted real sales to be made and real purchases to be made for him on the Winnipeg Grain Exchange for future delivery. I cannot see that he can escape from the payment of his losses.

If I may say so, with great respect, I am in entire agreement with the conclusion as well as with the reasons for the judgment of the Chief Justice.

The judgment of Kerwin and Hudson JJ. was delivered by

HUDSON, J.—This action was brought on promissory notes made by defendant in favour of the plaintiffs, and in the alternative for moneys lent by the plaintiffs to the defendant. The only defence which requires consideration here is that the notes were given or the money lent in respect of transactions in the nature of gaming or wager-

ing and contrary to law, and particularly contrary to section 231 of the *Criminal Code*. The courts below upheld the contention of the defendant, except in respect to a sum of $1,350 and interest, part of the plaintiff's claim.

The defendant, a substantial farmer growing large crops of grain in the neighbourhood of Lang, Saskatchewan, also over a period of many years speculated in grain futures on the Winnipeg Grain Exchange.

The plaintiffs carried on a general banking business and also operated a grain elevator at Lang. They did the defendant's banking and financial business, handled most of his grain through their elevator, and in addition to this the defendant's grain speculations were carried on through them. The method of procedure was that the defendant gave a verbal order to the plaintiff's manager to buy or sell a specified quantity of wheat for future delivery. These orders were then transmitted by the plaintiffs to the Reliance Grain Company to be carried out on the Winnipeg Grain Exchange. When the orders had been executed, the Reliance Grain Company forwarded to the plaintiff what was called a confirmation memorandum. Several of these were put in evidence and were in the following language:

EXHIBIT "D. 15"

Confirmation Memorandum

Grain Exchange,
Winnipeg, Jany. 15, 1931.

From

Reliance Grain Company Limited

Messrs. Prudential Exch. Coy. Ltd., Lang, Sask.

We have made the following transactions for your account and risk, under the by-laws, rules, regulations and customs of the Winnipeg Grain Exchange and also those of the Winnipeg Grain and Produce Exchange Clearing Association.

All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor. On all marginal business we reserve the right to close transaction when margins are running out without further notice. We also reserve the privilege of substituting other responsible parties as principals with you in these transactions at any time until closed, in accordance with the rules of the Winnipeg Grain Exchange, where the transactions are made, and to clear all transactions through clearing associations from day to day in accordance with the usage prevailing at the time.

This trade has been, or may be, cleared through the said clearing association, and on being so cleared, we will be the only persons respon-

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sible for the carrying out of this trade or trades, and furthermore we will be the only persons against whom you will have any recourse for the fulfilment thereof.

BOUGHT

Quantity	Market	Delivery	Article	Price	
M					
5	July	Wht.	.57⅞	Your Reference Edwards	
1		July		.58½	Mrs. Knouse

Evidence was admitted of a by-law of the Grain Exchange in the following terms:

> Under all contracts of sale of grain for future delivery the actual receipt and delivery of the property and payment therefor is contemplated and may be enforced.

Purchase and sale slips showing details of each transaction were also sent to and received by the plaintiff. The learned trial judge has held that the trades in question were actually executed from time to time on the exchange.

The plaintiffs were compensated by one half of the brokers' commission but had no other interest in the transactions.

The trades were carried on margin; the money for the margins was usually advanced by the plaintiff for the defendant and charged to the defendant in his current account with the bank. He got monthly statements of these payments. Sometimes the moneys were advanced in Winnipeg through shipments of actual grain made by the defendant. These operations continued over a period of 15 or 16 years, so far as appears, to the profit of the defendant. Subsequently, however, the defendant was less wise or less fortunate, as the case may be, and in the beginning of 1930 he had not sufficient money to his credit with the plaintiff to meet margin requirements and the advances which gave rise to the present litigation were thereafter made by the plaintiffs at the defendant's request. These advances seem all to have been in respect of contracts for sale or purchase previously entered into and presumably were made to maintain outstanding contracts, that is, the defendant's right to deliver or to receive the quantity of grain on the terms specified.

Notes were given by the defendant at the time to the plaintiffs and these notes were subsequently marked paid and given to the defendant and new notes taken in their place.

The defendant swore repeatedly and positively that he never intended to take or make delivery in any of these transactions and that the plaintiffs' manager knew this from the very beginning. Notwithstanding that his statements were denied by the plaintiffs' manager, the learned judges chose to accept the defendant's story.

Just what the defendant meant by taking or making delivery may be inferred from some of his answers. He was asked:

Q. I am not talking about cash. You wanted a real sale to be made or a real purchase to be made on the Winnipeg Grain Exchange for future delivery? A. Yes.

That he knew that these contracts involved an obligation to take or make actual delivery at the time fixed by the contract is shown by an experience which he had in 1928, when he took delivery of some 25,000 bushels of grain which he had bought on margin. He explains this transaction in the following terms:

I thought—the premium was so high on cash grain that I did not think it could be delivered on contracts so I left it go and when the time came I couldn't get out and they unloaded on me.

Q. They gave you the grain you had previously bought? A. Yes.

At another place he states:

Q. Now, when you were buying grain for future delivery you were hoping it would rise in prices? A. I was gambling in the rise in price.

Q. You were expecting it would rise in price? A. Anybody that gambles that way will expect it to rise.

Q. When you had bought grain for a future delivery did you intend to sell an equal quantity of grain when the price was high enough to suit you? A. Well, I did not wait. I had to sell out when it came time, whether it was up or down.

Q. You would expect your broker to go into the market and sell? A. I would instruct Mr. Steidl to sell.

Q. An equivalent quantity of grain? A. Yes.

Q. And the same thing would apply where it went short? A. I would expect him to buy it back.

Q. You would expect him to buy an equivalent quantity of grain? A. Yes.

It would then appear that what the defendant had in mind when he said he did not intend to make delivery was that although he recognized that the contracts were binding contracts, he intended to turn over the fulfilment of the obligation to somebody else by buying or selling a similar quantity of grain on the best terms he could before the date for fulfilment. He also recognized that if he failed to do this he would then be called upon to make or take actual delivery himself. It appears that the

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defendant had himself adequate resources to take care of any call for delivery.

The question, then, is whether or not the conduct of the parties here was a violation of the provisions of section 231 of the *Criminal Code*. Before discussing this section, it might be wise to consider the law prior to its enactment and as the law still is in England. The case of *Thacker* v. *Hardy* (1) is most frequently cited. The headnote fairly summarizes the opinions of four very eminent judges. It is as follows:

> The plaintiff, a broker, was employed by the defendant to speculate for him upon the Stock Exchange: to the knowledge of the plaintiff the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the plaintiff would so arrange matters that nothing but differences should be payable by him; the plaintiff knew that unless he could arrange matters for the defendant as the latter expected, the defendant would be unable to meet the engagements which the plaintiff might enter into for him. The plaintiff accordingly entered into contracts on behalf of the defendant, upon which the plaintiff became personally liable; and he sued the defendant for indemnity against the liability incurred by him and for commission as broker:—
>
> *Held*, that the plaintiff was entitled to recover; for the employment of the plaintiff by the defendant was not against public policy, and was not illegal at common law, and, further, was not in the nature of a gaming and wagering contract against the provisions of 8 & 9 Vict., c. 109, s. 18.

There are several quite recent decisions in England to the same effect: see *Franklin* v. *Dawson* (2); *Woodward* v. *Wolfe* (3).

In Halsbury (2nd Ed.), vol. 15, at p. 493, it is stated:

> If one who is desirous of "speculating" employs a broker on the Stock Exchange to buy or sell for him, their relation is that of principal and agent. The broker charges a commission for his services, and a rise or fall in the price of the stocks purchased or sold does not affect him. If such be the case, there is nothing at stake between the parties, and there is no wager. As long, therefore, as the relation of the parties is really only that of broker and client, the contract between them cannot itself be a wager, even although the broker may know that the client does not expect to be called upon to settle the transaction except by the payment of differences.

In the case of *Forget* v. *Ostigny* (4), the same principles were applied by the Privy Council in an appeal from Quebec. It is said there by the Lord Chancellor at p. 322 of the report:

> The appellant was employed by the respondent as his mandatory or agent to make certain contracts of purchase and sale on his behalf.

(1) (1878) 4 Q.B.D. 685.
(2) (1913) 29 T.L.R. 479.
(3) (1936) 155 L.T.R. 619.
(4) [1895] A.C. 318.

The contracts made, which were unquestionably within the authority given by the respondent, were certainly not gaming contracts as between the parties to them. They were real transactions: the shares purchased and sold were in every case delivered, and the price of them paid or received, as the case might be. All this is not in dispute. The appellant having entered into these contracts as agent for the respondent, the latter was *primâ facie* bound to indemnify the former against any liability incurred in respect of them. He was, on the other hand, exclusively entitled to the benefit of them. If the shares purchased increased in value the result was a gain to the respondent and did not involve any loss to the appellant. If, on the other hand, the shares decreased in value, while the respondent sustained a loss no gain resulted to the appellant. In neither contingency, therefore, did the respondent's gain involve a loss to the appellant. His remuneration was in any event a fixed commission of ¼ per cent. It would be, of course, an abuse of language to apply the term "bet" to such a transaction. Their Lordships cannot think that it is any more legitimate to speak of it as a gaming contract between the appellant and the respondent.

I think that from these decisions it is clear that the transactions involved in the present case were not gaming or wagering transactions within the law and were valid and enforceable unless prohibited by section 231 of the *Criminal Code.*

The present section 231 originated in an Act passed by the Parliament of Canada in 1888, being 51 Vict., chap. 42, entitled "An Act respecting Gaming in Stocks and Merchandise." This Act was introduced by the following preamble:

Whereas gaming and wagering on the rise and fall in value of stocks and merchandise are detrimental to commercial and public morality, and places affording facilities for such gaming and wagering, commonly called bucket shops, are being established; and it is expedient to prevent such gaming and wagering, to punish the persons engaged in them, and to prohibit and punish the opening and maintaining of places therefor, and the frequenting thereof.

Then followed provisions which are in substance the same as those subsequently incorporated in section 231 of the *Criminal Code.* This section reads as follows:

Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise,

(*a*) without the *bona fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same, as the case may be, makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares or merchandise; or

(*b*) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase

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of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bona fide* intention to make or receive such delivery.

2. It is not an offence under this section if the broker of the purchaser receives delivery, on his behalf, of the articles sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money or any part thereof.

Transactions on the Winnipeg Grain Exchange have been the subject of much litigation in the Prairie Provinces and have given rise to the expression of very divergent views in the courts. Most of the judges who held such transactions in some respect similar to the present to be of a kind prohibited by section 231, have based their decisions on views expressed by some of the judges of this Court in the case of *Beamish* v. *Richardson* (1). Notwithstanding those views, I think it is still open to us to determine this case according to our own views as to the interpretation and application of the section.

The transactions under consideration in the case of *Forget* v. *Ostigny* (2) already referred to, took place before the Act of 1888 came into force, but it had been enacted before the Privy Council came to give its decision and this reference was made to it by the Lord Chancellor:

> Much stress was laid on the fact that the respondent never asked for delivery of any of the shares purchased, and that the appellant never tendered such delivery. The question whether a contract is intended to be executed by delivery according to the obligations expressed upon the face of it is no doubt an important test for determining whether it is a real one or only a gambling arrangement under the guise of a commercial contract.
>
> In the Act passed by the Dominion Parliament in 1888 (51 Vict., c. 42) with a view of putting down what were then known as "bucket shops," it is provided (sect. 1) that: "Every one who * * * with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, * * * or of any goods, wares or merchandise makes * * * any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise, in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery; and every one who acts, aids or abets in the making or signing of any such contract or agreement is guilty of a misdemeanour."
>
> A proviso was, however, added in the following terms: "but the foregoing provisions shall not apply to cases where the broker of the purchaser receives delivery, on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase-money or any part thereof."
>
> Their Lordships think this proviso was enacted by way of precaution only, inasmuch as they cannot doubt that, where a real contract of pur-

(1) (1914) 49 Can. S.C.R. 595. (2) [1895] A.C. 318.

chase has been made and carried out by a broker on behalf of a principal, delivery to the broker is delivery to the principal just as much as if it had been actually made to himself.

In the present case, the respondent might at any time on tendering the balance due in respect of any of the shares purchased have required the appellant to deliver them to him. As has been pointed out, he received the dividends upon them, and any increase in their value enured exclusively for his benefit, whilst if there were a diminution of value the loss was exclusively his.

It seems to me that delivery to or by a vendee of the defendant would be as effective as delivery to or by an agent.

The purpose of the statute was to prohibit bucket shops and to render void gaming or wagering transactions. There can be no suggestion that there was any bucket shop transaction involved here, once it is admitted that real contracts were entered into. Nor do I think there was any gaming or wagering as those words are construed in law. There was, it is true, speculation, which is quite a different thing. The contracts entered into for the defendant were real; they were not fictitious. They called for delivery and all the parties thereto understood them to be enforceable. I think the word "delivery" in a criminal statute should be construed broadly enough to include anything which would be considered as delivery under the *Sales of Goods Act*. The contracts entered into were similar to the contracts on which practically the whole of the grain business of Canada is carried out and similar to contracts which have been in use on stock and commodity exchanges since long before the enactment of the legislation under consideration.

Now, if the contracts were valid and enforceable contracts entered into by the Reliance Grain Company on behalf of the defendant and the defendant fully understood the nature of the obligation which was being entered into on his behalf, I do not think that he should be relieved of the responsibility for moneys advanced by the plaintiffs to enable him to carry out binding obligations which had been undertaken on his behalf, even if he himself never intended to fulfill these obligations by delivery of the grain but intended to relieve himself of such obligations by so arranging things that the delivery might be made by others.

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For these reasons I think that the appeal should succeed and the judgment of the courts below be set aside and judgment entered for the plaintiffs for the amount of the notes sued upon with interest at the proper rate or rates. I have not entered into any discussion of the views expressed by former members of the Court in the case of *Beamish* v. *Richardson* (1), in view of the reference thereto made by My Lord the Chief Justice.

Taking this view, I do not think it necessary to discuss the other grounds of appeal put forward on behalf of the plaintiffs.

I concur in the suggestion that the respondent, if so advised, shall have liberty to have a reference to the Local Registrar of the Court of King's Bench of the judicial district of Regina, to ascertain the correct figures if the parties cannot agree.

Appeal allowed with costs.

Solicitors for the appellant: *Cross, Jonah, Hugg & Forbes.*

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

BERNARD CONNORS (PLAINTIFF) .....APPELLANT;

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AND

* May 16, 17
* Dec. 19.

CONNORS BROS., LTD., AND LEWIS CONNORS & SONS, LTD. (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Contracts—Covenant in restraint of trade—Whether binding—Principles applicable — Nature of covenant — Reasonableness — Circumstances — Onus.

Both respondents, Connors Bros. Ltd. and Lewis Connors & Sons Ltd., packed and sold sardines and other fish in the Bay of Fundy area in New Brunswick. By an agreement of June 9, 1925, Connors Bros. Ltd. agreed to purchase on demand within a certain time appellant's shares in Lewis Connors & Sons Ltd. Appellant was engaged as manager of the latter company. By an agreement of October 2, 1926, appellant sold his shares in Lewis Connors & Sons Ltd. to Connors Bros. Ltd., and his employment as manager was terminated. In this agreement, and in the earlier agreement in practically the same

(1) (1914) 49 Can. S.C.R. 595.

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

terms, appellant covenanted that he would not "directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada." In April, 1937, appellant claimed that said covenant was not binding, being such as should not be enforced in restraint of trade, and took proceedings, by way of originating summons, to have the question determined.

Held (reversing judgment of the Supreme Court of New Brunswick, Appeal Division, 13 M.P.R. 68, and judgment of Baxter C.J., 12 M.P.R. 102) (Crocket and Kerwin JJ. dissenting): The said quoted covenant should be declared to be unenforceable.

Per The Chief Justice, Davis and Hudson JJ.: A covenant in restraint of trade is *prima facie* invalid; the onus is on the person who seeks to enforce it to show that it is valid—one which was reasonably necessary for his protection at the time when it was entered into (and is not otherwise contrary of public policy). The nature of the business, the position of the covenantor, and the scope of the covenant must be considered. In the present case the appellant, brought up from boyhood in the sardine business, was only 37 years of age at the date of the covenant, which was restrictive for his lifetime. Upon all the facts and circumstances in evidence (and assuming that the words "directly or indirectly engage in the sardine business" are capable of precise definition and are not so vague as to be void for uncertainty), the respondents had not shown that the terms of the covenant could pass the test of reasonableness as between the parties.

Vancouver Malt v. *Vancouver Breweries,* [1934] A.C. 181, at 189-190, and *Gilford Motor Co.* v. *Horne,* [1933] 1 Ch. 935, at 958, referred to.

Per The Chief Justice: In exacting the stipulation, the controlling shareholders of Connors Bros. Ltd. were not chiefly applying their minds to the protection of the business of Lewis Connors & Sons Ltd. or of themselves as purchasers of shares in that company; their aim was to eliminate competition and get control of the business of Canadian sardines in themselves through Connors Bros. Ltd. and it was the business thus controlled with respect to which they were protecting themselves; therefore the agreement itself provides no evidence of serious weight as to its reasonableness in respect to the protection of the business of Lewis Connors & Sons Ltd. It was incumbent upon respondents to show clearly—and this they failed to do—facts from which it could be determined (as a question of law) that the comprehensive restriction was reasonably necessary to protect the interest acquired. (As ancillary to a contract of employment, the stipulation, on its face, was clearly unreasonable).

Vancouver Malt v. *Vancouver Breweries,* [1934] A.C. 181, at 190-191; *British Reinforced Concrete Co. Ltd.* v. *Schelff,* [1921] 2 Ch. 563, at 574-576, and other cases, referred to.

The Chief Justice also discussed (but expressed no final opinion upon) the question as to detriment to the public interest. Having regard to ss. 2 (1) (*b*), 2 (1) (*c*) (v) (vi) and 32 of the *Combines Investigation Act* (R.S.C., 1927, c. 26) (s. 498 (*c*), *Cr. Code,* also referred to), it may not be that enhancement of prices is the only relevant form of public detriment in this country.

Per Crocket and Kerwin JJ. (dissenting): Appellant's covenant was not one in gross but was one to be gauged by the principles applicable to a covenant exacted by the purchaser of the good-will of a business. (These principles discussed, and cases cited. *Nordenfelt's* case, [1894]

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A.C. 535, is applicable to the present case). In the circumstances of the case, the restraint gave to Connors Bros. Ltd., with respect to the business and good-will purchased by it, nothing more than reasonable protection against something which it was entitled to be protected against. In no respect (upon the evidence) could the operation of the covenant be said to be injurious to the public. Appellant is barred from engaging in the sardine business in Canada as owner, in partnership with others or as a shareholder of an incorporated company engaged in such business in Canada. (It was held inadvisable to answer in the present proceedings a question raised by the originating summons, but not answered in the courts below, as to whether appellant was barred from working at that business in Canada as an employee).

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1) dismissing his appeal from the judgment of Baxter C.J. (2) deciding against him certain questions raised for determination upon an originating summons, issued on appellant's application, for an interpretation and construction of, and a declaration as to the rights of the parties herein under, a covenant contained, in practically the same terms, in each of two agreements in writing; which covenant the appellant claimed was not binding upon him, being such as should not be enforced in restraint of trade. The covenant in question (as contained in each agreement) is set out, and the material facts and circumstances sufficiently appear, in the judgments now reported. Special leave to appeal to this Court was granted by the Appeal Division of the Supreme Court of New Brunswick. The appeal to this Court was allowed, the judgments below set aside, and judgment directed to be entered declaring that the covenant in question, in so far as it prohibits the appellant from engaging directly or indirectly in any sardine business whatsoever in the Dominion of Canada, is unenforceable; appellant to have his costs throughout. Crocket and Kerwin JJ. dissented.

J. H. Drummie for the appellant.

C. F. Inches K.C. and *A. N. Carter* for the respondents.

THE CHIEF JUSTICE.—I concur in the reasons as well as in the conclusion of Mr. Justice Davis.

It is well settled that, at common law, all contracts, covenants and stipulations in restraint of trade of themselves are contrary to public policy and therefore void. If

(1) 13 M.P.R. 68. (2) 12 M.P.R. 102.

that is a complete description of the transaction it is contrary to public policy and the courts will not enforce it. This appears, not to be upon the ground that the common law regarded such arrangements as necessarily harmful to the public interest, but because the policy of the common law has always been that the courts should not enforce them unless they can be justified by reason of special circumstances (*Morris* v. *Saxelby*) (1). The onus of proving the facts upon which such justification rests is upon the party who alleges justification. Once the facts are ascertained, the question of reasonableness is a question of law for the court.

It would seem to be involved in the general principle thus stated (*McEllistrim* v. *Ballymacelligot* (2), *Vancouver Malt and Sake Brewing Co. Ltd.* v. *Vancouver Breweries, Ltd.* (3)) that a "bare covenant not to compete," to quote from Lord Macmillan's judgment in the last mentioned case at p. 190, will not be enforced. "Covenants restrictive of competition," still quoting from the same passage,

> which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been found justified because they were reasonably necessary to render that transaction, contract or arrangement effective.

As regards the stipulation in the agreement of June, 1925, the respondents, as their principal ground of justification, take their stand upon the proposition that this stipulation is ancillary to a contract for the sale and purchase of shares in Lewis Connors & Sons, Ltd. (hereafter referred to under the designation "Lewis Connors") between the appellant and the respondents Connors Bros. In their factum the respondents state their position thus:

> The principle clearly established by this case [the *Nordenfelt* case (4)] is that where a stockholder upon transfer of his stock, binds himself not to compete with the corporation, the agreement is generally enforced on the ground that ownership of stock carries with it an interest in the good-will of the business, and that the covenant is reasonably necessary to protect the good-will.
>
> The suggestion was made by the appellant in the Court below that the covenants under discussion in this case were merely restraints on competition (i.e., covenants in gross, so-called) and as such void as in *Vancouver Malt Co.* v. *Vancouver Breweries* (5) (where nothing was sold, and the covenant was consequently held invalid). The suggestion is simply contrary to the fact. The covenants in the case at bar formed part of contracts for the sale of shares in a business, as the covenant in

(1) [1916] 1 A.C. 688, at 706-707.
(2) [1919] A.C. 548, 562.
(3) [1934] A.C. 181, at 190-1.
(4) [1894] A.C. 535.
(5) [1934] A.C. 181.

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the *Nordenfelt* case (1), with which this case is on all fours. In that case Nordenfelt was selling shares in a company—not a controlling interest—as a part of the contract by which he covenanted not to compete. The good-will was treated as an interest in the shares and the covenant was held not to be "in gross" but as falling within the special category of restrictive covenants contained in contracts for the sale of a business.

In determining whether the restrictive covenants challenged in this case were reasonable as between the parties the very lenient rules governing contracts for the sale of a business must be applied as they have been applied by the learned Chief Justice.

I shall first deal with this contention.

Have facts been proved by the respondents which establish the proposition that this sweeping stipulation was "reasonably necessary to render" this contract for the transfer of shares "effective," or, to put it in other words, in order to enable the respondents to enjoy what they acquired under it? The restriction, as regards Canada, is unlimited both as to time and area. It is for the plaintiffs to show that the restriction in order to be "reasonably effectual" must be Dominion-wide (*Vancouver Malt* v. *Vancouver Breweries* (2).

The fact that the purpose of the McLeans, the controlling shareholders of Connors Bros., as was well understood by all parties, was to eliminate competition, not only by Lewis Connors but of the appellant and of his father personally, and to do this with the object of establishing a practical monopoly in the business of packing and selling Canadian sardines, is, to my mind, decisive on one point. In exacting the stipulation in question, they were not exclusively or chiefly applying their minds to the protection of the business of Lewis Connors or of themselves as purchasers of shares in Lewis Connors. Their aim was to get a monopoly in the business of Canadian sardines controlled by themselves through Connors Bros. and it was the business thus controlled with respect to which they were protecting themselves.

It follows, of course, that the agreement itself provides no evidence of serious weight as to the reasonableness of the arrangement in respect of the protection of the business of Lewis Connors. It cannot be said that there is any presumption that Connors Bros. were merely protecting what they were acquiring. They were getting for themselves, for their own business, protection against competition; and it is perfectly plain from the evidence that it

(1) [1894] A.C. 535. (2) [1934] A.C. 181, at 191.

was for this they were paying for the shares a price considerably above the market value, more than the shares themselves would have been worth.

In these circumstances, and such being the purposes and objects of the parties to the agreement, it was incumbent upon the respondents to show clearly that it was necessary for the protection of the interest they acquired in the Lewis Connors business to exact this comprehensive stipulation.

In June, 1925, when the agreement was made, it appears from the evidence that the only competition encountered by Canadian sardine packers in Canada was that arising from the import of Norwegian sardines. The French sardines, it may be assumed, being of a higher grade and fetching much higher prices, did not come into the same field. There were, according to the evidence, something like 30,000 cases of Norwegian sardines sold in the course of a year in the Dominion. The Lewis Connors Canadian business amounted to 26,000 odd cases in the year 1925. The only evidence as to the scope in point of territory of the Canadian business is that given in cross-examination by the appellant and the strongest statement that can be found in his evidence is in this question and answer:

Q. Is it fair to say that Lewis Connors & Sons, Ltd., were selling in all the provinces of Canada?

A. I think perhaps they were selling some in pretty near every province in Canada.

There are some other statements with regard to other countries extremely vague and of doubtful import which have really no bearing on the point immediately before us.

Now, let it be observed, first of all, that there is a very considerable territory in the Dominion of Canada which is not included in any province. There are the Yukon Territory and the North West Territories. There is not a word of evidence to indicate that the business of Lewis Connors extended into, for example, the Yukon Territory; and yet the covenant, as I read it, and according to the construction contended for by the respondents, would seem to exclude the appellant from acting as agent in Dawson for any concern other than Connors Bros. or Lewis Connors selling French or Norwegian sardines there.

But this is not the strongest point. This statement of the appellant cannot fairly be read as a positive affirmation that Lewis Connors were in 1925 or 1926 engaged in

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selling sardines in all the provinces of Canada. It is a hesitating statement "I think perhaps," and the scope of the area is defined as "pretty near." Clearly, it excludes one or more of the provinces, and there is nothing to indicate the province excluded. It may be British Columbia. It may be Quebec.

The Canadian business for 1936 was less than the Canadian business for 1925. Lewis Connors were entirely under the control of Connors Bros., all of the directors of the former being directors of the latter. The packing establishment of Lewis Connors was discontinued at the end of 1925, and thereafter all the packing for them was done by Connors Bros. It is clear enough that any considerable expansion of the business of Lewis Connors was not aimed at or expected. It follows that the appellant is by this stipulation excluded from business and employment which, so far as the evidence shows, there is no reason to suppose would be likely to injure the business of Lewis Connors.

But there is another consideration. This evidence of Bernard Connors speaks of "selling some" that "he thinks, perhaps" were sold in "pretty near every province in Canada." Now, six of the provinces extend over very wide territory. There is nothing to show that this indefinite "some" sold in, for example, some locality in the province of Ontario, would be affected by the employment of the appellant in some other far remote locality in another part of the province, and yet, strictly, the evidence leaves us at that point. It is consistent with the assumptions that there were no sales in one or more provinces and that in any given province business was limited to a single locality. The onus is on the respondents to establish the facts. They are in control of Lewis Connors. They have the books of Lewis Connors in their possession. It would have been in their power to adduce precise evidence as to the localities in which Lewis Connors were carrying on business in 1925 and 1926 and the extent of the business in each locality. Since, as the export and shipping manager of Connors Bros. says, the Lewis Connors customers of 1925 were retained, there could have been no difficulty in showing, not only the provinces in which they had customers, but the locality in each province to which their goods were shipped. Furthermore, there should have been no difficulty in showing localities in which retail sales took

place. These facts should have been adduced by the respondents as facts necessary to be considered in order to decide whether or not the restriction was a reasonable one, that is to say, reasonably necessary to make the contract for the sale of shares effective or, to apply Lord Parker's words (*Morris* v. *Saxelby* (1), *supra*, at p. 709) whether or not, if the plaintiff should engage at any time during his natural life anywhere in the Dominion of Canada directly or indirectly in the business of packing or selling sardines, "it would in all probability enure to the injury of" Lewis Connors or of Connors Bros. as purchasers of an interest in that business.

I quote as apposite the following passage from the judgment of Lord Blanesburgh (then Younger L.J.) in *British Reinforced Concrete Engineering Co. Ltd.* v. *Schelff* (2):

I should have thought that the law on this subject was clear. It is the business sold which is the legitimate subject of protection, and it is for its protection in the hands of its purchaser, and for its protection only, that the vendor's restrictive covenant can be legitimately exacted. A restrictive covenant by a grocer on the sale of his business in a country town, if it would be unreasonable and void when the purchaser was acquiring it as his sole business, does not become valid if the purchasers are, say, Messrs. Lipton, with branches everywhere. The point is perhaps most clearly brought out in those recent cases in the House of Lords in which the essential distinction between vendors' and employees' restrictive covenants has been so clearly laid down. Take, for instance, the justification for a wider vendor's covenant in Lord Shaw's speech in *Mason's* case (3): "If the contract, for instance, be for the sale of a business to another for full consideration or price, there may be elements going in the strongest degree to shew that such a contract—in so far as it restrains the vendor from becoming a rival of the business whose goodwill he has sold and which he has bargained he shall not oppose— * * * is enforceable, and, indeed, that declinature by the law to enforce it would amount to a denial of justice." Again in *Saxelby's* case (4) Lord Parker says: "In the *Nordenfelt* case (5), that which it was required to protect was the good-will of a business transferred by the covenantor to the covenantee, and that against which protection was sought was competition by the covenantor throughout the area in which such business was carried on." He does not say "going to be carried on." Take again Lord Watson's observations in the *Nordenfelt* case (5): "I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold. Accordingly, it has been determined judicially, that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which

(1) [1916] 1 A.C. 688.
(2) [1921] 2 Ch. 563, at 574-576.
(3) [1913] A.C. 724, 737.
(4) [1916] 1 A.C. 688, 708.
(5) [1894] A.C. 535, 552.

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having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced. Whether—when the circumstances of the case are such that a restraint unlimited in space becomes reasonably necessary in order to protect the purchaser against any attempt by the seller to resume the business which he sold—a covenant imposing that restraint must be invalidated by the principle of public policy is the substance of the question which your Lordships have to consider in this appeal." Lord Herschell in the same case says (1): "I think that a covenant entered into in connection with the sale of the good-will of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser." In all these cases the business sold is treated as the subject of permissible protection; and similar judicial utterances could be indefinitely multiplied.

And in my judgment when the matter is looked at on principle these statements necessarily mean what they say.

The respondents also advance an argument, not very precisely stated, based upon some supposed relation between the subject-matter of the stipulation and the appellant's connection with the respondents Connors Bros. while "he was interested in it as a shareholder, director and plant manager." In my view, it is not necessary to enquire into the question whether there is any "main transaction, contract or arrangement" disclosed by the evidence to which the stipulation in question could be said to be "ancillary" and to which this particular argument can apply. In the pertinent sense, on the face of it, it appears to me to be plain that, as ancillary to a contract of employment, the stipulations under consideration are, to borrow once more a phrase of Lord Macmillan's in *Vancouver Malt Co.* v. *Vancouver Breweries* (2), "out of all reason".

I am also far from satisfied that it was necessary for the protection of the Lewis Connors business outside of Canada to prohibit the appellant engaging in the sardine business in his own name in any part of the world for a period of ten years. In 1925, the foreign sales of sardines by Lewis Connors amounted to a little over 26,000 cases. The sales in the Dominion of Canada for the same year amounted to a few hundred cases more. In 1936, the foreign sales had increased by about 5,000 cases; the Canadian sales having been diminished by about 1,000 cases. We have no figures for 1935. In view of these figures, I find myself unable to accept the proposition that the prohibition of the use by the appellant of his own name

(1) [1894] A.C. at 548. (2) [1894] A.C. 181, at 191.

during the period of ten years succeeding April, 1925, in any single locality outside of Canada in any sardine business was necessary for the protection of this very limited foreign business of Lewis Connors.

I may also add that I think the evidence falls far short of establishing facts sufficient to support the conclusion that such a restriction was necessary for the protection of the foreign trade of Connors Bros. This provision with regard to the use of the name "Connors" would appear to be severable; but the unnecessarily sweeping character of it points to the conclusion that the parties were not really applying their minds to the question whether or not the restriction was one which their legitimate interests required.

There is another most important consideration. I am inclined to think that the evidence establishes detriment to the public interest. The aim was admittedly to create a monopoly in the packing of Canadian sardines and there appears to be no doubt that it was successful. I am not sure that, having regard to sections 2 (1) (*b*) and 2 (1) (*c*) (v) and (vi) and section 32 of the *Combines Investigation Act* (R.S.C., 1927, ch. 26), enhancement of prices is the only relevant form of public detriment in this country. The policy of the law as manifested by those sections and section 498 (*c*) of the *Criminal Code* seems to condemn restrictions upon competition even in the case of transactions of this character, that is to say, where an interest has been acquired in a business quite independently of the effect of the transaction upon prices. I do not pursue this topic further and I express no final opinion upon the point in the absence of argument.

It has been held by this Court (*Weidman* v. *Shragge*) (1), that, in considering whether an agreement in restraint of trade falls within section 498 of the *Criminal Code* as unduly preventing or lessening competition, the fact that the agreement is reasonable from the point of view of the parties, is not conclusive; and in that particular case it was held that the agreement was invalid. So, in applying section 32 of the *Combines Investigation Act*, it is by no means clear that reasonableness as between the parties concludes the question whether or not a combine is "likely

(1) (1912) 46 Can. S.C.R. 1.

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to operate against the interest of the public, whether consumers, producers or others."

I should add that I do not understand that the learned Chief Justice of New Brunswick, in discussing the topic of injury to the public, is suggesting that enhancement of price is the only pertinent form of injury. In speaking of enhancement of price, I have in mind the explanation in the *Adelaide Steamship Company's* case (1) of the phrase "pernicious monopoly" employed by Bowen L.J. in *Nordenfelt's* case (2) as a monopoly having the effect of increasing prices.

The judgment of Crocket and Kerwin JJ. (dissenting) was delivered by

KERWIN J.—The appellant is Bernard Connors and the respondents are Connors Bros., Limited, and Lewis Connors and Sons, Limited. The proceedings were commenced by an originating summons issued by the appellant under Rule 54A of the Supreme Court of New Brunswick for the determination of three questions of interpretation, which the appellant alleged arose under covenants contained in two certain agreements dated respectively June 9th, 1925, and October 2nd, 1926. The three questions submitted are as follows:

(*a*) Whether, upon construction of the provision written variously in the said agreements as "will not directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada" and "will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada" the said Bernard Connors, the covenantor mentioned in both agreements, is at the present time and shall be thenceforward barred from engaging in the sardine business in Canada as owner by himself or in partnership with others of such a business or as a shareholder of an incorporated company engaged in such business in Canada.

(*b*) Whether, upon construction of the words "will not directly or indirectly engage in" used in said covenants. the said Bernard Connors is barred at law from working at the sardine business in Canada as an employee of any person, persons, firm or corporation engaged in the sardine business in Canada.

(*c*) Whether, upon construction of the said covenants and particularly the following words contained therein "nor for a period of ten years from the 30th day of April, A.D. 1925, use the name of Connors in connection with the sardine business in any country whatsoever,"

(1) *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co. Ltd.*, [1913] A.C. 781.

(3) *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt*, [1893] 1 Ch. 630, at 668.

the said Bernard Connors may at this time and thenceforward lawfully use the name of "Connors" in connection with the sardine business in Canada.

The Chief Justice of New Brunswick (1), before whom the motion came, determined that Question (*a*) should be answered in the affirmative and Question (*c*) in the negative. As to Question (*b*), the Chief Justice considered that there existed "a wide difference between the plaintiff working at a machine which seals the tins of sardines and superintending the operations of a new company," and in the exercise of the discretion given by the Rule, declined to give any answer. Upon appeal to the Appeal Division (2) his order was affirmed.

Evidence was led on behalf of both parties before the Chief Justice, and from it and the exhibits filed the relevant facts appear to be as follows.

Some years ago Lewis Connors, the father of the appellant, and Patrick W. Connors, an uncle, commenced a fish business in the Passamaquoddy area of the Bay of Fundy in the Province of New Brunswick. The undertaking thrived and in time it was transferred to Connors Bros., Limited. At an early age the appellant had entered the business and by 1923, when he was about thirty-five years of age, had been working in it for a considerable period. In that year the shareholders of Connors Bros., Limited, sold their holdings to A. Neil McLean and associates, who formed a new company bearing the same name. It is the latter company that is one of the respondents. Shortly after the consummation of this sale by the transfer of the assets of the old company to the new, Lewis Connors, the appellant and another son purchased a factory in the same area and, first as a partnership and later under the name of a company incorporated as Lewis Connors and Sons, Limited (the other respondent), carried on the same kind of business as Connors Bros., Limited. Some comment has been made as to the manner in which this business was conducted but it is unnecessary to deal with these strictures. It is important, however, to realize that Lewis Connors and Sons, Limited, packed and sold the same products as Connors Bros., Limited, consisting of kippered herrings, canned herrings, finnan haddies, clams, flaked fish, chicken haddies, and sardines. The most important

(1) 12 M.P.R. 102. (2) 13 M.P.R. 68.

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of these was the last named, and it is common ground that the Passamaquoddy area is the only place in the Dominion of Canada where sardines may be packed in a practical and economical manner.

Whether as a result of the ensuing competition or because, as A. Neil McLean testified, Lewis Connors approached him with a view of Lewis Connors and Sons, Limited, selling out to Connors Bros., Limited, negotiations ensued between the rival companies and as a result an option agreement dated April 30th, 1925, was entered into between Lewis Connors and the appellant, of the first part, and A. Neil McLean and Allan McLean, of the second part. At this time the issued capital stock of Lewis Connors and Sons, Limited, consisted of $50,000 preferred and $100,000 common stock, and under the agreement the Connors were to sell to the McLeans $25,000 preferred and $52,500 common stock in exchange for $25,000 preferred and $30,000 common stock of Connors Bros., Limited. In substance, the latter company was thus acquiring a controlling interest in Lewis Connors and Sons, Limited, but, by the purchase of a comparatively small number of shares, Lewis Connors and the appellant, together with Patrick W. Connors, might easily secure control of Connors Bros., Limited, and to obviate this a Voting Trust Agreement of May 23rd, 1925, was signed. It is not necessary to enter into the details of this trust agreement, but ultimately the option contained in the document of April 30th, 1925, was exercised and an agreement of June 9th of the same year, implementing the terms of the option agreement, was entered into between Connors Bros., Limited, of the first part, and Lewis Connors and the appellant, of the second part. This agreement provides: (1) That with reference to the remaining outstanding capital stock of Lewis Connors and Sons, Limited ($25,000 preferred and $47,500 common), Connors Bros., Limited, would at any time within five years from January 1st, 1926, and on demand from any of the stockholders of Lewis Connors and Sons, Limited, who at the time of such demand held any part of the remaining outstanding issued capital stock of Lewis Connors and Sons, Limited, purchase the holdings of such stockholders so making such a demand on the basis of $35,000 cash for $72,500 capital stock. (2) That Connors Bros., Limited, should relieve and discharge Lewis Connors

and the appellant from all personal liability with respect to the bank account of Lewis Connors and Sons, Limited. (3) That a measure of co-operation between the two companies, which is not of importance in the present inquiry, should exist.

(4) The said Lewis Connors and Bernard Connors agree with said Connors Bros., Limited, that they will not either directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada, nor directly or indirectly use the brands of either Connors Bros., Limited, or Lewis Connors & Sons, Limited, in the Dominion of Canada, or elsewhere, nor, for a period of ten years from the 30th day of April, 1925, use the name of Connors in connection with the sardine business in any country whatsoever.

This is one of the covenants, the construction of which is sought and the legality of which is impugned.

By another agreement bearing even date Lewis Connors and Sons, Limited, engaged the appellant for five years as manager, the salary being guaranteed by Connors Bros., Limited.

The appellant commenced his duties as manager of the factory in West Saint John and, when the business was transferred to Black's Harbour, he went there but was not satisfied. Disputes had arisen between the appellant and the two companies and finally by an agreement of October 2nd, 1926, between the appellant, of the first part, Lewis Connors and Sons, Limited, of the second part, Connors Bros., Limited, of the third part, and the two McLeans, of the fourth part, the appellant sold his 172 shares of the capital stock of Lewis Connors and Sons, Limited, to Connors Bros., Limited, for $11,416, and his employment agreement was ended by mutual consent. By clause 3, which is the second covenant, the construction and legality of which is in question:

The party of the first part also agrees with the said parties of the second and third parts that he will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada nor directly or indirectly use the brands of either Connors Bros., Limited, or Lewis Connors & Sons, Limited, in the Dominion of Canada or elsewhere, nor for a period of ten years from the 30th day of April, A.D. 1925, use the name of Connors in connection with sardine business in any country whatsoever.

The terms of clause 5 may be more conveniently referred to when dealing with the appellant's contention that in any event he was, by it, released from the burden of the restrictive covenant contained in the agreement of June 9th, 1925.

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Within a comparatively short time after the execution of the agreement of October 2nd, 1926, the appellant commenced a fish business under the name of Harbour Packing Company, which he subsequently had incorporated. Still later he started a business under the name, "The B. Connors Fish Company," also subsequently incorporated. Throughout this period, the appellant and these companies were dealing in all the products already mentioned, except sardines. Lewis Connors died in 1934. In the meantime the respondents had continued their operations, of which the packing and merchandizing of sardines was the larger and more important part. On April 15th, 1937, the appellant intimated that he considered the two restrictive covenants not binding upon him and asked for a formal release. Upon this being refused, the present proceedings were commenced.

The question immediately arises as to the principles upon which the restricting covenant contained in the agreement of June 9th, 1925, is to be construed. Are the rules applicable to a covenant exacted by the purchaser of the good-will of a business to be applied? It was argued that the business sold was one belonging to Lewis Connors and Sons, Limited, and that the agreement by the appellant was intended to prevent competition *per se* and is, therefore, invalid. Such a contention was advanced in *Nordenfelt's* case (1), and was rejected. There, Nordenfelt had previously transferred his business to a limited company and it was upon the sale of the business by the latter to the respondent that the personal covenant of Nordenfelt was insisted upon. The Court treated the position on the same footing as if the obligations of the covenant had been undertaken in connection with the direct transfer by Nordenfelt to the purchaser. It is true that he was the only one interested in the original business, but without determining how far that principle is to be extended, it is, in my view, applicable to the circumstances of the present case.

The appellant was an active participant in the business, as well of the first Connors Bros. company as of Lewis Connors and Sons, Limited. He was a shareholder, to a substantial extent, in each company and took an active

(1) [1894] A.C. 535.

part in the negotiations leading to the sale by the latter company to Connors Bros. Limited. He secured his proportion of the preferred and common stock of Connors Bros. Limited, in exchange for his holdings in Lewis Connors and Sons, Limited, and an agreement by Connors Bros. Limited, to purchase, for cash, his share of the remaining outstanding capital stock in the event of his desire to sell. Furthermore, he was one of the guarantors of the bank account of Lewis Connors and Sons, Limited, and from this liability he was relieved in pursuance of the agreement of June 9th, 1925.

Upon this narrative I conclude that the appellant's covenant is not one in gross but, on the contrary, is one to be gauged by the principles mentioned. These are now well settled. Lord Macnaghten sets them out at page 565 of the *Nordenfelt* case (1) in these words:

> The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.

His judgment was not authoritatively approved until *Mason's* case (2), and its full effect was not explained until *Morris* v. *Saxelby* (3). In the latter case (4) Lord Atkinson quoted with approval that part of Lord Macnaghten's judgment in the *Nordenfelt* case (5) set out above, and at the conclusion of the passage pointed out that Lord Macnaghten had used the plural, "parties concerned," in the earlier portion of the passage, meaning to include both the covenantor and covenantee,—

> while in the latter portion of the passage he merely speaks of "protection" being given to the covenantee, which does not injure the public. But in the opening lines of the passage he had already said that the individual (here the covenantor), as well as the public, have an interest in freedom of trading.

(1) [1894] A.C. 535.
(2) *Mason* v. *Provident Clothing & Supply Co. Ltd.*, [1913] A.C. 724.
(3) [1916] 1 A.C. 688.
(4) [1916] 1 A.C. at 699-700.
(5) [1894] A.C. 535, at 565.

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Lord Atkinson continues:—

> If it be assumed, as I think it must be, that no person has an abstract right to be protected against competition *per se* in his trade or business, then the meaning of the entire passage would appear to me to be this. If the restraint affords to the person in whose favour it is imposed nothing more than reasonable protection against something which he is entitled to be protected against, then as between the parties concerned the restraint is to be held to be reasonable in reference to their respective interests, but notwithstanding this the restraint may still be held to be injurious to the public and therefore void; the onus of establishing to the satisfaction of the judge who tries the case facts and circumstances which show that the restraint is of the reasonable character above mentioned resting upon the person alleging that it is of that character, and the onus of showing that, notwithstanding that it is of that character, it is nevertheless injurious to the public and therefore void, resting, in like manner, on the party alleging the latter.

Lord Parker of Waddington, with whom Lord Sumner agrees, phrases the matter in a slightly different form but the substance is the same.

In *Atwood* v. *Lamont* (1), Lord Justice Younger (with whom Lord Justice Atkin agreed) points out that it had been established by the House of Lords that it is for the covenantee to show that the restriction sought to be imposed upon the covenantor goes no further than is reasonable for the protection of his business and that the restraint must be reasonable not only in the interests of the covenantee but in the interests of both contracting parties.

In *Fitch* v. *Dewes* (2), Lord Birkenhead, at page 163, states:

> The Courts have been generous in elucidating these matters by the enunciation of general principles in the course of the last few years, and I am extremely anxious not to carry this process further to-day; therefore I say plainly and, I hope, simply, that it has for long now been accepted that such an agreement as this, if it is impeached, is to be measured by reference to two considerations: first, is it against the public interest? and, second, does that which has been stipulated for exceed what is required for the protection of the covenantee? It might perhaps be more properly stated, as it has sometimes been with the highest authority stated, does it exceed what is necessary for the protection of both the parties?

The Lord Chancellor proceeds to point out that in that case there was required only the consideration of the earlier question.

Coming then to the covenant of June 9th, 1925, the first part provides that so far as the appellant is concerned he "will not either directly or indirectly engage

(1) [1920] 3 K.B. 571. (2) [1921] 2 A.C. 158.

in any other sardine business whatsoever in the Dominion of Canada," that is, other than the sardine business of Lewis Connors and Sons, Limited, as manager of which company he was engaged for a period of five years. On the construction of this sentence, "business" must include packing as well as selling, and in my opinion the restraint affords to Connors Bros., Limited, with respect to the business and good-will purchased by it, nothing more than reasonable protection against something which it was entitled to be protected against. The courts have uniformly refrained from setting out what restriction in point of area or time may be reasonable, and have left these questions to be determined upon a consideration of the circumstances in each particular case. In the present instance, as I have already mentioned, the packing of sardines in Canada is concentrated in the Passamaquoddy area, and, in my view, it cannot be said to be unreasonable that the appellant should agree not to pack sardines in the Dominion. Sardines were sold by Lewis Connors and Sons, Limited, throughout the world as well as in every province of Canada. And again I hold that the respondents were entitled to accept from appellant a covenant limited to not selling them in Canada. The appellant is not prevented from packing or selling other fish in Canada or elsewhere and as a matter of fact has done so since shortly after October of 1926. This last consideration, to my mind, is conclusive in determining that the covenant is not too wide in point of time, even remembering that the appellant was about thirty-seven years of age in 1925.

The evidence is that the price of the sardines to the public has not been increased but, on the contrary, has probably been lowered. The record also discloses that the price paid to the fishermen has not decreased. There is, of course, nothing to prevent anyone else engaging in the sardine business in Canada and I cannot see that the operation of the covenant may be said to be injurious to the public in any respect.

It is then contended that the appellant was relieved of his obligations under this covenant by the release contained in clause 5 of the agreement of October 2nd, 1926. That clause is in the following terms:

> The parties of the second, third and fourth parts hereby release the said party of the first part (the appellant) from all claims and demands of every nature and description which they or either of them have or

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which hereafter they or either of them may have against the party of the first part by reason of anything to the date of these presents including but without limiting the generality of the foregoing any claims by reason of any shortage in inventory alleged misrepresentation or for alleged improper conduct of the party of the first part in connection with the business of the said Lewis Connors & Sons, Limited, or the purchase of an interest therein or stock thereof.

I am inclined to think that the proper construction of this clause is that it refers only to what the appellant may have done down to the date of the agreement and not to anything that he may have previously agreed to do or refrain from doing. It is significant that the employment agreement was ended by a separate clause. In any event, the insertion of clause 3 in the agreement of October 2nd, 1926, makes it clear that it was never intended that the appellant should be released from the earlier covenant.

This conclusion renders it unnecessary to consider the terms of that clause, 3, and we are left, therefore, with the question as to whether the appellant is barred for life from engaging in the sardine business in Canada, as owner only. It is perhaps unnecessary to say that he is prevented from so engaging in partnership with others and I think that the Chief Justice of New Brunswick arrived at the proper conclusion that the appellant is also prevented from engaging in such business as a shareholder of an incorporated company engaged in such business in Canada.

So far as Question (*c*) is concerned, the name "Connors" has been registered in Canada as a trade mark in connection with the sale of Fish and Fish Products and such trade mark is now owned by Connors Bros., Limited. It is obvious, therefore, that the appellant may not use that name in connection with the sardine business.

Irrespective of the difficulty in the appellant's way in securing an answer to Question (*b*), in view of the fact that the Chief Justice in the exercise of the discretion conferred by Rule 54A declined to express an opinion, and of the fact that the Judges in the highest Provincial Court agreed with him, I entertain no doubt that for the reasons given by the Chief Justice, it would be inadvisable to give any opinion unless and until the appellant undertakes to act in some form of employment for some person or corporation engaged in the sardine business in Canada.

The appeal should be dismissed with costs.

The judgment of Davis and Hudson JJ. was delivered by

DAVIS, J.—On June 9th, 1925, the appellant, then a man of 37 years of age, who had been brought up from boyhood in the sardine business with his father and uncle, sold his shares in the respondent company Lewis Connors & Sons, Limited, to the respondent company Connors Bros., Limited, and with his father entered into the following covenant in an agreement with the respondent Connors Bros., Limited:

> The said Lewis Connors and Bernard Connors agree with said Connors Bros., Limited, that they will not either directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada, nor directly or indirectly use the brands of either Connors Bros., Limited, or Lewis Connors & Sons, Limited, in the Dominion of Canada, or elsewhere, nor, for a period of ten years from the 30th day of April, A.D. 1925, use the name of Connors in connection with the sardine business in any country whatsoever.

The appellant thereupon entered the employ of Lewis Connors & Sons, Limited, but on October 2nd, 1926, disputes having arisen between the parties, the engagement of employment was terminated upon the terms of a further agreement in writing of that date. That agreement contained the following covenant:

> The party of the first part (i.e., the appellant) also agrees with the said parties of the second and third parts (i.e., Lewis Connors & Sons, Limited, and Connors, Bros., Limited) that he will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada nor directly or indirectly use the brands of either Connors Bros., Limited, or Lewis Connors & Sons, Limited, in the Dominion of Canada or elsewhere, nor for a period of ten years from the 30th day of April, A.D. 1925, use the name of Connors in connection with the sardine business in any country whatsoever.

Subsequent to the expiration of the ten-year period from the 30th of April, 1925, referred to in the said clause of the agreement, the appellant desired to engage in the sardine business in Canada and addressed a letter on April 15th, 1937, to the respondent Connors Bros., Limited, in which, after referring to the two covenants above set forth, he said:

> I wish to point out to you that I do not consider the provisions cited above to be binding as agreements in restraint of trade. I have no desire to use or intention of using the brands of either Connors Bros., Limited, or Lewis Connors & Sons, Limited, but I do desire to engage in and work at the sardine business in Canada and/or elsewhere and it is also my desire to use the name of "Connors," if I so choose, in connection with the sardine business in Canada or elsewhere.

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If the agreements I have cited above are good and valid agreements enforceable at law or in equity, I neither desire nor intend to violate them. It has occurred to me that you may consider them enforceable and, should I engage in the sardine business in Canada, you may take steps to restrain me from doing so or, after I have done so, sue me for damages for breach of contract. Naturally I have no desire to make plans for or invest capital in a business I may be restrained from carrying on at great cost and inconvenience to me.

Accordingly I would ask you to accept this letter as notice of my intention to engage in the sardine business in Canada and/or elsewhere and to use, if I see fit, the name "Connors" in connection with the sardine business in Canada or elsewhere, my activities in these respects to start as soon as possble after this date. I would therefore ask you to advise me on or before April 26th, 1937, whether you consider the above agreements, or either of them, enforceable and intend to hold me to them, that is to say, prohibiting me from engaging in the sardine business in Canada for all time. It may well be that you consider the period of twelve years, which has since elapsed, sufficient restraint in point of time so far as your purposes are concerned. If that is the case, I should be pleased to have you advise me accordingly, and to receive from you a release from the said agreements.

If I do not hear from you in the time suggested, or if I do not secure a release from the said agreements, or if you advise me that you intend to treat the agreements as enforceable, I shall feel that I am entitled to ask the Chancery Court for directions on the agreements mentioned in order that I may know whether I can legally enter this business. For that purpose, I am advised, I shall be forced to make you party to an application by way of originating summons for a court construction of and declaration on the agreements mentioned so far as they apply to my engaging in the sardine business along the lines I have in mind.

The solicitors for Connors Bros., Limited, and Lewis Connors & Sons, Limited, replied under date of April 24th, 1937, that they had been instructed to inform the appellant that their clients

consider the provisions of the contracts quoted in your letter to be legally binding upon you in every respect, and that they have no intention whatever of releasing to you, or abandoning in any way their rights under these agreements.

On the 27th of April, 1937, the appellant commenced these proceedings for an interpretation of the covenants and for a declaration of the rights of the parties thereunder and propounded for the Court the following questions for determination:

(*a*) Whether, upon construction of the provision written variously in the said agreements as "will not directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada" and "will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada," the said Bernard Connors, the covenantor mentioned in both agreements, is at the present time and shall be thenceforward barred from engaging in the sardine business in

Canada as owner by himself or in partnership with others of such a business or as a shareholder of an incorporated company engaged in such business in Canada.

(*b*) Whether, upon construction of the words "will not directly or indirectly engage in" used in said covenants the said Bernard Connors is barred at law from working at the sardine business in Canada as an employee of any person, persons, firm or corporation engaged in the sardine business in Canada.

(*c*) Whether, upon construction of the said covenants and particularly the following words contained therein "nor for a period of ten years from the 30th day of April, A.D. 1925, use the name of Connors in connection with the sardine business in any country whatsoever," the said Bernard Connors may at this time and thenceforward lawfully use the name of "Connors" in connection with the sardine business in Canada.

This course of proceeding by way of originating summons was taken pursuant to Order 54A of the New Brunswick *Judicature Act*. The matter came on for hearing before Chief Justice Baxter in the Chancery Court of New Brunswick and in his judgment delivered on August 24th, 1937 (1), the learned Chief Justice of New Brunswick answered question (*a*) in the affirmative, declined to answer question (*b*) and answered question (*c*) in the negative, and ordered the appellant to pay the costs of the application. The plaintiff then appealed to the Appeal Division of the Supreme Court of New Brunswick, at the November Sittings in 1937, and, after taking time to consider, the Appeal Court (2) dismissed the appeal with costs on February 8th, 1938, written judgments being delivered by Grimmer J. and LeBlanc J. The appellant on February 18th, 1938, obtained special leave from the Appeal Division of the Supreme Court of New Brunswick to appeal to this Court and brought on the appeal for hearing in due course.

It is always unsatisfactory to deal with questions of this kind in the abstract without concrete facts being in issue. Take, for instance, the questions whether the appellant is barred from engaging in the sardine business in Canada "as owner by himself" or "in partnership with others" of such a business or "as a shareholder" of an incorporated company engaged in such business in Canada or "from working at" the sardine business in Canada as "an employee of" any person, persons, firm or corporation engaged in the sardine business in Canada.

(1) 12 M.P.R. 102. (2) 13 M.P.R. 68.

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In the view that I have arrived at, it is unnecessary to consider, if indeed the Court would be justified in determining, the detailed propositions involved in the submitted questions.

The agreement of October 2nd, 1926, which contains the secondly above-recited covenant, terminated the employment of the appellant with the respondent Lewis Connors & Sons, Limited, for a five-year term from June 9th, 1925, at a salary of $5,000 a year under an agreement of June 9th, 1925, that had been made as part of the bargain for acquiring the shares of the appellant and his father in Lewis Connors & Sons, Limited. By the said agreement of October 2nd, 1926, the respondents expressly released the appellant "from all claims and demands of every nature and description which they or either of them have or which hereafter they or either of them may have against" the appellant "by reason of anything to the date of these presents * * *" but a new covenant was taken from the appellant in substantially the same words as the covenant in the earlier agreement. I will assume in the respondents' favour, what I do not think it necessary to decide, that the latter clause was intended merely to repeat and confirm the covenant in the earlier agreement and is to be treated, if in law there is any difference in the application of the principles respecting covenants in restraint of trade, as a covenant with the vendor of shares of a business rather than a covenant by an employee in favour of his employer.

The main question in this case is whether the provision against engaging directly or indirectly in any sardine business whatsoever in the Dominion of Canada, during the entire lifetime of the appellant, is too wide to be enforceable. The answer to that question depends upon whether, in the particular facts of the case, the covenant was reasonably necessary for the protection of the business carried on by the covenantees at the time when it was entered into. The court, in order to determine the question, must consider three things: the nature of the business, the position of the covenantor, and the scope of the covenant. The question of the validity of covenants in restraint of trade has been considered many times in recent years and in more than one case the House of Lords has laid down the principles applicable to such covenants. It is quite

unnecessary to attempt to repeat them. One principle is perfectly clear and that is, that in approaching such questions the court must bear in mind that a covenant which is in restraint of trade is *prima facie* invalid and that the onus is on the person who seeks to enforce it to show that it is a valid covenant—a covenant which is reasonably necessary for the protection of his business and is not otherwise contrary to public policy. I need only, I think, refer to the language of Lord Macmillan in *Vancouver Malt* v. *Vancouver Breweries* (1):

> The law does not condemn every covenant which is in restraint of trade, for it recognizes that in certain cases it may be legitimate, and indeed beneficial, that a person should limit his future commercial activities, as, for example, where he would be unable to obtain a good price on the sale of his business unless he came under an obligation not to compete with the purchaser. But when a covenant in restraint of trade is called in question the burden of justifying it is laid on the party seeking to uphold it. The tests of justification have been authoritatively defined by Birkenhead, L.C., in these words: "A contract which is in restraint of trade cannot be enforced unless (*a*) it is reasonable as between the parties; (*b*) it is consistent with the interests of the public. * * * Every contract therefore which is impeached as being in restraint of trade must submit itself to the two standards indicated. Both still survive": *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society, Ltd.* (2).

Lord Hanworth, M.R., in *Gilford Motor Co.* v. *Horne* (3), referring to page 475 of 1 Smith's Leading Cases, 13th ed., dealing with the *Nordenfelt Co.'s* case (4), said that the true view is

> that any restraint, whether general or partial, is *prima facie* invalid, but may be good if the circumstances of the case show it to be reasonable.

The covenant here in question, like all such covenants, must be considered with regard to the surrounding circumstances. The appellant, a young man brought up in the sardine business since 14 years of age, was at the age of 37 years restrained during his lifetime from directly or indirectly engaging in any sardine business whatsoever in the Dominion of Canada. My conclusion upon the evidence is, assuming that the words "directly or indirectly engage in the sardine business" are capable of precise definition and are not too vague as to be void for uncertainty (the very questions submitted to the court indicate the uncertainty of the meaning to be attributed to the words), that the respondents have not shown that the

(1) [1934] A.C. 181, at 189-190.
(2) [1919] A.C. 548, 562.
(3) [1933] 1 Ch. 935, at 958.
(4) [1893] 1 Ch. 630.

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terms of the covenant can pass the test of reasonableness as between the parties. Nothing really turns upon the prohibition against the use of the brands of either of the respondents because the appellant would have no right to use the brands of these companies without leave or licence. The prohibition against the use of the name "Connors" in connection with the sardine business was limited for a period of ten years, which has since expired.

In my opinion the appeal should be allowed and the judgments below set aside and it should be declared only that the covenant in so far as it prohibits the appellant from engaging directly or indirectly in any sardine business whatsoever in the Dominion of Canada is unenforceable.

The appellant should have his costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *J. H. Drummie.*
Solicitors for the respondents: *Inches & Hazen.*

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*May 17, 18.
*Dec. 19.

THE ROYAL BANK OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

THE PORT ROYAL PULP & PAPER COMPANY, LTD (DEFENDANT).... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Banks and Banking—Security under s. 88 of The Bank Act (now 1934, c. 24, Dom.)—Validity—"Owner"—Pulpwood—Description—Conversion—Basis of damages.

The appellant bank claimed against the respondent company the unpaid balance of amounts which the bank had advanced to A. to assist A. in pulpwood operations to fulfil two contracts to sell and deliver pulpwood to respondent. The bank had taken from A. the form of security under s. 88 of the *Bank Act* (now 1934, c. 24, Dom.) and assignments of the moneys payable by respondent under the contracts. The bank sued, under the security and assignments, as assignee of A's rights against respondent and alternatively for damages for conversion. Respondent, among other defences, challenged the validity of the security under the *Bank Act,* claimed certain credits and priorities, and denied that any further moneys were payable under the contracts.

* PRESENT:—Cannon, Crocket, Davis, Kerwin and Hudson JJ.

The contracts between A. and respondent were dated October 31, 1933, and April 26, 1934. The pulpwood to be cut was on Crown lands on which a company, New Lepreau Ltd., held licences to cut timber. A. was president of that company and held a majority of its shares, nearly all the remaining shares being held by respondent. The contract of October 31, 1933, was first made in the name of New Lepreau Ltd. but later A's name was substituted.

The trial judge, Barry, C.J. K.B.D., gave judgment for the bank for the amount of its claim, $8,000 and interest. The Supreme Court of New Brunswick, Appeal Division, 12 M.P.R. 219, reduced the judgment to $192.02. It held that, so far as the bank's case was based on s. 88 of the *Bank Act,* it failed, as A. was not the "owner" entitled to give security within s. 88 (the pulpwood being, so far as the evidence disclosed, the property of New Lepreau Ltd.); that (apart from s. 88) on A's assignments to the bank of the moneys payable by respondent under the contracts, the bank should recover, but, on the proper debits and credits, the amount recoverable was only $192.02. The bank appealed.

Held (Kerwin J. dissenting in part): The judgment at trial for the bank for the amount of its claim should be restored.

A's assignments given as security under s. 88 of the *Bank Act* were valid under s. 88. (*Per* Cannon, Crocket and Hudson JJ.: A. must be treated as the owner of the pulpwood when it was cut, within the meaning of s. 88). (*Per* Davis and Hudson JJ.: A. had at all times a qualified ownership or interest in the pulpwood as soon as it was cut, sufficient to entitle the bank to take from him security under s. 88). (*Per* Kerwin J.: The security under s. 88 must be given by the owner. The proper inference from the evidence is that A. was the owner and that he gave security to the bank under s. 88).

Though down to a certain date the assignments by A. to the bank as security under s. 88 described the wood as "all the rough or draw shaved spruce and fir pulpwood" on the described location, omitting "or sap peeled" spruce and fir pulpwood (inserted in later assignments; and also inserted in A's first and subsequent applications for credit and promises to give security), it was *held* that all the spruce and fir pulpwood (including sap peeled wood) got out by A. on the described location was included in the pledges to the bank (affirming the trial judge, who held that the particular designations only served to indicate the season of the year in which the wood is cut).

As to respondent's claim that, should the bank's security be held valid under s. 88, respondent's liability, if any, rested in a claim for conversion, and that damages should be fixed by ascertaining the value of the pulpwood at the time and in the condition that respondent took possession of it, involved in which was the question of certain expenditures by respondent:—

Held (Kerwin J. dissenting on this point), that respondent was bound to pay the full amount of the bank's advances to A.

Per Cannon, Crocket and Hudson JJ.: A's assignments as security under s. 88 being valid, and the bank having kept respondent fully informed of every step in its negotiations with A., there is no right in respondent to deduct from the amount of the bank's advances any moneys which respondent paid to A. or to anybody else for supplies, wages, stumpage, or any other purpose in pursuance of the terms and conditions of its agreement with him.

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Per Davis and Hudson JJ.: Practical difficulties arise in any attempt to fix value at any particular stage; respondent took possession of the wood with full knowledge of the bank's position and rights and destroyed the identity of the wood in using it in its mill operations; it is respondent's knowledge that is the determining factor in this case; A's evidence was that all the moneys got from the bank were actually used in the woods operations; the evidence does not establish that the actual value of the wood when respondent took possession of it was less than the amount of the bank's advances against it.

Kerwin J. dissented as to the amount recoverable, holding that respondent was liable in damages for conversion, the damages being the value of the logs at the time and place of conversion; that in fixing such damages there should be deducted, from the ascertained value of the logs in the state in which they were to be delivered, at the place of delivery, under A's contracts with respondent, certain sums expended by respondent in bringing the logs to that state at that place, being for wages and supplies in such operation, stumpage, workmen's compensation, taxes, etc., rent for housing men, and freight; (*Reid* v. *Fairbanks*, 13 C.B. 692, *Morgan* v. *Powell*, 3 Q.B. 278, *Burmah Trading Corpn. Ltd.* v. *Mirza Mahomed*, L.R. 5 Ind. A. 130, at 134, cited). On above basis he fixed the bank's claim at $4,788.62 and interest thereon from the date when respondent received the last of the logs.

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), reducing the amount of the judgment given by Barry, C.J. K.B.D., in favour of the plaintiff ($8,000 and interest, in all $8,897.53) to $192.02. The action was brought by the plaintiff bank to recover the sum of $8,000 (and interest) alleged to be the unpaid balance of moneys advanced by the bank to one Atkinson to assist him in getting out pulpwood under two contracts between him and the defendant company. The bank had taken from Atkinson the form of security under s. 88 of the *Bank Act* and assignments of the moneys payable by defendant under the contracts. The bank sued, under the security and assignments, as assignee of Atkinson's rights against respondent and alternatively for damages for conversion. The material facts of the case and issues in question are sufficiently stated in the judgments now reported. The bank's appeal to this Court was allowed and the judgment of the trial judge restored, with costs throughout, Kerwin J. dissenting in part.

W. F. Chipman K.C. and *C. L. Dougherty* for the appellant.

C. F. Inches K.C. and *M. Gerald Teed* for the respondent.

(1) 12 M.P.R. 219; [1937] 4 D.L.R. 254.

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Crocket J.

The judgment of Cannon and Crocket JJ. was delivered by

CROCKET, J.—This action arose out of two contracts, which the defendant entered into for the purchase of pulpwood for the defendant's pulp manufacturing operations at its mill at Fairville, New Brunswick, the first contract dated October 31, 1933, and the second April 26, 1934. Although stating in its introduction that it is made between E. C. Atkinson (New Lepreau Ltd.) of Fredericton and the defendant, the first contract was signed New Lepreau Ltd. by Ewart C. Atkinson, President, and Port Royal Pulp and Paper Co. Ltd. by its manager. By it the seller agreed to sell and deliver to the defendant and the defendant agreed to purchase and accept 1,000 to 4,000 cords of draw shaved or rossed spruce and fir pulpwood at $6.50 per cord. The pulpwood was to be cut from lands owned or controlled by the seller and situated at New River, N.B., (these lands were Crown lands on which New Lepreau Ltd. held a licence to cut timber), and was to be shipped from New River, consigned to the defendant at Fairville or such other points as the company might designate, freight to any other point than Fairville to be equalized on Fairville freight rate. It was agreed that the contract should continue as directed by the defendant until all pulpwood had been shipped to the defendant during the winter 1933-34, "to be completed by June 1, 1934." The contract provided that payment should be made by the defendant to the seller on the 15th day of each month for all pulpwood delivered to and accepted by the company during the previous month, and also that if there were any encumbrances or government dues on the wood the company "shall deduct same from remittance to the seller."

Atkinson was the president of New Lepreau Ltd., in which he owned a controlling interest, holding 247 of the 489 shares of its capital stock, the remaining shares, with the exception of five qualifying shares, being held by the defendant company. On January 20th Atkinson gave notice under the provisions of *The Bank Act* of his intention to give security under s. 88 to the plaintiff Bank. This notice was duly registered in the office of the Receiver-General at Saint John on January 22nd. Two days later he made application to the plaintiff on the usual printed

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form for a revolving line of credit to the amount of $5,000 for his pulpwood business and for advances thereunder on the security of all the rough or draw shaved or sap peeled spruce and fir pulpwood

which are now owned or which may be owned by the undersigned from time to time while any advances made under this credit remain unpaid, and which are now or may hereafter be in the Lawrence flowage on New River Stream in the County of Charlotte,

and agreed to give the Bank

from time to time and as often as required security and further security for the said advances by way of assignments under section 88 of *The Bank Act*

covering all the said goods, and appointed the Bank his attorney "to give from time to time such security and further security." Simultaneously he executed an agreement with the Bank in the regular printed form also as to its powers in relation to all advances and securities held therefor.

On March 1, 1934, the manager of the defendant wrote Atkinson that following their conversation and correspondence the defendant would agree

to change the contract * * * dated October 31, 1933, which is in the name of the New Lepreau Ltd. to E. C. Atkinson, personal account.

On the same date the defendant advised the Bank of this change in the contract, and on March 10th Atkinson executed an assignment to the Bank by way of security under s. 88 of

all moneys, claims, rights and demands whatsoever which the undersigned may now, or at any time hereafter, have or be entitled to under or by virtue of or in respect of or incidental to [the said contract], the said moneys, claims, rights and demands or any of them, or any part or parts thereof, being hereinafter referred to as the "debt."

It sets forth in para. 2 that Atkinson agrees that

the debt shall be held by the Bank as general and continuing collateral security for the fulfilment of all obligations, present or future, of the undersigned to the Bank, whether arising from dealings between the Bank and the undersigned or from any other dealings by which the Bank may be or become in any manner whatsoever a creditor of the undersigned, and whether such obligations were or be incurred alone or jointly with another or others, and whether as principal or surety, and whether matured or not, and whether absolute or contingent.

Also by para. 14 that it

is given in addition to and not in substitution for any similar assignment heretofore given to and still held by the Bank and is taken by the Bank as additional security for the fulfilment of the aforesaid obligations of the undersigned to the Bank and shall not operate as a merger of any simple contract debt or in any way suspend the fulfilment of, or prejudice or

affect the rights, remedies and powers of the Bank in respect of, the said obligations or any securities held by the Bank for the fulfilment thereof.

On March 12th the manager of the Bank sent the defendant a copy of this assignment, requesting it at the same time in future to send all cheques in payment direct to the Bank and to advise the Bank what payments the defendant had made to date on the contract. On March 16th the defendant acknowledged receipt of the assignment of the contract and informed the Bank that its advances on the contract during the winter amounted to $484.90 plus an amount of about $4,000 over-advance on a previous contract it had with Atkinson and which, the letter stated, Atkinson had asked the defendant to charge against the new contract. To this letter the Bank made the following reply:

> Referring to your letter of the 16th inst., in which you advise that $484.90 has been paid against the contract dated Oct. 31st, 1933, with Mr. E. C. Atkinson, we note that you have a claim against him for $4,000 on the previous contract which has not yet been completed owing to pulp to be shipped. We have advanced him $3,000 on the contract dated Oct. 31st, under Section 88 Security, and therefore shall expect our advances in this connection to be repaid before your claim of $4,000 mentioned.

No pulpwood had been shipped or delivered to the defendant under the October, 1933, contract up to this time.

The Bank made its first advance—$1,000—on January 24, 1934—the date of Atkinson's application for the $5,000 credit—and four other advances of $500 each between that date and March 19th. No further advance was made until May 28th.

In the meantime, on April 26th, the defendant entered into the second contract, this time with Atkinson personally. By this contract Atkinson agreed to sell and deliver and the defendant to purchase and accept 10,000 cords of peeled spruce and fir pulpwood at $7.25 per cord, which was "to be cut from lands owned or controlled by the seller and situated in Charlotte County, N.B." This last contract provided that advances on the pulpwood should be made by the defendant to Atkinson at the rate of $1.25 per cord when it had been sawed and piled in the forest ready for scaling, an additional dollar per cord when the wood had been hauled to the river ready for driving and the further advance of 50 cents a cord when it had been driven down the river to New River Station, and that the

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balance of the purchase price should be paid on the 20th day of each month for all pulpwood delivered to and accepted by the defendant during the previous month. It contained the same provision as regards shipment as the contract of Oct. 31st, 1933, and as to deduction for any encumbrances or government dues.

On May 27th Atkinson executed an assignment to the Bank as security under s. 88 of "all moneys, claims, rights and demands whatsoever, which the undersigned may now, or at any time hereafter, have or be entitled to under or by virtue of or in respect of or incidental to" this last contract in the same terms as his assignment of his rights under the first contract.

On July 14th the defendant wrote a letter to Atkinson advising him that it agreed to alter the contract to read, "whatever shipment you may have this summer up to a quantity of 3,000 cords we will take care of this shipment on the terms in this contract."

On July 16th Atkinson made application to the Bank for a further revolving line of credit for his pulpwood business to the amount of $10,000 and for advances to him thereunder on the security of all

> the rough or draw shaved or sap peeled spruce and fir pulpwood which are now owned or which may be owned by the undersigned from time to time while any advances made under this contract remain unpaid, and which are now or may hereafter be in the Lawrence flowage on New River Stream in the County of Charlotte

—the same locus as described in his application for the $5,000 credit on January 24th. This application was in precisely the same form and contained the same undertakings on the part of Atkinson as that of January 24th in respect of the first contract. At the same time Atkinson signed another agreement as to the powers of the Bank in relation to all advances and securities held therefor in the same form as that of January 24th in reference to advances and securities in connection with the first contract. The Bank made its first advance thereunder ($1,000) on July 17th, on which date the manager sent the defendant Atkinson's assignment of May 27th. In his covering letter he made reference to the defendant's letter to Atkinson of July 14th and the statement contained therein as to its agreement to "take delivery of 3,000 cords this summer" and asked the defendant to advise him the amount the defendant had advanced to Atkinson.

on pulpwood not delivered. The defendant acknowledged the receipt of this letter on July 19th and advised the Bank that the amount of advances to Atkinson on pulpwood was $10,975.62, and on July 24th wrote Atkinson that it was "going to make all the effort possible to provide further advances of three thousand for August 6th."

Up to the time when the second contract was entered into (April 26, 1934), the Bank had made advances to Atkinson to the amount of $3,000 on the security it took from Atkinson in January, 1934, in connection with the first contract of October 31, 1933, the last of these advances —$500—having been made on March 19th. In addition to the $1,000 advanced on May 28th, four other advances of $200 each and another, $500, were made in the month of June after Atkinson had entered into his second contract for the 10,000 cords of pulpwood to be cut on the same limits and for which, the record makes it quite clear, the Bank had not been fully repaid, neither when Atkinson executed the assignment to the Bank of his rights under the second contract on May 27th nor when he obtained his additional credit of July 16th. On the making of all these advances the Bank took from Atkinson a demand note for the amount of each advance with interest from date until paid, to which was attached a signed promise to give the Bank from time to time, as required, security and further security for such note by way of assignments and further assignments under s. 88 upon the goods mentioned in his application for the line of credit as well as a further assignment of the "goods now owned by the undersigned and now in the possession of Atkinson in the Lawrence flowage on New River Stream in the County of Charlotte or elsewhere." To each of these assignments was attached a schedule setting out the advances made under the line of credit to date. The schedule annexed to the assignment of May 28th shows nine advances amounting to $4,000 and that of June 30th eleven advances amounting to $5,000. On July 17th, 1934, after the Bank received Atkinson's application for the $10,000 credit and the assignment of his rights under the second contract, the assignment of the pulpwood at the Lawrence flowage under s. 88 is stated as being given in consideration of an advance of $6,000 and the attached schedule setting out the advances includes all those made from May 28th to July 17th, totalling

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$6,000, while the demand note of $1,000 given to the Bank on that date (July 17th, 1934) is stated in Atkinson's attached written promise as being given

> for an advance made to the undersigned under the terms of the "Application for credit and promise to give bills of lading, warehouse receipts or security under Section 88" made by the undersigned to the Bank and dated January 24th and July 16th day of 1934.

The Bank made two further advances of $1,000 each in July; six advances in August amounting to $3,500; four in September amounting to $1,125; three in October amounting to $300; one in November of $100; three in December amounting to $650 and two in January, 1935, amounting to $239.45.

An examination of the schedules attached to the various individual assignments shows that on August 6th Atkinson's indebtedness to the Bank in respect of its advances to him for his pulpwood operations under both contracts had reached $8,000 and that, although subsequent advances were made during August, September, October, November, December and down to January 29th, 1935, on further demand notes with individual assignments under s. 88 attached thereto similar to the one referred to as given on July 17th, 1934, the subsequent advances effected no increase in his net indebtedness to the Bank beyond this sum. This, presumably, was due to the fact that the demand notes given thereafter by Atkinson to the Bank, secured as described, were in reality the consequences of adjustments of interest and renewals of previous notes.

While the first contract of October 31, 1933, described the wood Atkinson agreed to sell and deliver to the defendant and the defendant agreed to purchase and accept as "draw shaved or rossed spruce and fir pulpwood" and the contract of April 26th, 1934, as "peeled spruce and fir pulpwood," all the individual assignments executed by Atkinson in consideration of the various advances made to him by the Bank from January 24th under his formal applications for credit of January 24th and July 16th, 1934, described the wood as "all the rough or drawn shaved spruce and fir pulpwood" down to September 11th, 1934. The assignment taken on the latter date and all subsequent assignments down to January 29th, 1935, described the wood covered thereby as "all the rough or drawn shaved or sap peeled spruce and fir pulpwood."

Atkinson cut and delivered to the defendant a total of 6,005·45 cords of pulpwood under the two contracts, of which the defendant claimed that 707·17 cords were cut and delivered under the first contract and the balance amounting to 5,298·26 cords were cut and delivered under the second. The purchase price, therefore, of the 707·17 cords at the contract price of $6.50 per cord would amount to $4,596.60 and the purchase price of the 5,298·26 at the contract price of $7.25 per cord to $38,412.37, making for the 6,005·43 cords $43,008.97.

None of the pulpwood was shipped to the defendant under either contract until November, 1934, Atkinson having made his first shipment on the 12th of that month. The defendant received the entire quantity of 6,005·43 cords between November 1st, 1934, and the last day of July, 1935.

Although the Bank in its action, which it brought in February, 1936, sued in the alternative for the wrongful taking and conversion of the pulpwood and for the purchase price under the two contracts as assignee of Atkinson's rights thereunder, it claims on either head only to the amount of the advances made by it and interest on the demand notes given therefor.

The defendant in its statement of defence challenged the validity of all of the Bank's assignments from Atkinson under the provisions of s. 88 and denied that it wrongfully converted any of the pulpwood. It denied also that it was aware of Atkinson's assignment of May 26th, 1934, of his rights under the second contract until it received from the Bank a copy thereof on or about July 17th, 1934. It claimed that it paid the Bank and Atkinson jointly all moneys thereafter accruing due to the latter under the contract of April 26th and denied that any further moneys were due and payable by it to the plaintiff or to Atkinson under that contract. It also raised the question as to the Bank's having no security on any of the "sap peeled" pulpwood until after September 11th, and claimed that the defendant had an equitable right in the wood as soon as it was cut and marked and that the Bank had actual knowledge or notice of its said equitable right. The defendant also raised the question as to its right to charge against the Bank's security a sum of $5,330.91, alleged to have been due to it by Atkinson for over-advances on a

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previous contract it had with Atkinson in the spring of 1933. This apparently was the amount at which, after the termination of the operations of 1934-5, under the two contracts of October 31st, 1933, and April 26th, 1934, it figured its over-advances to Atkinson in relation to the earlier contract of the spring of 1933, and which in its letter to the Bank under date of March 16th, 1934, it placed at $4,000—the amount that letter stated Atkinson had asked the defendant to charge against the new contract of October 31st, 1933. The Bank in its reply hereinbefore set out refused to assent to this proposition and informed the defendant that it would expect its advances to Atkinson on the October 31st contract under s. 88 security to be repaid before the said claim of $4,000.

The defence also put forward a claim that, of the 6,005·43 cords of pulpwood it received from Atkinson, 522·34 cords were cut upon lands of the Fraser Co. Ltd. or the Restigouche Co. Ltd., without the consent or licence of either of those companies and that, the stumpage on this 522·34 cords ($1,044.68) having been paid after its delivery to the defendant, it was entitled to deduct this amount from the amount of the advances made by the Bank to Atkinson.

It also claimed priority over the Bank's security to an amount of $11,096.56 for moneys paid to New Lepreau Ltd. and/or Atkinson under its contract of October 31st, 1933, prior to its receipt of notice of Atkinson's assignment to the Bank of his rights thereunder, and moneys subsequently paid to Atkinson and/or the Bank, which it alleged were received by the Bank. It also claimed priority over the Bank's security in respect of the following moneys:

Moneys paid for wages for the operation..	$9,631 11
Moneys paid for supplies for the operation.	4,482 31
Moneys paid for stumpage, Crown Land Timber Licence fees, Workmen's Compensation Board Assessment.....	7,376 56
Moneys paid for rent, housing men for operation	26 00
Moneys paid for freight on wood received.	5,607 81

The action was tried by Barry, C.J. K.B.D., without a jury, who found a verdict for the plaintiff for the full

amount of its claim, $8,366.66, to which he added $530.87 to represent the accrued interest on the principal sum of $8,000 from the date of the delivery of the particulars to the date of his judgment.

The defendant appealed from this judgment to the Appeal Division of the Supreme Court, with the result that the judgment was reduced to $192.02, with costs of the action, while the Bank was ordered to pay the costs of the appeal. The judgment of the Appeal Court was delivered by Baxter, C.J., and concurred in by Grimmer and Fairweather, JJ. It seems to have been based principally on the conclusion that Atkinson was not an "owner" within the meaning of s. 88 of the *Bank Act* and that, so far as the Bank's case was based on that section, it could not be supported. Having reached that conclusion, the court proceeded to deal with the case on the basis of the assignment which Atkinson made to the Bank of all his rights under the contract of October 31st, 1933, a copy of which the Bank sent to the defendant on March 12th.

Referring to the defendant's letter of March 16th as to the charging of the $4,000 over-advanced on the previous contract, the learned Chief Justice said:

> I cannot see, in view of the testimony, any justification for applying the original deficit to anything but the contract of 31st October, 1933. It seems clear, however, that the deficit on the earlier contract was agreed to be charged against the contract of 31st October, 1933, before Atkinson's assignment to the Bank.

This, of course, refers to the agreement between the defendant and Atkinson and not between them and the Bank. As already pointed out, the Bank refused to assent to the proposal. Then the learned Chief Justice dealt with the contract of April 26th, 1934, and pointed out that after July of that year the defendant paid all the operating expenses and the Bank ceased to make any further advances to Atkinson. His Lordship held that the defendant received wood to the value of $4,596.60 under the contract of October 31st, 1933, and which it could properly set off against the balance of $5,330.91 due upon the earlier contract, leaving a loss to the defendant of $734.31 in respect of the earlier contract, which it was not entitled to charge against the contract of April 26th, 1934. He subtracts the $5,330.91 from the total debit against Atkinson of $43,551.26 for the over-advance in respect of the earlier contract of

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the spring of 1933 and for moneys paid and supplies provided by the defendant on account of Atkinson's operations under the contract of April 26th, 1934, leaving $38,220.35 as the debit chargeable to the latter contract. "Under that contract," he says, "the defendant received 5,298·26 cords at $7.25 per cord which would give Atkinson a credit of $38.412.37, or a balance in his favour of $192.02."

If the Appeal Court is right in its conclusion that the Bank's securities under s. 88 of the *Bank Act* were invalid because Atkinson was not the owner of the pulpwood within the meaning of that section and the case is one which rests entirely, so far as the Bank is concerned, upon the assignments to it, apart from the provisions of s. 88, of Atkinson's rights under the two contracts of October 31st, 1933, and April 26th, 1934, the result at which it arrived might be difficult to impeach.

This appeal, however, in my view, turns entirely upon the question as to the validity of the Bank's assignments under s. 88 in respect of the two contracts of October 31st, 1933, and April 26th, 1934, and their relation to each other. As to this, after the fullest and most careful consideration I have been able to give to the case, I find myself in complete accord with the reasons by which Barry, C.J., K.B.D., so lucidly and logically supports his judgment. There is no material dispute respecting any one of the facts I have above set forth. As the learned trial judge points out, the question is: In whom during the interim between the first advance of $1,000 to Atkinson on July 17th, 1934, and the shipments of the pulpwood to the defendant in the following November rested the legal title to the pulpwood? I quote the following passages from his judgment:

> Before the banks were authorized to loan money on such operations as those with which we are now dealing, it was the common practice of purchasers under a contract to cut lumber, to make it a term of the written contract with the operator that the property in the lumber cut would be in the contractee from the stump. This would be a protection to the party who was advancing the money to the operator to carry on the operation. But no such stipulation, I venture to think, will be found in the contracts of the present day, in cases at any rate where the operator has to go to a bank for assistance, for the very obvious reason that such a stipulation would deprive the operator of the very assistance which he wanted, in the event of neither the operator nor the purchaser of the output being able to finance the operation. No bank would loan to a pulpwood operator, were the product of the operation as soon as

cut, to become the property of the purchaser of the output. So, also, I think it would be true to say, that no bank would be willing to advance money to a woods-operator of any kind, to enable him to carry on an operation, unless he could satisfy the bank that he had a contract with some responsible party, to take at a commercially attractive price, the output of the operation. If that be sound doctrine then we are met here with the paradoxical contention of the defendant, which advances the proposition, and one which I think untenable, that because Ewart C. Atkinson had contracted to sell his pulpwood cut to the defendant company and the plaintiff bank was aware of the fact, it could not under the *Bank Act* take security for advances on the pulpwood, the subject-matter of the contract between Atkinson and the defendant company. There is nothing in the *Bank Act* that I can see to prevent the bank from doing so.

* * *

It is set out in the defendant's factum that: "In the summer of 1934, the defendant's manager, Mr. Lacroix, becoming aware that the plaintiff's advances had reached $8,000, endeavoured to negotiate some compromise between the parties in a settlement of their conflicting claims, and believing that there would be sufficient wood to meet the claims of both parties, endeavoured to reach an arrangement whereby the wood would be conveyed to the defendant by Bill of Sale, and the plaintiff would receive $2 a cord as the wood was delivered at the mill. This offer, however, was refused."

Although this offer was refused, it shows at least one thing, that is that the defendant at that time had little faith and did not think itself secure in the title which it now asserts, but was anxious to have the wood conveyed to it by Bill of Sale from the plaintiff so as to put its title to the wood upon a sounder basis and beyond further question.

Pulpwood is pulpwood whether draw shaved, rossed or sap peeled. The particular designations, if I understand the matter, only serve to indicate the season of the year in which the wood is cut; nothing more. If cut in the spring while the sap is running freely, and the bark can be easily removed, it is sap peeled wood. If cut in the fall and winter, when the sap has stopped running, the bark is more firmly attached to the tree trunk, and another method of removing it has to be resorted to; it is then called rough draw shaved or rossed, but to say that it is an entirely different commodity from the sap peeled wood is, I think, a fallacy.

The title to all of the spruce and fir pulpwood gotten out by Ewart C. Atkinson during the two seasons and put into the Lawrence flowage on New River Stream in the County of Charlotte, no matter of what particular description it may be called, was in my opinion pledged to the plaintiff bank upon the taking of the securities referred to.

* * *

There is no evidence that there was any other operator simultaneously cutting pulpwood on the ground operated by Atkinson, or that there was any other operator putting wood into the Lawrence flowage on New River Stream in the County of Charlotte. There was no danger of Atkinson's cut becoming intermingled or mixed up with the cut of any other operator. There was not the slightest danger of failure of identification. Extrinsic evidence, could, as we have seen, have been resorted to if necessary. Therefore it is that I say that in my opinion the description of the pulpwood pledged by Atkinson to the bank, anterior to the 11th of September, 1934, was broad enough in its terms to include "sap peeled" wood, although that term was not used in the securities taken.

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Aside from all that, however, I can see no objection to the bank taking additional security upon the sap peeled pulpwood at the time of the renewals of the $8,000 note. If the bank holding pledged pulpwood as security for the notes, substitutes for these notes renewals from time to time, without, however, receiving actual payment, the whole series of notes and renewals form links in the chain of liability, which is secured by the pledged pulpwood. Although as a matter of book-keeping the bank may have treated the first notes, and the subsequent substituted notes, as paid by the application of the proceeds from time to time of the renewals, there is no payment in fact of the notes for which the security was given.

The facts of the transactions between Atkinson and the bank are not really in dispute here; it is the legal effect of those transactions that is the question. The bank had before it the contracts between Atkinson and the defendant company, and therefore knew that the company as purchaser of the pulpwood under the contracts, would, when the liens and charges against it were discharged, become its owner. In its negotiations with Atkinson the bank was not acting in the dark or behind closed doors, but on the contrary kept the defendant fully informed of every step in the negotiations. I think one would be justified in saying that the company knew as much of what was going on between the bank and Atkinson as did the bank itself. That I think is so fully demonstrated by the mass of documentary evidence which was introduced at the trial, that I see no reason for further referring to this phase of the case.

I have no hesitation in holding, for my part, that upon the undisputed facts as disclosed by the evidence, Atkinson must be treated as the owner of the pulpwood when it was cut, within the meaning of s. 88 of the *Bank Act,* and that his assignments to the plaintiff Bank were valid thereunder. This being so, and the Bank having kept the defendant fully informed of every step in its negotiations with Atkinson, as the learned trial judge has found, I cannot understand upon what ground the defendant's claim can be justified that it has a right to deduct from the advances made by the Bank any moneys which it (the defendant) paid to Atkinson or to anybody else for supplies, wages, stumpage or any other purpose in pursuance of the terms and conditions of its agreement with him.

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

DAVIS, J.—The transactions out of which this litigation arose were carried on throughout their various stages by the parties to this litigation and one Atkinson, with whom both parties were dealing, in such a loose and unbusiness-like manner as necessarily to create a state of facts which now involves difficult questions of law. And the evidence at the trial was not in any way developed to lessen the manifest difficulties and confusion.

The respondent, Port Royal Pulp & Paper Company Limited (hereinafter for convenience referred to as the Port Royal Company) carried on, as its name implies, a pulp and paper business in the province of New Brunswick. One of its sources of supply for pulpwood appears to have been the standing timber in what is commonly called the Lawrence flowage in Charlotte county in the said province held under licence to cut from the Crown by another New Brunswick company, New Lepreau Limited. There is so little evidence in the case directed to the narrative and the really material facts (the Crown timber licence is not even produced) that the Court is driven to conjecture to a large extent as to what really occurred. It is plain that prior to the transactions involved in this litigation New Lepreau Limited had acted as a contractor in taking out wood from its limits for the Port Royal Company. Atkinson and the Port Royal Company were the owners of practically all of the shares of New Lepreau Limited. What is a common practice in the woods operations of large pulp and paper companies in this country was no doubt adopted by the Port Royal Company, that is, to engage a contractor to cut, haul and deliver pulpwood to the mill rather than do the work by servants or employees of the company, because of practical business considerations in dealing with the woods operations in that way. In this case, the Port Royal Company and Atkinson (although we are told nothing about it) may have incorporated and organized New Lepreau Limited, and very likely did, for that very purpose. All we know is that Atkinson held 247 shares and the Port Royal Company 241 shares out of a total issued capital stock of 490 shares. Why the Crown timber licence to cut was not taken in the name of the Port Royal Company rather than in the name of New Lepreau Limited is not explained. The common practice in this country undoubtedly is for the large pulp and paper mills to acquire their own timber limits from the Crown upon which to cut timber for the supply of wood to their mills and then to let out to different contractors the cutting and delivery of the wood to the mills. All that is plain in the evidence is that the timber involved in this case was cut upon Crown land in respect of which New Lepreau Limited held a licence to cut.

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For reasons best understood by themselves, not attempted to be explained in any way in this litigation, the Port Royal Company made two contracts with Atkinson personally whereby Atkinson undertook and agreed to cut on the New Lepreau limits and deliver to the Port Royal Company at its mills, and the appellant bank undertook to assist Atkinson in financing his woods operations. The singular fact is that although all the parties were perfectly familiar with the position of New Lepreau Limited, no one of them appears to have paid the slightest attention to the rights of that company. So far as the evidence shows, New Lepreau Limited for the purposes of these two contracts was just obliterated from the picture. The two contracts for the delivery of the pulpwood were dated October 31st, 1933, and April 26th, 1934, respectively. The first contract covered 1,000 to 4,000 cords of pulpwood and the second contract covered 10,000 cords. The first of these contracts had in fact been made between the Port Royal Company and New Lepreau Limited, Atkinson signing for New Lepreau Limited as its President, but sometime about March 1st, 1934, Atkinson and the Port Royal Company agreed to strike out the name New Lepreau Limited on this contract and substitute therefor Atkinson's name as the seller. The first of the several promissory notes sued on in this action, secured by sec. 88 security, was taken by the bank subsequent to this change in the first contract. The second contract was taken directly in the name of Atkinson as seller. The Port Royal Company clearly understood the position of New Lepreau Limited, whatever it was, because the Port Royal Company was with Atkinson in substance a joint owner of the company. The appellant bank knew of New Lepreau Limited because it had a pledge of Atkinson's shares in that company and it had the Crown timber licence of that company in its possession. But New Lepreau Limited, so far as the evidence discloses, was disregarded in these two transactions. It is shown in the evidence that at the time of the first contract Atkinson was personally indebted to the appellant bank in a large sum of money and that on an earlier contract (of the spring of 1933) which the Port Royal Company had with New Lepreau Limited the Port Royal Company ultimately sustained a loss of approximately $5,000. The conclusion appears to me to be inescapable that both the appellant bank and the Port Royal

Company desired to see Atkinson get a chance to make some money for himself by taking these pulpwood contracts in his own name and at his own risk, in the hope that he might recoup both the bank and the Port Royal Company, to some extent at least, for their losses. Atkinson undoubtedly agreed with the Port Royal Company that that company might charge up against him the amount of its loss on the New Lepreau Limited contract that had been made in the spring of 1933, although at the time of entering into the contracts the actual amount of the loss, or of any loss at all, had not been ascertained.

In due course Atkinson cut and delivered to the Port Royal Company large quantities of pulpwood under the two contracts in question. The Government dues for cutting the timber from Crown lands were ultimately paid to the Government and there is no suggestion that the Government ever raised any question of trespass. New Lepreau Limited is not a party to these proceedings and does not appear to have raised at any time any question as to Atkinson's right to go in and cut on the areas covered by its Crown timber licence, and a fair inference on the evidence is that both the Government and New Lepreau Limited knew and were quite satisfied that Atkinson should personally take the contracts in question here. It made no difference to the Government, so long as it got its Crown dues paid, which it did, and it is only reasonable to assume that New Lepreau Limited (owned and controlled as it was by Atkinson and the Port Royal Company) was content that what was done should be done. We do not know what consideration moved New Lepreau Limited, but there is nothing to indicate any protest or unwillingness on its part that Atkinson should personally cut on its limits. New Lepreau Limited did not own the land or the standing timber; it had a mere right or licence to cut and remove on payment of Crown dues.

It is perfectly plain that Atkinson had no money and was known to have no money to finance the woods operations covered by his two contracts. While Atkinson was not strictly an employee or servant of the Port Royal Company in relation to his woods operations under the two contracts, he was virtually in the position of an agent or employee. The arrangement, no doubt, was a matter of business convenience; Atkinson in this way could borrow

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money at the bank on the wood by giving security under sec. 88 of *The Bank Act* and, over and beyond whatever borrowings he could make from the bank to finance the operations in ease of the Company, the Company would itself advance moneys to Atkinson during the course of the woods operations to enable him to carry out his contracts. And that is what actually happened. The bank advanced substantial sums; the Company advanced substantial sums; and Atkinson superintended the woods operations and delivered the wood to the Company. Both the bank and the Company were perfectly familiar from the beginning to the end with the fact (though perhaps not with the exact details) of the borrowings and advances from each of them to enable Atkinson to carry out his contracts.

On the completion of the contracts, it became obvious that Atkinson had not made any profit. When the amount of wood which he had actually delivered had been calculated at the contract price per cord, the total advances of the bank and of the Company exceeded the total contract price. The bank was out of pocket $8,366.66 and the Company claimed to be out of pocket $542.29, although in arriving at the latter sum the Company had charged up against Atkinson on the two contracts the amount of its loss on the New Lepreau Limited contract that had been made in the spring of 1933, the actual loss from which contract had in the meantime become ascertained at $5,330.91.

The bank demanded from the Port Royal Company that it pay the balance that remained outstanding upon Atkinson's borrowings in respect of the two contracts which had, to the full knowledge of the Company, been secured not only by sec. 88 security but by assignments of the purchase moneys under the two contracts. There does not appear to have been any effort made by the bank to collect from Atkinson; no doubt because his position must have been worse at the conclusion of the two contracts than it was when he undertook them. The Port Royal Company, while not denying in any way that it got the pulpwood, took two positions against the bank. First, it said that the bank security under sec. 88 was invalid because Atkinson was not the owner of the wood that had been cut—it said that it was the timber of New Lepreau Limited

and not of Atkinson—and that the bank was therefore not entitled to take sec. 88 security from him. Second, that it was entitled as between itself and the bank to charge against Atkinson's contracts the $5,330.91 loss that it had suffered in the contract with New Lepreau Limited of the spring of 1933, and that when this sum was charged up against Atkinson on the contracts, there was a debit against Atkinson of $542.29. A subsidiary point taken on behalf of the Port Royal Company, but a point without any substance, was that the difference between rossed or rough draw shaved pulpwood and sap peeled pulpwood materially affected the issues in the action.

The learned trial judge, the Chief Justice of the King's Bench Division of the Supreme Court of New Brunswick, Chief Justice Barry, gave judgment in favour of the appellant bank for its full claim with interest ($8,897.53) and costs. An appeal was taken by the Company from that judgment to the Appeal Division of the Supreme Court of New Brunswick, which allowed the appeal and reduced the amount of the judgment in favour of the bank to $192.02. The members of the Appeal Court took the view that Atkinson was never an "owner" within the meaning of sec. 88 of *The Bank Act* and that the bank was therefore not entitled to take from him sec. 88 security. They held that

> So far as the evidence discloses, the wood was the property of the New Lepreau Limited.

But although the Crown timber licence was not produced at the trial, it was perfectly plain that it was Crown land and that the standing timber was Crown property. All that the licensee, New Lepreau Limited, had was a right to enter upon and to cut and remove the standing timber; and no doubt, as stated by one of the counsel on the hearing of the appeal before us, the licence contained the usual provision that the property in the wood would not pass from the Crown to the licensee until the Crown dues were paid. However, in the conclusion of the Appeal Court that Atkinson was not an "owner" within the meaning of sec. 88, that Court held that the bank's security under sec. 88 was invalid. The Appeal Court then considered the rights of the bank by virtue of its assignments from Atkinson of the purchase moneys under the two contracts. That Court held that the Port Royal

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Company was entitled, as between itself and the bank, to charge against Atkinson the deficit ($5,330.91) on the New Lepreau contract of the spring of 1933, upon the ground that Atkinson had agreed to the charging of this deficit against him before the date that the bank had taken the assignment from Atkinson of the first of the contracts involved in this action (that is, the contract of October 31st, 1933). But the Appeal Court held that the agreement to charge the deficit against Atkinson only applied to the first of the two contracts (that of October 31st, 1933) and not to the second of the contracts (that of April 26th, 1934) and therefore arrived at the conclusion that, so treating the deficit, any credit to Atkinson on the first contract had been wiped out; but, disregarding the deficit, or any part of it, on the second contract, Atkinson had a credit balance of $192.02 on the second contract for which amount, and for which amount alone, the Appeal Court held the bank was entitled to recover from the Port Royal Company on the basis of the assignment to the bank by Atkinson of the second contract.

On the argument before this Court, counsel for both parties very ably discussed at considerable length the history and the effect of sec. 88 security, but I do not find it necessary for the purpose of this appeal to become involved in the consideration of the somewhat intricate points of law argued on this branch of the case. It seems quite plain to me that Atkinson had at all times a qualified ownership or interest in the wood, as soon as it was cut from the standing timber, sufficient to entitle the bank to take from him sec. 88 security. I think the attack upon the bank's security fails.

That being so, the question was then argued that the liability of the Port Royal Company, if any, to the bank rests in a claim for damages for wrongful conversion. An attempt was made by the Company to fix the damages (in the event that its attack upon sec. 88 security failed) by ascertaining the exact value of the pulpwood at the time and in the condition the Company took possession of it. In dealing with deliveries from time to time of thousands of cords of pulpwood very practical difficulties arise in any attempt to fix value at any particular stage. The Company took possession of the wood with full knowledge of the bank's position and of its rights, and

destroyed the identity of the wood in using it in its mill operations. It is the knowledge of the Company that is the determining factor in this case. Atkinson's evidence is that all the moneys he got from the bank were actually used in the woods operations and not diverted to any other purpose. The evidence does not satisfy me that the actual value of the wood when the Company took possession of it was less than the amount of the bank's advances against it and I think that under all the circumstances the Company is bound to pay the full amount of the bank's advances.

For these reasons I would allow the appeal and restore the judgment at the trial, with costs throughout.

KERWIN, J. (dissenting in part)—The first point to be determined in this appeal is whether the security which banks may take under subsections one and three of section 88 of the *Bank Act* must be given by the owner of the products, goods, wares and merchandise therein referred to. Prior to 1890, when Parliament inserted in the *Bank Act* the forerunner of section 88, it was possible for a bank to lend money upon a warehouse receipt issued by the possessor of the goods to a third party (the owner) or upon a warehouse receipt issued by the owner who originally was one of a select class of manufacturers but which class had been considerably widened by 1890. Chapter 31 of the statutes of that year retained the privilege, so far as warehouse receipts issued by the possessor, not being the owner, were concerned, but it abolished the right of the bank to loan upon warehouse receipt issued by the possessor, who was also the owner, and substituted what is now known as Schedule C security. If subsection 3 of section 74 of the Act of 1890 had provided only that the bank should acquire by virtue of such security the same rights as if it had acquired them by virtue of a warehouse receipt, it might have been contended that, the security being given by an owner, no rights could be acquired by the bank, and it was to overcome that difficulty that it was provided that the security might be given by the owner.

It appears obvious to me that if security under section 88 is not given by the owner, it is of no avail, as the bank cannot acquire title from a person who has none. The

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notice of intention to give security must be given by the person to whom the loan is to be made. That, I think, is apparent from subsection 17 of section 88, which reads as follows:

> Any person intending to give a bank security under the authority of this section must give notice of such intention before any loan is made by the bank to such person and the security taken, by signing a document hereinafter called a "notice of intention," which may be in the form set out in Schedule G to this Act or to the like effect.

I have no hesitation, therefore, in coming to the conclusion that the security must be given by the owner.

While the licences to cut timber had been issued in the name of New Lepreau Limited and the first contract for the sale of logs to the respondent was made by that company, and the contract of October, 1933, was at first made between the same parties, the respondent agreed to the alteration whereby Atkinson was substituted as vendor under the last mentioned contract. New Lepreau Limited is not a party to these proceedings, and, while there is no evidence that it agreed to the alteration, it must be borne in mind that all the shares in that company, except a few qualifying ones, are held by the respondent and Atkinson, and as a matter of fact the latter's certificates were left with the appellant. The distinction between a company and its shareholders is well known, but no claim has been made by New Lepreau Limited that it is the owner of the logs. Furthermore, it is only by virtue of the two contracts filed as exhibits that the respondent claims any interest in the logs, and I think the proper inference from the evidence is that Atkinson was the owner and that he gave security to the Bank under section 88.

It was argued that the securities were not validly given or taken, but I find no substance in this contention as, with reference to the last twenty-one advances made by the Bank to Atkinson (which are the only ones in question), the evidence is clear that these were made contemporaneously with the taking of the securities, and in any event the second notice by Atkinson of intention to give security had been given after the amendment to the statute in 1934, and the advances in question are all later than the date of the coming into force of that enactment.

It was also contended that, in any event, of the securities taken only the twelve last were valid. This argument

is based upon the fact that the nine prior securities described the products of the forest owned by Atkinson and in his possession as being "all the rough or draw shaved spruce and fir pulpwood" and as being "in the Lawrence flowage on New River stream in the County of Charlotte," while in the latter securities the words "or sap peeled" were inserted after the words "draw shaved." I agree, however, with what the trial judge said with respect to this:

> Pulpwood is pulpwood whether draw shaved, rossed or sap peeled. The particular designations, if I understand the matter, only serve to indicate the season of the year in which the wood is cut; nothing more. If cut in the spring while the sap is running freely, and the bark can be easily removed, it is sap peeled wood. If cut in the fall and winter, when the sap has stopped running, the bark is more firmly attached to the tree trunk, and another method of removing it has to be resorted to; it is then called rough draw shaved or rossed, but to say that it is an entirely different commodity from the sap peeled wood is, I think, a fallacy.

I am of opinion that the description in the securities objected to is sufficient.

Upon the basis of the respondent's own figures, as contained in its factum, the total advances made by the appellant, after deducting all sums received by it from the respondent, left a balance of approximately the principal sum claimed by the appellant in this action, $8,000. As security for the repayment of this sum together with interest thereon, the Bank, under subsection 7 of section 88, had acquired the same rights in respect of the logs as if it had acquired the same by virtue of a warehouse receipt; that is, in the circumstances, all the right and title of the owner, Atkinson (section 86). Notwithstanding that the respondent had notice of the Bank's rights, it converted the logs to its own use and is therefore liable in damages for such conversion; i.e., the value of the logs at the time and place of conversion.

No evidence was directed to the determination of the proper amount of damages on that footing. The respondent, however, submitted a statement showing the value of the logs at the place they were to be delivered by Atkinson to the respondent under his contracts with it. The appellant has accepted this value as correct, although it was arrived at only after certain amounts had been expended by the respondent subsequent to the conversion.

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The items deducted by the respondent from the value in its statement are as follows:

1. Moneys paid to E. C. Atkinson before assignment of the Draw Shaved contract and moneys subsequently paid to E. C. Atkinson and/or the Royal Bank which were received by the bank....	$11,096 56
2. Wages paid by Port Royal.....	9,631 11
3. Supplies	4,482 31
4. Stumpage, Workmen's Comp., taxes, etc.	7,376 56
5. Rent, housing men	26 00
6. Freight on wood received under the contracts	5,607 81
	$38,220 35

No question arises as to the first item, and I understood counsel for the appellant to admit the propriety of allowing the fourth item. In no case did it challenge the accuracy of the amounts or the fact that they had been paid for the purposes mentioned. I have no doubt, however, that Item 2, being the amount paid by the respondent as wages in the manufacture of the logs to a point where they acquired the value accepted by the appellant; Item 3, being the amount paid for supplies in connection with the same work, Item 5, being rent for housing the workmen, and Item 6, being the freight on the wood to the point of delivery, should all be allowed. In case I misunderstood counsel's admission, I should add that in my view Item 4 is in the same position.

This is not a claim for detinue such as arose in *Glenwood* v. *Phillips* (1), but the general rule applicable is stated in *Reid* v. *Fairbanks* (2), as epitomized in the Second Edition of Halsbury, Vol. 10, page 138, paragraph 178:

> The value of a chattel which was converted whilst in an unfinished state is estimated by ascertaining what would have been its value in a complete state at the place where it was converted and deducting the amount which it would have cost to complete it.

An allowance for freight under the circumstances has been justified ever since the decision in *Morgan* v. *Powell* (3),

(1) [1904] A.C. 405.
(2) (1853) 13 C.B. 692.
(3) (1842) 3 Q.B. 278.

which was approved in *Burmah Trading Corporation* v. *Mirza Mahomed* (1).

In addition to the items to which I have referred, the respondent seeks to deduct from the value of the logs the balance of an old claim under the first contract between it and New Lepreau Limited and which it claims Atkinson authorized it to set off against the amount that would ultimately be due him by the respondent under the later contracts of 1934 and 1935. Even with Atkinson's consent it can have no right to deduct this sum from the amount of damages that it should properly pay.

Respondent's statement shows that, excluding this sum, it paid out $38,220.35 and that the increased value of the logs was $43,008.97. The balance of $4,788.62 represents the value at the time and place of the conversion. As assignee of Atkinson's rights under the two contracts, the appellant can claim no greater amount, and I would, therefore, allow the appeal and direct that judgment be entered for this sum together with interest thereon at five per cent. per annum from July 31st, 1935, being the date agreed upon in the pleadings of each party by which the respondent had received the last of the logs. The respondent should pay the costs of the action and of the appeal to this Court but they are entitled to their costs of the appeal to the Appeal Division.

HUDSON, J.—I agree that this appeal should be allowed and judgment at the trial restored, with costs throughout, for the reasons given by my brothers Crocket and Davis.

Appeal allowed with costs.

Solicitors for the appellant: *Hanson, Dougherty & West.*
Solicitors for the respondent: *Sanford & Teed.*

(1) (1878) L.R. 5 Ind. A. 130 at 134.

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* Dec. 12.
* Dec. 23.

HIS MAJESTY THE KING .....APPELLANT;

AND

BETTY COHEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — "Common bawdy house" (Criminal Code, s. 225).

Accused had rented a room and there had intercourse with men who paid her. Some called at the room and others were accosted by her on the street. No woman except accused had intercourse with men in the room.

Held: Accused kept "a common bawdy house" within the definition of that term in s. 225 of the *Criminal Code*.

APPEAL by the Attorney-General for Ontario from the judgment of the Court of Appeal for Ontario which (Middleton J.A. dissenting) dismissed the Attorney-General's appeal against the acquittal of the accused by a magistrate on the charge against her (under s. 229 of the *Criminal Code*) of unlawfully keeping a disorderly house, that is to say, a common bawdy house.

C. R. Magone for the appellant.
G. J. McIlraith for the respondent.

The judgment of the Court was delivered by

KERWIN, J.—The accused was charged under section 229 of the *Criminal Code* with keeping a disorderly house, that is to say, a common bawdy house. This latter expression is defined by section 225 of the *Code* as follows:

A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution or for the practice of acts of indecency, or occupied or resorted to by one or more persons for such purposes.

There is no dispute about the facts, as the accused gave evidence from which it appears that she had rented a room and there had intercourse with men who paid her. Some called at the room and others were accosted by her on the street. Another girl lived with her but nothing turns upon this as this girl was not a prostitute. No woman had intercourse with men in the room except the accused.

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

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The magistrate dismissed the charge, following the judgment of the Court of Appeal for Ontario in *Rex* v. *Sorvari* (1). That Court, with Middleton J.A. dissenting, affirmed the acquittal and from its order the Crown now appeals.

Prior to 1907, a common bawdy house was defined by section 225 of the *Code* as "a house, room, set of rooms or place of any kind kept for purposes of prostitution," but in that year, by 6-7 Edward VII, chapter 8, section 2, the section was repealed and a new one enacted in the same terms but with the addition at the end, of the words "or occupied or resorted to by one or more persons for such purposes." These added words clearly cover the circumstances in the present case where there was not an isolated act of fornication but a habitual occupation of the room for purposes of prostitution.

This same view had been expressed by the Ontario Court of Appeal in *Rex* v. *Margaret Smith* (2), but this decision was not cited to the court that decided the *Sorvari* case (3) or to the court below in the present appeal. To the same effect is the decision of the British Columbia Court of Appeal in *Rex* v. *Miket* (4).

The appeal should be allowed. All the facts are before the Court but we merely direct a new trial, which we were informed by counsel for the appellant it is not the Crown's intention to prosecute.

Appeal allowed.

Solicitor for the appellant: *W. B. Common.*

Solicitor for the respondent: *G. J. McIlraith.*

(1) [1938] O.R. 9.
(2) (1908) 12 O.W.R. 80.
(3) [1938] O.R. 9.
(4) (1938) 70 C.C.C. 202.

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* Dec. 12.
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* Jan. 16.
* Feb. 7.

NORMAN WALKER .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence—Admissibility—Trial on charge of manslaughter through motor car accident—Alleged admission by accused to police officer that he was driver of car—Highway Traffic Act, R.S.O., 1927, c. 251—Sec. 88 (5) (as enacted by 20 Geo. V, c. 47, s. 6)—Privilege thereunder—Construction, application—Sec. 40 (1)—Criminal Code, s. 285 (2)—Trial—Procedure—Proper practice—Trial judge deciding there is no evidence to go to jury, withdrawing case from jury and giving judgment for acquittal—Jurisdiction on appeals—Criminal Code (R.S.C., 1927, c. 36, as amended), ss. 1013 (4), 1025 (3).

On the trial of an accused on a charge of manslaughter through the operation of a motor car, evidence given by a police constable of an alleged admission by the accused to him as he was investigating the accident shortly after it occurred, and when there was no charge against accused and he was not under arrest, that accused was the driver of the car, was rejected on the ground that accused must be presumed to know that he was required under penalty to give the information by virtue of s. 88 (as enacted by 20 Geo. V, c. 47, s. 6) of the Ontario *Highway Traffic Act*, R.S.O., 1927, c. 251, and therefore his statement was not voluntary.

Subs. 5 of said s. 88 enacted that "any written reports or statements made or furnished under this section shall be without prejudice, shall be for the information of the Registrar, * * * and the fact that such reports and statements have been so made or furnished shall be admissible in evidence solely to prove compliance with this section, and no such reports or statements, or any parts thereof or statement contained therein, shall be admissible in evidence for any other purpose in any trial, civil or criminal, arising out of a motor vehicle accident."

Held: The said evidence of the police constable was admissible. Judgment of the Court of Appeal for Ontario, [1938] O.R. 636, ordering a new trial, affirmed.

Statements made under compulsion of statute by a person whom they tend to incriminate are not for that reason alone inadmissible against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them (*Reg.* v. *Scott*, Dearsley & Bell's Crown Cases 47; *Reg.* v. *Coote*, L.R. 4 P.C. 599, at 607).

Whether or not, in point of grammatical construction, oral as well as written statements are within the privilege created by s. 88 (5), yet, having regard to s. 40 of said Act and s. 285 (2) of the *Criminal Code* (as to a driver's duty, on the occasion of a motor car accident in which he is involved, to give his name and address—of which enactments the Ontario legislature must be presumed to have

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

been aware when enacting s. 88) and to the manifest primary purpose of s. 88 (to provide for procuring information for record for statistical and rating purposes,. etc.), s. 88 has not in its true construction the effect of rendering such statements as that now in question under the circumstances in question inadmissible in evidence. Sec. 88 (5) should not be read as intended to qualify the duty imposed by said s. 40 (1) for the purposes and in the interests there contemplated, or the duty recognized by said s. 285 (2), *Cr. Code*. Sec. 88 (5), which is expressly limited to reports and statements made under s. 88, should in its operation be strictly confined thereto, and its general terms should not be construed as having the intention of creating a privilege in respect of the specific class of statements contemplated by said other enactments.

On the trial of an accused, if the trial judge decides that there is no evidence to go to the jury, the proper practice is for him to direct the jury to acquit and discharge the accused (*The King* v. *Comba*, [1938] S.C.R. 396, at 397-8). But where (in the present case) the trial judge, deciding that there was no admissible evidence of guilt to go to the jury, withdrew the case from the jury and gave judgment for acquittal, it was *held* that there was an acquittal within the meaning of ss. 1013 and 1025 of the *Criminal Code* (R.S.C., 1927, c. 36, as amended) and that under s. 1013 (4) an appeal lay to the Court of Appeal and, that court having directed a new trial on the ground that the trial judge had improperly held certain evidence to be inadmissible, an appeal lay to the Supreme Court of Canada under s. 1025 (3).

APPEAL by the accused from the judgment of the Court of Appeal for Ontario (1) which allowed the appeal of the Attorney-General for Ontario from the judgment of MacKay J. at trial acquitting the accused, and ordered a new trial.

The accused was charged with manslaughter under the *Criminal Code* (s. 268) arising out of the operation of a motor vehicle at about midnight of July 16 or early in the morning of July 17, 1937, in the township of Tiny, county of Simcoe, province of Ontario, and was tried before MacKay J. and a jury at Barrie, Ontario. The driver of the car in question failed to negotiate a turn and the car went off the highway into a ditch and overturned, resulting in the death of two persons in the car. The trial judge held that there was no evidence as to who was the driver of the car and withdrew the case from the jury and discharged the accused. He had held that certain evidence given by a police constable of an alleged admission by the accused (shortly after the accident, when there was no charge against accused and he was not under

(1) [1938] O.R. 636; [1938] 3 D.L.R. 516.

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arrest) that he was the driver of the car was not admissible; on the ground that the accused must be presumed to have known that he was required under penalty to give the information by virtue of s. 88 (as enacted by 20 Geo. V, c. 47, s. 6) of the Ontario *Highway Traffic Act* (R.S.C., 1927, c. 251), and therefore his statement was not voluntary. On appeal by the Attorney-General of Ontario, the Court of Appeal, Henderson J.A. dissenting, allowed the appeal and ordered a new trial (1). The accused appealed to this Court.

E. A. Richardson K.C. and *B. O'Brien* for the appellant.

C. R. Magone and *J. C. Anderson* for the respondent.

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

THE CHIEF JUSTICE—*As to jurisdiction:* This question depends upon the effect of section 1013, subsection 4, and section 1025, subsection 3. These enactments are severally in these words:

1013. (4) Notwithstanding anything in this Act contained, the Attorney-General shall have the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone.

1025. (3) Any person whose acquittal has been set aside may appeal to the Supreme Court of Canada against the setting aside of such acquittal.

The proper practice, where the trial judge decides that there is no evidence to go to the jury in the well understood meaning of those words, is to direct the jury to acquit and discharge the accused (*The King* v. *Comba* (2)).

The basis of Mr. Justice MacKay's order was that there was no such evidence and it is common ground that he intended to pronounce a judgment of acquittal finally disposing of the charge in the indictment found against the appellant.

It is clear that, the learned trial judge having intended to pronounce, and having considered he was pronouncing a valid judgment of acquittal, what he did cannot be treated as a nullity. Presiding in a court of general jurisdiction, having authority to pronounce on its own juris-

(1) [1938] O.R. 636; [1938] 3 D.L.R. 516.
(2) [1938] S.C.R. 396, at 397-8.

diction, and his judgment being one which under appropriate conditions could competently be given, it was in its nature susceptible of being the subject of appeal (*re Padstow* (1)); and the Court of Appeal rightly dealt with it upon the footing that it constituted a judgment or verdict of acquittal. The proper conclusion would appear to be, as counsel for the Crown as well as counsel for the accused contend, that there was an acquittal within the meaning of sections 1013 and 1025. It is to be observed that the question with which the trial judge was dealing was a question of law alone, a question upon which it was the duty of the jury to act under his direction; their duty, in other words, to render a verdict of not guilty upon a direction given by him; his judgment, therefore, was appealable under section 1013 (4), and this appeal lies under section 1025 (3).

As to the merits: The Court of Appeal directed a new trial on the ground that the learned trial judge improperly held to be inadmissible the evidence of Constable Beatty touching an alleged admission by the accused that he was the driver of the car at the time of the accident and, consequentially, decided that there was no evidence implicating the accused.

In order to clear the ground, it seems to be necessary to observe at the outset that statements made under compulsion of statute by a person whom they tend to incriminate are not for that reason alone inadmissible in criminal proceedings. The term "voluntary," as employed in the summary description of the class of statements by accused persons which are admissible in criminal proceedings, is well understood by lawyers as importing an absence of fear of prejudice or hope of advantage held out by persons in authority and is interpreted and applied judicially according to lines traced by well-known decisions and by a well settled practice. But there is no rule of law that statements made by an accused under compulsion of statute are, because of such compulsion alone, inadmissible against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall within the scope of some specific enactment or rule excluding them (*Reg.* v. *Scott* (2); *Reg.* v. *Coote* (3)).

(1) (1882) 20 Ch. Div. 137. (2) (1856) Dearsley & Bell's Crown Cases 47.
(3) (1873) L.R. 4 P.C. 599, at 607.

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The question of substance on the appeal is whether or not the alleged statement made by the accused to Constable Beatty was inadmissible in evidence by force of subsection 5 of section 88 of the Ontario *Highway Traffic Act* (R.S.O., 1927, ch. 251, as amended by 20 Geo. V, ch. 47, s. 6). Textually, the subsection is in these words:

> 88. (5) Any written reports or statements made or furnished under this section shall be without prejudice, shall be for the information of the Registrar, and shall not be open to public inspection; and the fact that such reports and statements have been so made or furnished shall be admissible in evidence solely to prove compliance with this section, and no such reports or statements, or any parts thereof or statement contained therein, shall be admissible in evidence for any other purpose in any trial, civil or criminal, arising out of a motor vehicle accident.

I do not disagree with the view that, in point of grammatical construction, the preferable reading of subsection 5 would be that it applies only to statements in writing; but grammatical considerations are not necessarily conclusive. If section 88 were to be considered by itself and apart from the enactments I am about to discuss, a good deal might be said for the view that the adjective "written" qualifies the word "reports" only, and that, consequently, oral as well as written statements are within the privilege created by subsection 5.

It is not necessary in the present appeal to examine the general question whether the *prima facie* or literal construction of subsection 5 as above indicated (namely, that it is limited in its operation to written reports and written "statements made or furnished under this section") gives the true effect of the section. We have to consider the admissibility of a statement of a particular class: a statement alleged to have been made by the driver or person in charge of a motor car directly concerned in a motor accident to the police constable engaged in the course of his ordinary duties in investigating the accident immediately after it occurred in which the driver is alleged to have identified himself as such.

We have to address ourselves to the question whether such statements or statements of a similar character made in similar circumstances are inadmissible by force of subsection 5, and this judgment, as will appear, is rigorously confined to the discussion and decision of that question.

My brother Kerwin has called our attention to the genesis of section 88 and has also called our attention

to section 40 of the Ontario *Highway Traffic Act* and section 285, subsection 2, of the *Criminal Code;* which were not discussed on the argument.

By section 40 of the Ontario *Highway Traffic Act* it is enacted:

40. (1) If an accident occurs on a highway, every person in charge of a vehicle who is directly or indirectly a party to the accident shall remain at or return to the scene of the accident and render all possible assistance and give in writing upon request to any one sustaining loss or injury or to any police constable or any officer appointed for the carrying out of the provisions of this Act or to any witness, his name and address, and also the name and address of the owner of such vehicle, and the number of the permit if any.

(2) Any person who violates any of the provisions of subsection 1 shall incur for the first offence a penalty of not less than $25 and not more than $100, and shall also be liable to imprisonment for any term not exceeding thirty days and in addition his licence or permit may be suspended for any period not exceeding sixty days; and for any subsequent offence, a penalty of not less than $100 and not more than $500 and shall also be liable to imprisonment for any term not exceeding six months, and in addition his licence or permit may be suspended for any period not exceeding one year.

The duty arising out of this enactment is obviously imposed in the public interest as well as in the private interest of persons injured. It is a reasonable presumption that the Legislature was not ignorant of the rule of law by which, in the absence of some provision to the contrary, statements made in execution of the duty imposed by this section would (as explained above) be admissible in evidence against the person making them. It seems clear enough that the enactment is a measure for securing information which may be employed for the purposes of legal proceedings, instituted either privately or *ad vindicatam publicam.*

Leaving section 40 for the moment, and turning to section 285, subsection 2, of the *Criminal Code.* That subsection is in these words:

285. (2) Whenever, owing to the presence of a motor car on the highway, an accident has occurred to any person or to any horse or vehicle in charge of any person, any person driving the motor car shall be liable on summary conviction to a fine not exceeding fifty dollars and costs or to imprisonment for a term not exceeding thirty days if he fails to stop his car and, with intent to escape liability either civil or criminal, drives on without tendering assistance and giving his name and address.

This enactment presupposes the existence of a duty resting upon the driver of a motor car not to withhold

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his name and address (in the circumstances mentioned) with the purpose of escaping legal liability, civil or criminal: a duty, it may be of imperfect obligation, but still a duty. It is not easy to reconcile the existence of such a duty with a rule of law having the effect of preventing statements made in conformity with it being adduced as evidence in criminal proceedings against the person making them.

The Ontario Legislature is presumed to know the statute law, and accordingly is presumed to have been aware, when enacting section 88, of the law as laid down in section 285 (2) of the *Criminal Code* as well as, needless to say, in section 40 (Wilberforce, Statute Law, pp. 30 and 31; 31 Hals. pp. 456 and 491). The primary purpose of section 88 is, manifestly, to make provision for procuring information for record with the Registrar which may be useful for statistical and rating purposes, and other purposes of general public interest in relation to motor traffic. Subsection 5 is aimed, no doubt, at silencing the apprehensions of people from whom such information must be obtained. Such being the purpose and effect of section 88, it ought not to be read as intended to qualify the duty imposed by section 40 of the *Highway Traffic Act* for the purposes and in the interests mentioned above or that recognized by section 285 of the *Criminal Code*. Subsection 5, which is expressly limited to reports and statements made under section 88, ought to be strictly confined in its operation to such statements and reports and its general terms should not be construed as having the intention of creating a privilege in respect of the specific class of statements contemplated by section 40 of the *Highway Traffic Act* or by section 285 of the *Criminal Code;* by which a driver or person in charge of a motor car in the circumstances envisaged by those enactments gives his name and address or simply identifies himself as such.

Had such been the intention of the Legislature in enacting subsection 5, that intention, we must presume, would have been stated in explicit words.

The proper conclusion seems to be that subsection 5 has not in its true construction the effect of rendering such statements inadmissible in evidence. Nothing is de-

cided and no opinion is intimated touching the effect of the subsection as to statements dealing with other matters or made in different circumstances.

In this view it is unnecessary to discuss section 35 of the *Canada Evidence Act* or sections 599 and 685 of the *Criminal Code;* nor is it necessary to examine the question whether, if subsection 5 of section 88 on its proper construction applied to statements such as that under consideration, this could have the effect of excluding such statements as evidence in criminal proceedings proper. For these reasons, since the evidence adduced was admissible, a new trial was rightly ordered and the appeal should be dismissed.

CROCKET J.—I agree that in the circumstances of this case the judgment entered upon the learned trial judge's withdrawal of the case from the jury must be deemed to have been an acquittal within the meaning of s. 1013 (4) of the *Criminal Code* and that an appeal therefore lay to the Court of Appeal and from the judgment of that Court under s. 1025 of the *Code.*

As to the admissibility of Constable Beatty's evidence regarding the defendant's alleged admission that he was the owner of the car involved in the accident, I am of opinion that it does not fall within the privilege created by section 88 (5) of the Ontario *Highway Traffic Act* for any written reports or statements made under the provisions of that section to any police officer or to the registrar and that that privilege ought to be strictly confined to communications which are required to be made for the purposes of and in accordance with the provisions of that section. The statement alleged to have been made by the defendant to Constable Beatty, which the learned trial judge held inadmissible under the provisions of s. 88 (5), related only to the defendant's identification as the driver of the car involved in the accident. The trial judge's attention was not called to the provisions either of s. 40 (1) of the Ontario *Highway Traffic Act* or to s. 285 (2) of the *Criminal Code;* neither were they called to the attention of the Court of Appeal nor to our attention during the argument here, but, having, as my Lord the Chief Justice has stated, been brought to our attention by my brother Kerwin since the argument, they must

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be given due effect in arriving at a conclusion as to the admissibility of Beatty's evidence. The clear object of both the two last indicated enactments was to require the driver of any motor vehicle involved in an accident on a highway to stop his car at the scene of the accident and there identify himself as its driver. Neither of these enactments created any privilege regarding the driver's duty to do so.

S. 285 (2) of the *Criminal Code* was in force at the time of the enactment of the Ontario *Highway Traffic Act*, and, as pointed out by my Lord the Chief Justice, the Legislature must be presumed to have been aware of its provisions when it enacted its *Highway Traffic Act*. S. 88 (5) having expressly confined the privilege created thereby to written reports or statements made under s. 88, I cannot see how the privilege created by s. 88 (5) in respect of communications made for the purpose of and in accordance with the provisions of that section can well be extended to specific communications required by either s. 40 (1) of the *Highway Traffic Act* or s. 285 (2) of the *Criminal Code* for another purpose.

Apart, therefore, from the question as to whether the privilege provided by s. 88 (5) of the Ontario *Highway Traffic Act* embraces oral as well as written reports or statements, which it is not now necessary to decide, I am of opinion for the reasons stated that the evidence of Constable Beatty, confined as it was to the defendant's alleged admission touching his identification as the driver of the car at the time of the accident, was admissible.

Appeal dismissed.

Solicitors for the appellant: *Phelan, Richardson, O'Brien & Phelan.*

Solicitor for the respondent: *W. B. Common.*

IN THE MATTER OF "THE FARMERS' CREDITORS ARRANGEMENT ACT, 1934," AND AMENDMENTS THERETO,

AND

IN THE MATTER OF A PROPOSAL FOR A COMPOSITION, EXTENSION OR SCHEME OF ARRANGEMENT UNDER THE SAID ACT BY BARICKMAN HUTTERIAN MUTUAL CORPORATION.

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* Oct. 12.
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* Feb. 7.

BARICKMAN HUTTERIAN MUTUAL CORPORATION ..... } APPELLANTS;

AND

SAMUEL A. NAULT, OFFICIAL RECEIVER, AND ALEXANDER LAFRENIÈRE AND JOHN JOSEPH ZASTRE, EXECUTORS OF THE ISADORE ZASTRE ESTATE (CREDITORS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Farmers' Creditors Arrangement Act, 1934 (Dom.), c. 53—"Farmer," as defined in the Act—Corporation—"Person"—"Principal occupation"—Incorporated religious community of farmers who believed in and practised ownership of property in common—All property owned by the corporation—Question whether it was a "farmer" within said Act and entitled to benefit thereof—Provisions of the incorporating Act, Man., 1931, c. 103.

The appellant corporation was created, as "a body corporate and politic," by special Act, Man., 1931, c. 103. Its members were farmers who constituted a religious community whose tenets and practice included ownership of all things in common, and, under said Act, no member retained or held any property but all property belonged to the corporation for the common use, interest and benefit of its members. Each member was required to devote his time, labour, etc., to the corporation and its purposes. In said Act the preamble stated that "a religious community of farmers exists * * * who have associated themselves together for the purpose of promoting and engaging in the Christian religion * * * according to their religious belief, and of having * * * all things in common"; and the objects of the corporation were stated to be "to promote, engage in and carry on the Christian religion * * * according to the religious belief of the members of the corporation" and "to engage in, and carry on farming, stock-raising, milling, and all branches of these industries; and to manufacture and deal with the products and by-products of these industries," with other subsidiary and incidental objects.

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

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Held (Cannon J. dissenting): Appellant corporation was a "farmer" within the meaning of that word as used in *The Farmers' Creditors Arrangement Act, 1934* (Dom.), c. 53 (and amendments); and was entitled to take advantage of that Act.

Judgment of the Court of Appeal for Manitoba, 45 Man. R. 619, reversed, and judgment of Roy, C.C.J. (*ibid*), restored.

The definition of "farmer" in said Act as "a person whose principal occupation consists in farming or the tillage of the soil" may include a body corporate and politic, including a corporation of such a nature as that of appellant. Such inclusion is justified by the meaning of the word "person" (definition of which in the *Bankruptcy Act*, s. 2 (*cc*), as including "a body corporate and politic" and a "corporation" as defined by s. 2 (*k*) of that Act, is brought into *The Farmers' Creditors Arrangement Act* by s. 2 (2) of the latter Act, "unless it is otherwise provided or the context otherwise requires") and by the fact (as held) that, on consideration of *The Farmers' Creditors Arrangement Act* (various provisions thereof dealt with in this regard), such inclusion is consistent with and not obnoxious to the provisions and objects of that Act.

The application to appellant of said definition of "farmer" was not affected by the fact that, in the incorporating Act, appellant's firstly expressed object was with regard to engaging in the Christian religion according to the religious belief of its members. Farming was appellant's temporal object and occupation, and, being such, was its "principal occupation" within said definition.

Per Cannon J. (dissenting): Having regard to the preamble and the provisions of the incorporating Act, and the evidence, it must be held that the primary object of appellant corporation is a religious one, and, being a religious body, it cannot get the benefit of *The Farmers' Creditors Arrangement Act*, which applies only to a person whose *principal occupation* consists in farming or the tillage of the soil. Further, being a religious body, appellant is not a "person" within the meaning of the *Bankruptcy Act* or *The Farmers' Creditors Arrangement Act*. Further, the latter Act, in view of the nature of its provisions, was intended to help only natural persons.

APPEAL by the Barickman Hutterian Mutual Corporation, incorporated as "a body corporate and politic" by special Act, Man., 1931, c. 103, from the judgment of the Court of Appeal for Manitoba (1) which allowed the appeal taken by certain creditors of the said corporation from the order of Roy C.C.J. (2) whereby the Official Receiver appointed under *The Farmers' Creditors Arrangement Act, 1934*, c. 53 (Dom.), was directed to proceed with the application of the said corporation, which had filed a proposal under the last mentioned Act. The order of Roy C.C.J. was made on an application, under Rule 42

(1) 45 Man. R. 619; [1938] 1 W.W.R. 777; [1938] 2 D.L.R. 802; 19 C.B.R. 176.
(2) 45 Man. R. 619; [1938] 1 W.W.R. 777; 19 C.B.R. 176.

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of the Rules and Regulations under the last mentioned Act, for an order for directions, in consequence of objection by some creditors to the Official Receiver's jurisdiction on the ground that said corporation was not a "farmer" within the meaning of that Act.

No written reasons were given in the Court of Appeal. According to its formal judgment, it was adjudged that the said corporation is not a "farmer" within the meaning of *The Farmers' Creditors Arrangement Act, 1934*, and amendments thereto, and it was ordered that the order of Roy C.C.J. be reversed.

Special leave to appeal to the Supreme Court of Canada was granted by a Judge of this Court.

E. F. Newcombe K.C. for the appellant.
J. T. Thorson K.C. for the respondent creditors.
F. P. Varcoe K.C. for the Minister of Finance.

THE CHIEF JUSTICE.—I have no doubt that by the combined operation of section 2, subsection 1 (*f*), of the *Farmers' Creditors Arrangement Act, 1934*, and amendments, section 2 (*cc*) and section 2 (*k*) of the *Bankruptcy Act*, a corporation may be a "farmer" within the meaning of section 6 and the correlated provisions of the former statute. It is sufficient to refer to the reasons given by my brother Kerwin for this conclusion.

The question of substance is whether the particular corporation with which we are concerned (the appellants) is a "farmer" within the contemplation of the statute and entitled to take advantage of its provisions. This question subdivides itself into two: whether, in point of verbal construction, that corporation comes within the definition of "farmer" in section 2 (1) (*f*); and, if so, whether there is anything in the provisions of the statute which impliedly excludes it from that category.

The corporation, the Barickman Hutterian Mutual Corporation, was created by Cap. 103 of the Statutes of Manitoba, 1931. The character and objects of the corporation appear from the provisions of this incorporating statute. The first paragraph of the preamble is in these words:

> Whereas a religious community of farmers exists in this province under the name of Barickman Colony of Hutterian Brethren, who have associated themselves together for the purpose of promoting and engaging

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in the Christian religion, Christian worship and religious education and teachings according to their religious belief, and of having, holding, using, possessing and enjoying all things in common, and who are desirous that the said religious community may be incorporated.

The preamble proceeds to state that certain persons, whose names are given and who are said to be members of this religious community, have by their petition prayed that they be incorporated for the objects set forth in the statute. By section 1, it is enacted that the persons named in the preamble and all others who shall become members of the corporation in accordance with the provisions of the statute and the by-laws, rules and regulations shall be constituted a corporation with the normal capacities of corporations constituted by the Manitoba Legislature.

The objects set forth are:

2. (*a*) to promote, engage in and carry on the Christian religion, Christian worship and religious education and teachings, and to worship God according to the religious belief of the members of the corporation;

(*b*) to engage in, and carry on farming, stock-raising, milling, and all branches of these industries; and to manufacture and deal with the products and by-products of these industries;

with other subsidiary and incidental objects.

It is provided that all property owned by or held in trust for the Barickman Colony of Hutterian Brothers shall be vested in the Corporation and that the Corporation shall assume and be liable for the debts and obligations of the Colony and all debts and obligations guaranteed by the Hutterian Brethren Church in Manitoba.

The Act provides that no individual member of the Corporation shall have any assignable or transferable interest in the Corporation or in any of its property. The property, affairs and concerns of the Corporation are to be managed by, and its business is to be carried on by, a board of five directors elected by the members who are to have full authority to exercise all the powers of the Corporation subject to the by-laws, rules and regulations of the Corporation and the provisions of the Statute.

The peculiar nature of the relations between the Corporation and its members appears from certain provisions which it is desirable to set forth verbatim. Section 12 provides as follows:

12. All property, both real and personal, that each and every member of the corporation has or may have, own, possess or may be entitled to at the time that such member becomes a member of the said corporation, and all the property, both real and personal, that each and every

member of the said corporation may have, obtain, inherit, possess or be entitled to after such person becomes a member of the said corporation shall be and become the property of the said corporation to be owned, used, occupied and possessed by the said corporation for the common use, interest and benefit of each and all the members thereof.

By section 13, if any member of the Corporation ceases to be a member he shall not be entitled to withdraw any of the property of the Corporation and, in the case of the death of a member, no interest in the Corporation or the property of the Corporation shall pass to the heirs or the legal personal representatives of such member.

By section 14,

Each and every member of the said corporation shall give and devote all his time, labour, services, earnings and energies to the said corporation and the purposes for which it exists, freely, voluntarily and without compensation or reward of any kind whatsoever other than as herein provided or in the by-laws, rules and regulations of the said corporation expressed.

The members of the Corporation constitute a religious community and it appears from the evidence, when read with the provisions of the statute, that as a religious community they aim at pursuing a way of life broadly conforming, as they conceive, economically as well as spiritually, to the "Christian principles described in the New Testament." Their tenets and their practice include ownership of all things in common, the administration of their goods and their worldly affairs generally by persons nominated by themselves for that purpose. It is freely admitted, and it may be assumed, that the arrangements for the administration of their temporal affairs are only a means to enable them to govern their lives by what they believe to be the primitive Christian plan.

On the other hand, the members of the Corporation are farmers dependent for their livelihood and the livelihood of their families upon revenues derived from their labours and those of their brethren in farming and in necessarily incidental pursuits; the Corporation being the depositary of the title to all the property and all the revenues of the community, which it holds and administers for their benefit. The Corporation (which takes the place of the former trustees) is simply the legal instrumentality by which this autonomous community of farmers manages under the law its affairs and those of its members (according to the plan of community of property); and I can see no impropriety in designating it as a "farmer," as a

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"person" whose principal occupation is farming. In a temporal sense, farming (with necessarily incidental pursuits) is not only the "principal," it is said to be the exclusive occupation of the members of this community.

I humbly think the application of the definition is not affected by the fact that the economic constitution and canon of the community are dictated by the religious beliefs and purposes of its members, or that one of the objects of the Corporation is to promote the religious objects of the community; because I am quite satisfied that the word "occupation" in the intendment of that definition is limited in its scope to temporal affairs. It should be observed that the provision of the statute enabling the Corporation to apply funds in support of religious objects is a very necessary provision in view of the fact that the title to all the property of the members is vested in the Corporation.

Nor do I think this application of the definition of "farmer" is obnoxious to the enactments or the objects of the statute considered as a whole. The principal argument to the contrary is that the main purpose of the *Farmers' Creditors Arrangement Act* is disclosed by one sentence in the preamble in these words:

> and whereas it is essential in the interest of the Dominion to retain the farmers on the land as efficient producers and for such purpose it is necessary to provide means whereby compromises or rearrangements may be effected of debts of farmers who are unable to pay:

and it is said that this affirmation cannot possibly envisage a corporation such as the appellants. I am unable to agree with this. Indeed, I should have thought that, in the case of a group of persons organized as this community is, the considerations upon which the statute appears to be founded might well be supposed to have greater force than in the case of an individual.

The appeal should be allowed and the judgment of the County Court Judge restored with costs throughout.

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

KERWIN J.—The question on this appeal is whether the appellant, the Barickman Hutterian Mutual Corporation, is a farmer within the meaning of that word as used in *The Farmers' Creditors Arrangement Act, 1934*, and amendments thereto, hereinafter referred to as the

Act. Subsection 1 (*f*) of section 2 defines a farmer as "a person whose principal occupation consists in farming or the tillage of the soil." By special Act of the Manitoba Legislature (chapter 103 of the Statutes of 1931), the appellant was declared to be a body corporate and politic, and the first point presented for determination is whether the word "person" in the definition clause of the Act includes as well a body corporate and politic as a natural person.

By subsection 2 of section 2 of the Act, "unless it is otherwise provided or the context otherwise requires," expressions contained in the Act are to have the same meaning as in the *Bankruptcy Act*, and by section 2 of the latter it is provided:—

> In this Act, unless the context otherwise requires or implies, the expression
>
> * * *
>
> (*cc*) "person" includes a firm or partnership, an unincorporated association of persons, a corporation as restrictively defined by this section, a body corporate and politic, the successors of such association, partnership, corporation, or body corporate and politic, and the heirs, executors, administrators or other legal representative of a person, according to the law of that part of Canada to which the context extends.

The word "implies" probably neither enlarges nor restricts the meaning of "requires" but in any event it is applicable only to a consideration of the provisions of the *Bankruptcy Act*. It is not otherwise "provided" and unless, therefore, the context otherwise "requires" (Act section 2, subsection 2), this clause in the *Bankruptcy Act* makes it clear that a body corporate and politic is covered by the word "person" in the Act.

It is true that, as a rule, one does not speak of such a body having an occupation; the reference is generally to its objects or business; but there is nothing to prevent the legislature using the word "occupation" as applicable to it, if the general intention, upon a reading of the whole of the Act, is clear. It was argued that the use of the word "resides" in subsection 2 of section 3, in section 5, and in subsection 11 of section 12, indicates that only a human being was envisaged. However, the courts have had no hesitation in determining, for the purpose of allowing service out of the jurisdiction under the rules, that a corporation is domiciled or ordinarily resident where it has its head office, and for the purpose of income tax

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that a company resides where its real business is carried on. One or other of these meanings may well be ascribed to the word in the Act when dealing with a body corporate and politic. Similarly the expression "his liabilities" in section 6 may be read "its liabilities."

By subsection 1 of section 11, "on the filing with the official receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against the property or person of the debtor." While the latter part is clearly inapplicable to a corporate body, it was evidently inserted in order to prevent the pursuit of any remedy by a creditor against a farmer who was an individual.

The mischief the Act sought to relieve and the remedy proposed may be ascertained from the preamble wherein, after reciting that in view of the depressed state of agriculture the present indebtedness of many farmers is beyond their capacity to pay, it is further recited that it is essenial, in the interest of the Dominion, to retain the farmers on the land as efficient producers. There is nothing incongruous in speaking of a corporate body being retained on the land or as being an efficient producer; each expression is applicable, in my opinion, as well to such an artificial person as to a natural one. How is it proposed to retain the farmers on the land? By permitting them, with the permission of a Board of Review, to scale down their debts to a point where they will be able gradually to liquidate them while continuing their farming operations. There is no reason why these advantages should not be enjoyed as well by a corporate farmer as by an individual unless there is something in the context that requires us to hold otherwise.

In addition to the expressions to which I have already referred, our attention has been called to subsection 8 of section 12, which provides:—

> The Board [of Review] shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm.

In my view, it is possible for a Board to consider the present and prospective capability of a corporate body as well as that of an individual. While such a body may stop its farming operations or carry on another business, there is nothing to prevent either of these things being done by an individual. Provision is made by Rule 48 of

the Rules and Regulations, approved by the Governor in Council in pursuance of section 15 of the Act, for the receiver or any creditor to apply to the Court for an order setting aside a proposal if "(*d*) the debtor has conducted himself, to the satisfaction of the official receiver, in such manner as indicates bad faith towards his creditors." I do not pause to consider the rules and regulations further because, while the word "resides" is used therein in many instances, the power to make rules is given only so far as "procedure" is concerned and "to give effect to the provisions of this Act."

It was urged that as Parliament had provided a means of compromising the debts of a company by *The Companies' Creditors Arrangement Act, 1933*, it was not intended that the Act should apply to bodies corporate and politic. As to this, it appears sufficient to point out that in 1934 Parliament was dealing with an entirely different matter. In my opinion it intended to say, and did say, that bodies corporate and politic might take advantage of the provisions of the Act as well as individuals.

Is the appellant, then, such a body whose principal occupation consists in farming or the tillage of the soil? The evidence is uncontradicted that not only the principal occupation but the sole occupation of all its members is farming. It is true that the preamble to the special Act of Incorporation recites:—

> Whereas a religious community of farmers exists in this province under the name of Barickman Colony of Hutterian Brethren, who have associated themselves together for the purpose of promoting and engaging in the Christian religion, Christian worship and religious education and teachings according to their religious belief, and of having, holding, using, possessing and enjoying all things in common, and who are desirous that the said religious community may be incorporated;

and in section 2 of the Act of Incorporation the first object "of the corporation" is stated to be:—

> (*a*) to promote, engage in and carry on the Christian religion, Christian worship and religious education and teachings, and to worship God according to the religious belief of the members of the corporation;

This, I think, may be taken to be the spiritual object. So far, however, as the temporal object of the "corporation" and its temporal occupation and chief business are concerned, the "corporation" was by clause (*b*) of section 2 authorized:—

> (*b*) to engage in, and carry on farming, stock-raising, milling and all branches of these industries; and to manufacture and deal with the products and by-products of these industries;

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subsequent clauses authorized the "corporation" to carry on any other business (whether manufacturing or otherwise) which might seem capable of being conveniently carried on in connection with its business, etc., but its principal occupation as carried on by its members does consist in farming or the tillage of the soil. I see nothing, therefore, to withhold the benefit of the Act from the appellant merely because of the reference in its objects to the promotion, etc., of the Christian religion.

I would allow the appeal and restore the judgment of the County Court Judge with costs throughout.

CANNON, J. (dissenting)—The Barickman Hutterian Mutual Corporation was incorporated by Chapter 103 of the Statutes of Manitoba, assented to on the twentieth of April, 1931. The petition to the Legislature for incorporation was signed by Samuel J. Hofer and others, not as *farmers,* but as members of a religious community. The preamble says that they have associated themselves for the purpose of promoting and engaging in the Christian religion, Christian worship and religious education, and teachings, according to their religious belief, and of having, holding, using, possessing, and enjoying all things in common.

The petitioners, according to the preamble, were desirous that the said *religious* community may be incorporated.

All the properties belonging to, or held in trust for the said Barickman Colony of Hutterian Brethren before incorporation were vested in the corporation. The trustees who held real or personal property for the said Brethren at the time of the passing of the Act, were authorized and directed to transfer, set over and assign to the said corporation all such real and personal property held by them.

Section 2 of the Charter sets up the object of the corporation as follows:

(*a*) to promote, engage in and carry on the Christian religion, Christian worship and religious education and teachings, and to worship God according to the religious belief of the members of the corporation;

(*b*) to engage in, and carry on farming, stock-raising, milling, and all branches of these industries; and to manufacture and deal with the products and by-products of these industries;

Under section 6, the corporation was liable for the debts incurred by the Barickman Colony, and section 8

says that no individual member of the corporation shall have any assignable or transferable interest in the corporation or in any of its property, real or personal.

Section 12 reads as follows:

All property, both real and personal, that each and every member of the corporation has or may have, own, possess or may be entitled to at the time that such member becomes a member of the said corporation, and all the property, both real and personal, that each and every member of the said corporation may have, obtain, inherit, possess or be entitled to after such person becomes a member of the said corporation shall be and become the property of the said corporation to be owned, used, occupied and possessed by the said corporation for the common use, interest and benefit of each and all the members thereof.

D. Decker, heard as a witness, as President of the appellant corporation, stated that it owns 2,780 acres of land situated about twelve miles off Headingly, and that no land belongs to any of the individual members, each of whom may be expelled from the corporation without taking anything. Decker says that he cannot deny that the primary object of the corporation is a religious one, although he says, "We are farmers at the same time."

In view of this admission, two conclusions cannot be escaped:

1° Being a religious body, the corporation cannot get the benefit of the *Farmers' Creditors Arrangement Act* which applies only to a person whose *principal occupation* consists in farming and tillage of the soil.

2° The individual farmers who join this religious community are not farmers within the meaning of the *Farmers' Creditors Arrangement Act,* for they own no farm, they owe personally no debts and have no obligation from which to be relieved. Indeed none of the farmers have made any application in the premises.

The appellant relies upon section 2 of the *Farmers' Creditors Arrangement Act* for the purpose of bringing the definition of "person" as contained in the *Bankruptcy Act* into the *Farmers' Creditors Arrangement Act,* but as the appellant is not a person within the meaning of the *Bankruptcy Act,* being a religious body, the *Bankruptcy Act* is not applicable.

Moreover, my definite view after a careful perusal of the *Farmers' Creditors Arrangement Act,* as amended, and of the regulations and forms approved by the Governor

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General in Council, is that the Act applies only to a person whose principal occupation is farming, and who is being unable to meet his liabilities as they become due. The object of the Act was to retain the individual farmer on the land as an efficient producer.

The Board of Review appointed by the Governor in Council under section 12 of the Act are supposed to inspect and investigate all the circumstances of each case and base a proposal upon the present and prospective capability of the debtor to perform the obligation prescribed, and also upon the productive value of the farm. The capability of a farmer to perform his obligations depends not only on the productive value of the farm, but also on his qualities and characteristics, e.g., a man who is an habitual drunkard would not have the same capability as a normal sober individual. His physical, moral qualities, his age, his experience must be considered. Also, whether he can depend on the help of a wife and of a more or less large number of children, or contrariwise, being a bachelor, cannot or can do without hired help. The farmer who could perform his work himself without any hired help would have more merit and deserve more consideration than the lazy fellow who would rely on others to do his work and pay them wages. The personal character, the honesty and record of the farmer making a proposal to his creditors are certainly to be weighed by the Board in making an award or approving a proposal and compelling the creditors to accept it. This test cannot apply to a corporation.

The application of this extraordinary piece of legislation cannot be extended beyond the obvious and natural intent of the legislator. Nothing shows that it was intended to help other than natural persons, citizens of Canada in difficult circumstances beyond their control.

The individual farmers who are employed in the tillage of the soil belonging to the Barickman Hutterian Mutual Corporation are not before us. They have made no application for relief, and there is no means to retain them on the land which does not belong to them, or to compel them to pay an indebtedness which is not theirs. These individual farmers have formed the corporation not for the main purpose of farming, but of constituting a religious

body, as it appears clearly in the preamble of the Charter. For the above reason the appeal should be dismissed with costs.

Appeal allowed with costs.

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BARICKMAN HUTTERIAN MUTUAL CORPN. v. NAULT ET. AL.

Cannon J.

Solicitor for the appellant: *Ernest A. Fletcher.*

Solicitors for the respondents: *McMurray, Greschuk & Walsh.*

JOHN R. STOLTZE, JAMES B. KEMPER, AND R. M. HADRATH (DEFENDANTS) ..... APPELLANTS;

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* May 2, 3.
* Dec. 12.

AND

GEORGE O. FULLER (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Conspiracy—Duress—Action for alleged obtaining of property by threat of criminal prosecution—Jury's findings—Ground of action—Substance of the claim—Remedy.

Plaintiff, who had been the general manager and a shareholder of a company, alleged that defendants, one of whom was the president and a large shareholder of the company, entered into an unlawful conspiracy to obtain from him a transfer of his shares in the company by threats of criminal prosecution; that pursuant to the conspiracy defendants made such threats and, induced thereby, he delivered to defendants a transfer of the shares as demanded; and he claimed recovery of their value. Defendants denied plaintiff's allegations and they alleged breaches of duty in plaintiff's management of the company, resulting in loss to it, and that plaintiff surrendered his shares in satisfaction of claims on behalf of the company for such loss. At the trial two totally different stories in the evidence went to the jury, who, in answers to questions submitted, found in favour of plaintiff's allegations. Judgment was given to plaintiff for the amount awarded as damages by the jury, being the value of the shares plus interest. An appeal by defendants to the Court of Appeal for Saskatchewan was dismissed, [1938] 1 W.W.R. 241. Defendants appealed to this Court.

Held: The appeal should be dismissed.

Per The Chief Justice, Crocket and Davis JJ.: There was evidence to justify the jury's findings. These findings were in effect that there was an intentional design on defendants' part to obtain from plaintiff, without any valuable consideration, a transfer of his shares and that

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

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the same was demanded and obtained by menaces and illegal extortion. This was quite sufficient to answer the argument that a mere threat in itself is not unlawful. A threat to prosecute may not of itself be illegal where a just debt actually exists and where the transaction between the parties involves a civil liability as well as, possibly, a criminal act (*Flower* v. *Sadler*, 10 Q.B.D. 572, at 576). Here the findings plainly negatived defendants' story that the transaction was merely the legitimate compromise of a claim for damages for breach of duty. Moreover, no question of plaintiff's civil liability to the company set up by defendants was asked of the jury and defendants had no finding that there was any such liability.

Per Davis J.: Remarks with regard to conspiracy as a ground of action. Inclination expressed to the opinion that civil conspiracy is not properly applicable to cases where physical property is sought to be recovered on the ground of duress and is really only relevant in cases of general or undefined rights, such as a right to trade, as distinguished from defined rights, such as the right to property. Doubt expressed whether the present case properly lies in conspiracy. But, whether or not plaintiff's remedy was properly laid as an action in conspiracy, the substance of the claim was that plaintiff had been maliciously and unlawfully deprived of his property by duress and coercion on defendant's part; that was the issue that was contested at the trial and that was the issue that really went to the jury.

Kerwin and Hudson JJ. adopted the reasons of Mackenzie J.A. in the Court of Appeal, [1938] 1 W.W.R. at 244-260.

APPEAL by the defendants from the judgment of the Court of Appeal for Saskatchewan (1) dismissing their appeal from the judgment of Taylor J., on the verdict of a jury, that the plaintiff recover from the defendants the sum of $26,840 and interest.

The action was brought to recover from the defendants the value of certain shares of stock in the Reliance Lumber Co. Ltd. The plaintiff had been the owner of the said shares; and he alleged that defendants entered into an unlawful conspiracy to obtain from him a transfer of said shares by threats of criminal prosecution; that pursuant to the conspiracy the defendants threatened to institute criminal proceedings against him unless he would transfer the shares to them; that, induced by said threats, he delivered to defendants a transfer of the shares, defendants obtained possession of the share certificates and had ever since been in possession of the same.

The plaintiff had been the general manager, and the defendant Stoltze was the president, of said company. The other defendants were employees of Stoltze and as such had made certain investigations into the affairs of the company.

(1) [1938] 1 W.W.R. 241; [1938] 1 D.L.R. 635.

In their defence the defendants denied plaintiff's allegations, and they alleged breaches of duty in plaintiff's management of the company, as a result of which, it was alleged, the company lost large sums of money and suffered and would suffer loss of profits, which the plaintiff became liable to repay and make good to the company, and that plaintiff agreed to surrender his shares to the company in full satisfaction of all claims of the company against him in respect of the aforesaid matters, and did so, delivering the share certificates endorsed in blank, and that the shares were now held by or on behalf of the company.

Defendants' allegations were denied by plaintiff.

The delivery of the share certificates (endorsed in blank), and also the resignation of the plaintiff as general manager of the company, took place immediately after a certain interview between the defendants and the plaintiff. Conflicting accounts of what was said at that interview were given at the trial.

The evidence is discussed at some length in the judgment of Davis J. in this Court, now reported, and also in the judgment of Mackenzie J.A. in the Court of Appeal (1).

At the trial the jury found in favour of the plaintiff. The questions submitted and the jury's answers thereto were as follows:

1. Did the plaintiff receive any valuable consideration for the transfer of his interest in his shares in the Reliance Lumber Company Limited referred to in the memorandum of agreement dated March 16th, 1936.

Answer: No.

2. Did the defendants, on or about the 16th day of March, 1936, enter into a conspiracy to obtain a transfer of the plaintiff's shares of the capital stock of the Reliance Lumber Company Limited by threats of criminal prosecution of the plaintiff?

Answer: Yes.

3. If you so find, did the defendants, pursuant to the said conspiracy, threaten to criminally prosecute the plaintiff?

Answer: Yes.

4. And if you find in the affirmative in answering questions 2 and 3, was the plaintiff induced by the said threat to transfer and deliver his said shares in the said company to the defendants?

Answer: Yes.

(1) [1938] 1 W.W.R. 241, at 244-260; [1938] 1 D.L.R. 635, at 637-651.

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5. Assess the damage sustained by the plaintiff in consequence of the said conspiracy, if you have so found.
Answer: $26,840, plus interest at legal rate (from) March 16th, 1936.
6. Did the defendants agree not to prosecute the plaintiff?
Answer: Yes, by implication.

The trial judge directed that judgment be entered for the plaintiff for the amount, with interest, as awarded by the jury. The defendants appealed from the verdict and findings of the jury and from the said judgment to the Court of Appeal, which dismissed the appeal (1), and defendants appealed to this Court. By the judgment of this Court, now reported, the appeal was dismissed with costs.

F. L. Bastedo K.C. for the appellants.

G. H. Yule K.C. and *R. L. Winton* for the respondent.

THE CHIEF JUSTICE.—I do not desire to lay down any rule of general application as to the scope of actions founded on conspiracy. Subject to that, I concur with the reasons and conclusion of my brother Davis.

CROCKET, J.—Subject to the same reservation as that indicated in the learned Chief Justice's memorandum, I concur in the judgment of my brother Davis.

DAVIS, J.—From some time in the year 1909 until March 16th, 1936, the respondent Fuller had been the general manager of the Reliance Lumber Company, Limited, a Dominion company with head office at Saskatoon in the province of Saskatchewan and with an executive office in St. Paul, Minnesota, U.S.A. The company carried on a retail lumber business in the province of Saskatchewan and had in March, 1936, about thirty lumber yards, mostly in the northern part of the province. The respondent resided in Saskatoon. The appellant Stoltze is the President of the Company and resides in St. Paul, Minnesota. His father, now deceased, had owned nine-tenths of the capital stock of the company and the respondent the other one-tenth. On the death of his father in 1928, the appellant Stoltze and his wife became the owners of, and still hold, nine-tenths of the stock of the company. The respondent remained the owner of the other one-tenth of the stock

(1) [1938] 1 W.W.R. 241; [1938] 1 D.L.R. 635.

of the company. Stoltze's co-appellants, Kemper and Hadrath, also reside in St. Paul, Minnesota, and were requested by Stoltze in February, 1936, to investigate for him certain charges of mismanagement against the respondent in respect of the company's affairs that had been reported to Stoltze by one Davies. Hadrath was in the employ of Stoltze, having done both clerical and executive work for some years for him in connection with different companies with which Stoltze was connected. Stoltze described Hadrath as his "confidential man—what in the United States we call in slang a trouble shooter. When something goes wrong I send him down to attend to it; if there is a problem before me, I ask him to look into it." Stoltze admitted that Hadrath had no special knowledge of the business of the Reliance Lumber Company. Kemper was an uncle of Stoltze's wife and had been assisting Stoltze in his office in St. Paul. Stoltze said he trusted him entirely but "he had no particular qualifications for this work."—that is, of investigating the affairs of the Reliance Lumber Company. Neither Hadrath nor Kemper appear to have had any shares in the company.

On March 16th, 1936, the respondent turned over to the appellant Stoltze all his shares in the company and resigned as secretary, general manager and a director of the company. His shares were admitted to be worth $30,000 and there is no question that they were his own property. The share certificates, immediately prior to their delivery to Stoltze, were in the Dominion Bank at Saskatoon, collateral to loans to the respondent of $3,160. This amount the company paid to the Bank in order to release the security. On April 2nd, 1936, the respondent by his solicitor demanded from the appellant Stoltze the immediate reassignment and delivery to the respondent of the share certificates in question, or their value, his contention being that the transfer of the shares had been obtained by duress, in the form of threats of prosecution. This action by the respondent against the appellants Stoltze, Kemper and Hadrath followed the refusal of Stoltze to return the share certificates.

Two totally different stories were given to the jury. The evidence on behalf of the appellants (defendants) was that at a meeting of the four persons, parties to this action, in the company's office in Saskatoon on the said

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March 16th, 1936, the affairs of the company were discussed for about an hour; charges of mismanagement and breach of duty by the respondent as general manager of the company were made on the basis that the respondent had caused the company great loss by buying lumber through the medium of his son, so that his son would get a commission; that after the respondent had asked what he could do or should do about the "mess" that Stoltze had told him he had got the company into, Stoltze suggested to the respondent that he might turn in his stock in reparation; and that the respondent agreed to do that. Stoltze said at the trial that his understanding was that the respondent was voluntarily turning over the stock in reparation of the damage he had permitted to be done to the company and that he, Stoltze, believed the turning over of the stock would be an equitable solution because he was satisfied that the losses were much greater than the value of the stock.

The respondent's story was that on returning from a western business trip he was summoned to his office at the company's head office by telephone on the day in question, March 16th, 1936, and found the three appellants there; they had changed the lock on the door of his office before his arrival; they made charges against him and threatened him with criminal prosecution and demanded, to avoid his prosecution, that he turn over to them all his shares in the capital stock of the company. The crucial part of his evidence as to the interview in the office that morning is this:

> Hadrath and Kemper both said, You had better come clean, come clean. And we have got the goods on you. * * * After that was gone over, it got to such an extent that I hardly knew what to say. And then it was Hadrath said, You had better throw yourself into the hands of Mr. Stoltze. * * * Another question came up that seemed to break the ice, was this: Why did you give Gerald—which is my son—all of this business? I said, Mr. Stoltze knows that Gerald got this business. Mr. Stoltze rather flew off in a huff, and he said, I didn't know that he got all of the business, or so much of the business. * * * He (Stoltze) says, You have had no sympathy with others, and I haven't sympathy with you; you ought to be in gaol, and that is where we are going to send you; and your friend Arthur Moxon agrees.

Mr. Moxon was the company's solicitor in Saskatoon and a man of very high standing in his profession. The significance of the words "and your friend Arthur Moxon agrees" would be very apparent to a local jury.

I was simply crushed; my mind was nearly a blank. They asked me a few more questions; and I was mentally—I hardly knew what they did ask; asked a few more questions. And I says, What do you want me to do? What do you want me to do? Or what can I do? What do you want me to say? I didn't know where I was at. I hadn't been told. And finally Mr. Stoltze came on to the scene again— * * * he spoke up. And he says, We want your shares in the Reliance Lumber Company; we want your resignation; we want you to agree not to compete with the Reliance Lumber Company anywhere, and to get out of the country.

The respondent said that he was crushed by all this; that Hadrath then went out into another room and came back with a paper which he respondent signed, containing his resignation and authority to the Dominion Bank to turn over his shares in the company. The respondent said that when Hadrath presented the document to him he said he thought he had better get a lawyer but was told by Stoltze, "This has got to be done before you get out of this room." Stoltze, on his cross-examination, when asked "Why didn't you go to him (the respondent) quietly, it seems the obvious thing to do, and say, 'Let us get together and talk about this quietly'?" answered, "That doesn't happen to be my way of doing things."

The respondent was obviously a man who was well and favourably known in his community, active in the work of the Y.M.C.A. and of the Rotary Club and was President of the Saskatoon Exhibition Board. He was a married man and his home was in Saskatoon. He said that he signed the document, not that he had done anything wrong, but he thought of "all those different things, different friends, and people, and associations, and I couldn't do it—the disgrace of it." He very positively swore that during his administration of the company's affairs he never knowingly did anything or omitted to do anything to the prejudice of the company; that there was in his mind no just ground for the complaints and charges that were made; and that he was not attempting to stifle the prosecution of any just charges against him. Overcome by the threats of these three men and the situation that confronted him, he sought escape by acquiescing in their demands that he turn over his shares.

Now those were the two stories that went to the jury. There was a mass of evidence directed to show that here and there the respondent had given advantage to his son in the buying of lumber for the company and suggestions

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that the company had as a result been getting a poorer grade of lumber than it otherwise would have obtained. The charges were of the most general character and the respondent gave his explanation of the several impeached transactions. There was no suggestion that the respondent was offered any release by the company of any claims the company might have against him for any loss that may have occurred as a result of the alleged breaches of duty. What was said by the appellants was that these losses were in excess of $30,000 and that it was a fair transaction to take the respondent's shares in the company in reparation for the losses.

It is perfectly plain that the jury accepted the respondent's story of what took place and, it being entirely contradictory of the appellants' story of what occurred, the jury obviously disbelieved the appellants. The jury's verdict was that the appellants should pay the respondent $26,840 (being the value of the stock, $30,000, less the amount of the loans paid to the Bank, $3,160) together with interest on that sum at the legal rate from March 16, 1936.

Without for the moment giving consideration to the form of the action or to certain objections taken by the appellants as to the rejection of evidence, no one could fairly disagree with the jury, upon the contradictory evidence, having arrived at the conclusion they did. If it had not been for the exhaustive review of the evidence and the very able argument presented to us by Mr. Bastedo, counsel for the appellants, I should not have thought that there was the slightest hope for any interference with the jury's verdict.

Mr. Bastedo, however, contended with great force that, the action being laid in conspiracy and there being no express plea of malice and nothing in the charge to the jury on malice, malice cannot reasonably be read into the questions to and the answers by the jury. If the action was properly framed in conspiracy, I should not find any difficulty in implying not only a charge but proof of malice. I have very considerable doubt myself that a case of this kind properly lies in conspiracy. Where, for instance, the charge is a charge of defrauding a man of his money, the allegation of conspiracy may add nothing to the charge and be mere surplusage. Conspiracy may be

important where the act complained of is *prima facie* not a violation of a right, but may become so by reason of malice or spite. I am inclined to think that civil conspiracy is not properly applicable to cases where physical property is sought to be recovered on the ground of duress, and is really only relevant in cases of general or undefined rights, such as the right to trade, as distinguished from defined rights, such as the right to property. But however that may be, the effect of the jury's findings in this case is that there was an intentional design on the part of the three appellants to obtain from the respondent, without any valuable consideration, a transfer of the respondent's shares in the company that were worth $30,000 and that the same was demanded and obtained from the respondent by menaces and illegal extortion. That is quite sufficient to answer the argument that a mere threat in itself is not unlawful. As Lord Justice Cotton said in *Flower* v. *Sadler* (1), a threat to prosecute is not of itself illegal where a just and *bona fide* debt actually exists and where the transaction between the parties involves a civil liability as well as, possibly, a criminal act. But here the jury's findings plainly negative the appellants' story that the transaction was merely the legitimate compromise of a claim for damages for breach of duty. Moreover, the appellants set up a civil liability on the part of the respondent to the company for alleged loss by reason of the alleged breaches of duty but no such question was asked of the jury and the appellants have no finding that there was any such liability. Whether or not the remedy of the respondent was properly laid as an action in conspiracy, the substance of the claim was that the respondent had been maliciously and unlawfully deprived of his property by duress and coercion, on the part of the appellants. That was the issue that was contested at the trial and that was the issue that really went to the jury.

Objection was taken by Mr. Bastedo to the refusal of the learned trial judge to admit evidence that was tendered on behalf of the appellants at the trial as to the details of the report made to Stoltze by one Davies with charges of the respondent's misconduct as general manager of the company, and as to information given by Davies to

(1) (1882) 10 Q.B.D. 572, at 576.

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Stoltze as a result of which Stoltze caused the investigation to be made by Hadrath and Kemper, and of conversations between these persons, and of information obtained by Hadrath and Kemper on their trip of investigation through western Canada; also general evidence of the yard agents of the Reliance Lumber Company as to purchases of lumber being of a poor and inferior quality and below invoice grade, and evidence of prices paid by the Reliance Lumber Company to other companies in respect of which the respondent's son was alleged to be getting a commission. On the question of the exclusion of this evidence, the jury had before them the report of Davies upon which Stoltze acted, and the learned trial judge was quite right in declining to permit the trial to be dragged out interminably. The report of Davies was quite sufficient in itself for the purposes of the appellants. In any event the exclusion of the evidence did not occasion any substantial wrong.

The appeal should be dismissed with costs.

KERWIN, J.—Notwithstanding Mr. Bastedo's able argument, I think this appeal should be dismissed. I cannot usefully add anything to the judgment of Mr. Justice MacKenzie (1).

HUDSON, J.—I think this appeal should be dismissed with costs for reasons mentioned by Mr. Justice MacKenzie in the court below (2).

Appeal dismissed with costs.

Solicitors for the appellants: *Estey, Moxon, Schmitt & McDonald.*

Solicitor for the respondent: *Gilbert H. Yule.*

(1) [1938] 1 W.W.R. 241, at 244-260; [1938] 1 D.L.R. 635, at 637-651.

(2) [1938] 1 W.W.R. 241, at 244-260; [1938] 1 D.L.R. 635, at 637-651.

VANITY FAIR SILK MILLS .....APPELLANT; 1938

AND

* June 16.
* Dec. 5.

THE COMMISSIONER OF PATENTS..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Invention—Lack of patentable advance over prior art—Refusal of application for patent, by Commissioner of Patents.

The judgment of Maclean J., President of the Exchequer Court, [1938] Ex. C.R. 1, affirming the refusal of the Commissioner of Patents to grant a patent in respect of certain claims in appellant's assignor's application for patent for an alleged invention of new and useful improvements in Hosiery With Elastic Strain Absorber, on the ground that there was no patentable distinction between the method disclosed in said claims and that disclosed in a certain prior patent, was affirmed; it being held that the alleged invention constituted no patentable advance or improvement upon said prior disclosure.

Semble, The Commissioner of Patents ought not to refuse an application for a patent unless it is clearly without substantial foundation.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing an appeal from the refusal of the Commissioner of Patents to grant a patent in respect of certain claims in the appellant's assignor's application for patent for an alleged invention of new and useful improvements in Hosiery With Elastic Strain Absorber. The ground of the judgment in the Exchequer Court was that there was no patentable distinction between the method disclosed in said claims and that disclosed in a certain prior patent. The appeal to this Court was dismissed with costs.

W. D. Herridge K.C. for the appellant.
W. L. Scott K.C. for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—We have fully considered the argument addressed to us on behalf of the appellant in this case and we are satisfied that the learned President of the Exchequer Court was right in his conclusion that the invention so-called, which was the subject of claims

(1) [1938] Ex. C.R. 1; [1938] 1 D.L.R. 148.

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

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3 and 4 in Snader's application, constitutes no patentable advance or improvement upon what is disclosed by Adamson.

On behalf of the appellant it was contended that the learned President missed the point in failing to perceive that Snader, in using the Adamson yarn as an instrumentality by which his conception of the use of narrow bands of elastic thread alternating with narrow bands of the knit basic fabric of the stocking would become practically operable, had made a definite advance over Adamson. But we think the learned President is right that Snader's procedure is an application of the ideas disclosed by Adamson which anybody familiar with and skilled in the art might be expected to arrive at without the exercise of invention in the sense of the patent law.

No doubt the Commissioner of Patents ought not to refuse an application for a patent unless it is clearly without substantial foundation. In effect both the President of the Exchequer Court and the Commissioner have held that.

Since, in our opinion, there is no real doubt that the rejected claims are not patentable and it is not suggested that we have not before us all the pertinent material, we ought not to interfere.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *William A. MacRae.*

Solicitor for the respondent: *William J. P. O'Meara.*

HENRY PIERCE (PLAINTIFF).....APPELLANT; 1939

AND * Jan. 18, 19.

CLARA EMPEY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Mortgage—Sale of land—Option—Quit claim deed given by mortgagor to mortgagee and right given to mortgagor to purchase within three months by paying amount of mortgage—No payment or tender within said period—True nature and effect of the transaction—Evidence—Mortgagor's contention that relationship of mortgagor and mortgagee still subsisted—Onus in seeking to enforce option—Claim that existing lease made by owner relieved option-holder from strict fulfilment of conditions.

Plaintiff, a mortgagor in default, executed a quit claim deed of the mortgaged land to defendant, the mortgagee, who was then in possession under proceedings taken in a foreclosure action. A letter from defendant's solicitors to plaintiff's solicitor agreed that plaintiff was to have the right for a period of three months to purchase the land upon payment of the mortgage, including all interest, taxes and costs up to date. There was no payment or tender within said period. In an action for redemption, plaintiff attempted to show that by the true arrangement the mortgage debt remained undischarged and the period for redemption was extended for three months; that the relation of mortgagor and mortgagee still subsisted.

Held: On the evidence, plaintiff's said attempt must fail; the true arrangement must be held to be that disclosed by the documents, namely, that the land became vested in defendant in fee simple in possession free from the equity of redemption, but that plaintiff had the option of re-purchase according to the terms in said letter.

It is true, in principle, that a conveyance absolute in form may be shown even by parol evidence to have been, according to the real agreement between the parties, accepted as security only, and the *Statute of Frauds* will not prevent the proof of this by parol evidence (*Flynn* v. *Flynn,* 70 D.L.R. 462; *Wilson* v. *Ward,* [1930] S.C.R. 212); but for this purpose convincing evidence is always required; and in the circumstances of the present case it behooved plaintiff to adduce evidence of the most cogent character (*Barton* v. *Bank of New South Wales,* 15 App. Cas. 379, at 381).

A plaintiff invoking the aid of the court for the enforcement of an option for the sale of land to him must show that the terms of the option as to time and otherwise have been strictly observed; the owner incurs no obligation to sell unless the conditions precedent are fulfilled or as the result of the owner's conduct the holder of the option is on some equitable ground relieved from the strict fulfilment of them (*Cushing* v. *Knight,* 46 Can. S.C.R. 555; *Hughes* v. *Metropolitan Ry. Co.,* 2 App. Cas. 439; *Bruner* v. *Moore,* [1904] 1 Ch. 305). In the present case, plaintiff relied upon the existence of a lease made

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

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by defendant while mortgagee in possession and before the date of the quit claim deed and creation of the option. Whatever the relevancy of this lease on a question of title if an obligation on defendant's part to sell had arisen, it could not affect the conditions of the option, because until these conditions were fulfilled no obligation to sell could arise and the relation of vendor and purchaser did not come into existence (*Cushing* v. *Knight, supra*). Moreover, it was highly probable, in view of the terms of the lease, that, had the conditions of the option been complied with, this objection would have been removed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario which allowed the defendant's appeal from the judgment of McFarland J. dismissing the defendant's appeal from the Report of the Local Master.

The plaintiff claimed the right to redeem certain land. He had, on March 17, 1925, mortgaged the land to defendant to secure the sum of $5,500 and interest. On May 5, 1933, there being interest in arrear upon the mortgage, defendant issued a writ for foreclosure, and on June 23, 1933, entered judgment in the action against plaintiff, for default of appearance, for foreclosure and immediate possession. At this time there was due to defendant for principal, interest and taxed costs the sum of $5,142.37. On July 12, 1933, defendant issued a writ of possession in said foreclosure action and under its terms took possession on July 14, 1933, and has remained in possession of the land.

On September 28, 1933, defendant made a lease of the land to one Bentley for three years from October 1, 1933. The lease contained a provision that,

> In the case of a sale to a purchaser other than the Lessee before the completion of the term of this Lease the said Lessee shall receive at least one month's notice prior to the end of the terms year and the sum of One Hundred Dollars ($100).

By quit claim deed bearing date January 8, 1934 (executed, according to plaintiff, on January 11, 1934), the plaintiff granted, released and quit claimed all his estate, interest, etc., in said land to the defendant. Its recitals stated that plaintiff was indebted to defendant under the mortgage, and that plaintiff was unable to pay the mortgage and had requested defendant to accept a quit claim deed and to release plaintiff from all actions, claims and demands up to the date of the deed, which the defendant had agreed to do by her acceptance of the deed. By a

letter dated January 8, 1934, from defendant's solicitors to plaintiff's solicitor, it was stated that it was understood that plaintiff was to have the right for a period of three months from the date of the quit claim deed to purchase the property from defendant upon payment of the full amount of the mortgage, including all interest, taxes and costs up to date, upon sending defendant reasonable notice in writing of his intention to do so before the expiration of said period of three months. There was raised in the present action the question as to what was the real nature and effect of this transaction or of the arrangement between the parties.

On April 26, 1934, plaintiff issued a writ in the Supreme Court of Ontario claiming for redemption and damages.

On the action coming on for trial, it was by consent referred to the Local Master at Goderich to decide all questions involved in the action. He found in favour of the plaintiff and that upon payment to defendant of the sum found by him as due on the mortgage account, less the costs of the action, there should be a re-conveyance by defendant to plaintiff of the premises freed from the claim of any person claiming under or through defendant. Defendant's appeal from the Local Master's report was dismissed, and the report confirmed, by McFarland J. Defendant appealed to the Court of Appeal for Ontario. That Court allowed the appeal, set aside the judgment of McFarland J. and the Master's report, and dismissed the action. The plaintiff appealed to this Court. By the judgment of this Court, now reported, the appeal was dismissed with costs.

P. J. Bolsby and *J. D. W. Cumberland* for the appellant.

G. T. Walsh K.C. and *J. A. E. Braden K.C.* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—The grounds on which counsel for the appellant based his appeal were:

First, the Court of Appeal was wrong in holding that, by virtue of the documents of the 8th day of January, 1934, the relation of mortgagor and mortgagee had been brought to an end and the respondent had become the

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owner of the property subject to an option to purchase under the terms of the letter of that date addressed by Braden & McAlister to Mr. Dancey; and,

Second, in the alternative, that the appellant was ready and willing to exercise the option and was relieved on equitable grounds from the strictness of its terms as to notice and payment by the conduct of the respondent.

At the conclusion of the argument, the Court being satisfied that neither of these grounds of appeal was established, the appeal was dismissed. The parties were then informed that reasons in writing would be handed down.

As regards the first ground of appeal, the deed of the 8th of January, 1934, is absolute in terms and contains this recital:

> And whereas the said Party of the First Part is unable to pay the said mortgage and the arrears of interest due thereon, and has requested the said Party of the Second Part to accept a quit claim deed of the said lands and to release the Party of the First Part of and from all actions, claims and demands up to this date, which the said Party of the Second Part has agreed to do by her acceptance of these presents.

This deed was drawn by the solicitors for the mortgagee and was sent by them to the solicitor for the mortgagor for execution by him. It was duly executed and returned. The letter of the solicitors for the mortgagee forwarding the document to the solicitor for the mortgagor for execution contained this clause:

> It is also understood that your client, Mr. Pierce, is to have the right for a period of three months from the date of the quit claim deed to purchase the property from our client upon payment of the full amount of the mortgage, including all interest, taxes and costs up to date, upon sending our client reasonable notice in writing of his intention to do so before the expiration of the said period of three months.

We do not doubt that this undertaking formed part of the arrangement by which the equity of redemption was released and the mortgage debt discharged and that it was binding upon the mortgagee as part of that arrangement. These documents by themselves, the deed and the letter, evidence in the plainest way the intention of both parties that the land was to be vested in the mortgagee in fee simple in possession free from the equity of redemption, but that the mortgagor was to have an option of repurchase according to the terms set forth as quoted above. It is important to observe also that the documents passed

through the hands of the solicitors of the respective parties. Some loose expressions in subsequent letters are of no importance.

In these circumstances, the attempt on the part of the mortgagor to show that the relation of mortgagor and mortgagee still subsisted would appear to have been a hopeless one. True it is, in principle, a conveyance absolute in form may be shown even by parol evidence to have been, according to the real agreement between the parties, accepted as security only and the *Statute of Frauds* will not prevent the proof of this by parol evidence (*Flynn* v. *Flynn* (1); *Wilson* v. *Ward* (2)); but for this purpose convincing evidence is always required, and in the circumstances mentioned it behooved the appellant to adduce evidence of the most cogent character (*Barton* v. *Bank of New South Wales* (3)).

The second ground is not suggested in the pleadings and was not really put forward at the trial. Mr. Dancey, the solicitor for the appellant, insisted in his evidence that the arrangement was not that appearing on the face of the documents by which the equity of redemption was released and the mortgage debt discharged and by which the appellant was to have an option to purchase; but that by the true arrangement the mortgage debt remained undischarged and the period for redemption was extended for three months. The learned County Judge, to whom the action was referred for trial, found that such was the arrangement and granted the relief claimed in the statement of claim. His report was affirmed by Mr. Justice McFarland. The Court of Appeal held that the true arrangement was that disclosed by the documents and in this we agree.

In the circumstances, it is at least doubtful whether the appellant was entitled to put forward his alternative claim based on the option in the Court of Appeal. Having regard to the course of the case in the courts below, it is at least incumbent upon the appellant, assuming the alternative claim to be open to him here, to show that all the available evidence is before us and that it establishes the essential facts in a convincing way.

(1) (1922) 70 D.L.R. 462. (2) [1930] S.C.R. 212.
(3) (1890) 15 App. Cas. 379, at 381.

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It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or, as the result of his conduct, the holder of the option is on some equitable ground relieved from the strict fulfilment of them (*Cushing* v. *Knight* (1); *Hughes* v. *Metropolitan Rly. Co.* (2); *Bruner* v. *Moore* (3)).

The appellant relies upon the existence of a lease for three years executed by the respondent while mortgagee in possession and before the date of the release of the equity of redemption and the creation of the option. Whatever the relevancy of this lease on a question of title, once an obligation to sell on the part of the mortgagee had arisen, it could not affect the conditions of the option, because until these conditions were fulfilled no obligation to sell could arise and the relation of vendor and purchaser did not come into existence (*Cushing* v. *Knight* (1)). Moreover, it is highly probable, in view of the terms of the lease, that, had the conditions of the option been complied with, this objection would have been removed.

The condition as to notice was not observed, but there was evidence of waiver and that condition need not be considered.

Admittedly, the condition as to payment was not fulfilled either strictly or in substance. There was no payment and no tender. The respondent had good reason to believe at the time the documents of the 8th of January went into effect that the appellant would be unable to get the necessary funds. She was expressly so informed by a letter from the appellant's solicitor of the 15th of December. Another letter from the appellant's solicitor of the 15th of March was calculated to confirm the impression that the appellant was hoping for a still further postponement of the date of payment. There is no evidence that the appellant was led by the respondent to believe that such indulgence would be granted, and, as already observed, the case put forward at the trial on the part

(1) (1912) 46 Can. S.C.R. 555.
(2) (1877) 2 App. Cas. 439.
(3) [1904] 1 Ch. 305.

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of the appellant was not that he had an option and that the respondent had waived strict fulfilment of the conditions, but that his equity of redemption was still subsisting.

The evidence adduced all points to the conclusion, and on that evidence the proper conclusion is, that the appellant was not in a position to pay or to tender the amount due under the mortgage, either on the date agreed upon or afterwards. The date agreed upon in January, 1934, was, as contended by the appellant, the 11th of April of that year and the appellant down to this moment has neither paid nor tendered any part of the option price nor manifested in any tangible way his ability to do so.

The appeal is, therefore, dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Dancey & Bolsby.*
Solicitors for the respondent: *Braden & McAlister.*

RIEDLE BREWERY LTD.....APPELLANT;

AND

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

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* Jan. 25, 26.
* June 27.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Deduction in computing assessable income—Income War Tax Act, R.S.C., 1927, c. 97, s. 6—Expenses "wholly, exclusively and necessarily" laid out "for the purpose of earning the income"—Expenditures by brewery company for treating in hotels selling its product, to promote sales of product—Manner of payment—Provincial statutory prohibitions as affecting the question.

Appellant company brewed and sold beer in Manitoba. Nearly all its shares were owned by R., who also controlled other corporations, each of which owned a hotel in Manitoba licensed to sell beer. During the taxation period in question appellant spent $4,206.40 through its officers or employees treating to beer frequenters of said hotels and other licensed hotels and clubs, the beer so purchased being nearly always of appellant's manufacture, though other beer was bought when, occasionally, a person being treated expressed a

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

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preference for it. Such treating was practised generally by brewers in the province, as they found it maintained or increased their sales, whereas discontinuance of the practice decreased their sales.

Held (reversing judgment of Maclean J., President of the Exchequer Court of Canada) (Rinfret and Davis JJ. dissenting): The said sum should be allowed to appellant as a deduction in estimating its profits or gains assessable for tax under the *Income War Tax Act,* R.S.C., 1927, c. 97. It was "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within the meaning of s. 6 of that Act.

With regard to *The Government Liquor Control Act, 1928* (Man.) (as amended), and the Crown's contention that appellant's policy was an evasion of s. 141 (against canvassing, advertising, etc., except as authorized); and that its procedure was in contravention of s. 84 (1) (4) (against a beer licensee taking anything except current money in payment or directly or indirectly allowing credit, etc.) in view of the facts that, in purchases in hotels controlled by R., instead of cash a chit was handed in and it then became a matter of accounting between the particular hotel corporation and appellant, and that in other hotels sometimes cheques were subsequently given by R. for the purchases:

Held (*per* The Chief Justice, Crocket and Kerwin JJ.): This Court should not, in the present proceedings, undertake the responsibility of determining the guilt or innocence of appellant under the provincial enactment; legality of the payments must be assumed. (*Per* The Chief Justice: It was incumbent upon the Crown to establish an actual violation of the statute in respect of the payments it contends should be disallowed. Moreover, it would seem that the Minister could not enter into the investigation of such an issue: *Minister of Finance* v. *Smith,* [1927] A.C. 193).

Per Rinfret and Davis JJ. (dissenting): Appellant adopted a system of treating which was largely based upon inducing the proprietors of hotels and clubs to sell on credit in breach of s. 84 (as amended) of *The Government Liquor Control Act, 1928,* Man. (s. 181 also referred to); under which Act alone the beer could be lawfully sold to the public; and in view of this the payments for its purchases cannot properly be said to have been "necessarily" made for the purpose of earning the income, within the contemplation of s. 6 of the *Income War Tax Act.* (If provincial laws, such as the prohibition against the usual advertising and publicity of brewers, which gave rise to this unusual treating system, are not to be taken into account, then the expenditures were of such an abnormal nature in the brewery business that they cannot be said to come within the contemplation of the Dominion statute as expenses for the purpose of earning income.) Further, appellant's treating system was, in part at least, to prevent a diminution of the sales of the business from which income would be earned, and therefore its expenditures in question could not be said to be "exclusively" incurred for the purpose of earning the income (*Ward & Co. Ltd.* v. *Commissioner of Taxes,* 39 T.L.R. 90, referred to).

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada, dismissing the appellant's appeal from the decision of the Minister of National Revenue affirming the disallowance of an item of $4,206.40 claimed by appellant as a deduction in computing its income subject to tax under the *Income War Tax Act* (R.S.C., 1927, c. 97, and amendments). Appellant company carried on the business of brewing and selling beer in the province of Manitoba, and expended the said sum in treating, in places where beer manufactured by it was sold, for the purpose of promoting sales of its product.

A. Sullivan K.C. and *B. B. Dubienski* for the appellant.

W. C. Hamilton K.C. and *J. R. Tolmie* for the respondent.

THE CHIEF JUSTICE.—The question presented by this appeal is by no means free from difficulty, which it is perhaps needless to observe in view of the differences of judicial opinion to which it has given rise. After fully considering the questions involved, I find myself in agreement with the judgment of my brother Kerwin.

As to the point based upon provisions of the Manitoba *Government Liquor Control Act, 1928,* I think it was incumbent upon the Crown to establish an actual violation of the statute in respect of the payments it contends should be disallowed. I do not see, moreover, in view of the judgment of the Judicial Committee in *Minister of Finance* v. *Smith* (1), how the Minister could enter into the investigation of such an issue.

The judgment of Rinfret and Davis JJ., dissenting, was delivered by

DAVIS, J.—This appeal raises the question whether certain expenditures of the appellant brewery, alleged to have been made for the purpose of encouraging the sale of its beer, can be set up as deductions against gross profits for the purpose of arriving at net profits for Dominion income tax purposes. The Minister of National Revenue disallowed the deductions ($4,206.40) claimed in respect of the appellant's income tax assessment for the fiscal year which ended October 31st, 1933. Upon an

(1) [1927] A.C. 193.

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appeal to the Exchequer Court of Canada from the decision of the Minister, that Court, by a judgment of the President, Mr. Justice Maclean, delivered April 12th, 1938, affirmed the Minister's decision, and the appellant appealed further to this Court.

The appellant is a company incorporated under the laws of the province of Manitoba, with its head office at the City of Winnipeg in the said province, and carried on in the said province the business of brewing and selling beer.

During the taxation period in question the appellant adopted the practice of having its officers or employees from time to time purchase its own manufactured beer in different beer parlours and licensed clubs throughout the province for the purpose of then and there treating those who were at the time on the premises, with the object of making the appellant's beer better known to the beer-drinking public and of creating and fostering a taste among beer-drinkers for its particular beer. The appellant's total sales for the said period amounted to $154,254.55 and the amount expended for "treating," $4,206.40, was, in the circumstances, a very moderate sum. The total advertising expenses of the appellant for the period in question amounted to only $331.29.

The said treating expenditures were made in 67 different licensed premises in the province by Mr. Riedle, now deceased, the then President of the company, or by the Assistant Manager or by one of the travellers of the company. The proprietors of these premises handled and sold the beer of several, if not all, of the brewers operating in the province and the customers who were treated by the appellant's officers or employees were supplied with either draught or bottled beer manufactured by the appellant which was being sold on the premises. In this way the appellant's beer was brought to the attention of and kept before the beer-consuming public and in the case of bottled beer the consumers, in addition, could see the appellant's labels on the bottles when these bottles were placed on the tables by the servers in the beer parlours.

However objectionable this treating system may be, the evidence is plain that it was general and widespread in

the province of Manitoba and that most, if not all, of the brewery companies whose beer was on sale at the different licensed beer parlours and clubs had adopted this same practice (because of the virtual prohibition against advertising—sec. 141 (3) of the Manitoba *Government Liquor Control Act, 1928*) to maintain or increase their sales.

Dominion income tax, under the *Income War Tax Act*, R.S.C., 1927, c. 97, is assessed upon the annual net profit or gain, and in computing the amount of the profits or gain to be assessed, sec. 6 provides that 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.

There cannot be any doubt upon the evidence that the expenditures by way of "treating" made by the appellant during the taxation period in question were made for the purposes of the business of the appellant; there was nothing charitable or benevolent about the expenditures.

The Privy Council in *Tata Hydro-Electric Agencies, Bombay*, v. *Income Tax Commissioner, Bombay Presidency and Aden* (1) adopted and applied the test laid down in *Robert Addie & Sons' Collieries, Ld.* v. *Commissioners of Inland Revenue* (2):

What is "money wholly and exclusively laid out for the purposes of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the company's working expenses; is it expenditure laid out as part of the process of profit earning?

Certain statutory prohibitions contained in the (Man.) *Government Liquor Control Act* present a difficulty to me in determining whether the expenditures in question here can properly be considered to be disbursements "wholly, exclusively and necessarily" incurred for the purpose of earning the income of the appellant company. "Necessarily" in sec. 6 means, I am satisfied, necessarily in a commercial sense, and if the practice of treating had become generally adopted in the province by most, if not all, of the brewers doing business in that province, it

(1) [1937] A.C. 685, at 696. (2) 1924 S.C., 231, at 235.

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would be reasonable to regard such treating expenditures as necessarily incurred within the meaning of the statutory provision. As Lord Sumner said in the *Usher* case (1):

> It is all very well for the tax-gatherer to reap where he has not strawed; it is too much (unless the legislature says so) that he should tax not only the harvest, but also the seed.

But the real difficulty in this appeal which presents itself to me is the question whether or not the expenditures can be said to have been necessary even in a business sense where the system adopted was in contravention, if not of the exact letter of the law, certainly of the spirit of the law of the province. The *Government Liquor Control Act* provides by sec. 84, as amended in 1933, that

> (1) No beer licensee shall take, receive or accept anything except current money in payment for or on account of any beer supplied by such licensee, and no beer licensee shall directly or indirectly give or allow credit in whole or in part for or on account of any beer sold, supplied or to be supplied by such licensee nor advance any money for the purchase of such beer.

"Current money" means cash. Now what happened in this case? The late Mr. Riedle, during the taxation period with which we are concerned, owned practically all the shares of the appellant company; he also owned or controlled the shares of eleven other corporations, each of which owned or operated a licensed hotel in the province of Manitoba. The expenditures for treating with which we are concerned were made in some 67 different licensed premises in the province, as before stated, of which these eleven hotel corporations formed a part. Riedle apparently dealt with the brewery company (the appellant) and the eleven other corporations as if they were his own personal business, because the common method of payment for the beer that was bought in these eleven hotels was, at least in large part, to have the accounts between each of these hotel corporations and the brewery company set off one against the other at the end of each month. As to other hotels in which the beer was purchased for the purpose of treating the customers, it was paid for, very frequently at least, by securing credit and ultimately giving a cheque to clean up the indebtedness. The evidence as to this practice was given in the cross-examina-

(1) *Usher's Wiltshire Brewery Ltd.* v. *Bruce*, [1915] A.C. 433, at 471.

tion of John Popp, the manager of the appellant company, as follows:

Q. Now going back again to the method by which this was done. In your own hotels no payment was made at all?

A. No, sir, but that money was accounted for.

Q. The manager's account would show that he had given away that much beer at some one else's direction?

A. Yes, but it was paid for.

Q. How?

A. We have a stores account at the brewery covering groceries which we send to the various hotels. Now those groceries are charged against them and they are rendered an account at the end of the month and they present a contra account for the free beer served.

Q. But no payment was made when the beer was bought?

A. No, sir.

Q. In reality it amounts to this: The Hotel Manager carries that item as a charge against Riedle Brewery until the end of the month when it is adjusted?

A. Yes.

Q. You mentioned that in some instances, say the case of independent hotels, cheques would subsequently be given in payment?

A. Yes.

Q. Did that happen pretty frequently?

A. Yes, this bundle of cheques represent such payments.

Q. It runs into quite a large amount?

A. Yes, quite a sum.

Q. And these cheques would not be given until a few days after the purchases were made?

A. In a week or two, probably after two or three visits had been made. Some of these cheques are to our own hotels.

Q. But, in respect to the independent hotels, the Manager would make a charge against you and this charge would stand until a cheque came in to square off the account?

A. Yes.

Mr. Sullivan suggested during the argument that if we thought this practice of buying beer on credit had the effect of depriving the appellant of the right to have the expenditures treated as proper deductions, there should be a reference to ascertain what portion of the amount claimed as a deduction was paid in cash and what portion was incurred on credit transactions; it being quite plain that some of the purchases of beer were undoubtedly paid for in cash at the time of their purchase. But in a matter of this sort, where it is a question whether or not certain expenditures are legitimate deductions, I do not think the Court should direct a reference in an attempt to separate the numerous items that have gone to make the total amount claimed for the deduction. It is plain that a substantial portion of the expenditure was incurred in credit transactions.

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The real difficulty is whether or not we are entitled to take into account the system adopted for the repurchase by the appellants of their own beer for treating purposes. The prohibition of the provincial statute is against the licensee and not against the purchaser or consumer. Strictly, it is only the licensee who is prohibited; he must not sell the beer for anything "except current money." But sec. 181 provides that every one is a party to and guilty of an offence against the Act who does or omits any act for the purpose of aiding any person to commit the offence or who abets any person in commission of the offence. Subsection (4) of sec. 84 further provides that any money paid or given in contravention of the section may be recovered from the licensee by the person making the payment. The appellant adopted a system of treating which was largely based upon inducing the proprietors of hotels and clubs (i.e., the licensees) to sell on credit in breach of the provincial statute under which alone the beer could be lawfully sold to the public, and I cannot bring myself to the conclusion that the payments for such purchases can properly be said to have been "necessarily" made within the contemplation of the Dominion *Income War Tax Act* provision (sec. 6) which expressly provides that in computing the profits or gain of the taxpayer, disbursements or expenses shall not be allowed as a deduction unless they were "necessarily" laid out or expended for the purpose of earning the income. The Dominion *Income War Tax Act* has added "necessarily" to the adverbs "wholly" and "exclusively" used in the English *Income Tax Act* and has changed the words in the English Act "for the purposes of the trade" to the words "for the purpose of earning the income." The narrowing effect of the additional adverb must always be kept in mind. As Lord Hanworth said in *Thomas Merthyr Colliery Co. Ltd.* v. *Davis* (1):

> It is necessary to tread a narrow path in these income tax cases. It is that stern rule which must be followed.

If we are not to take into account local or provincial laws, such as the prohibition in Manitoba against the usual advertising and publicity of brewers which gave rise to this unusual treating system, then the expenditures were of such an abnormal nature in the brewery business that they cannot be said to come within the contemplation of

(1) [1933] 1 K.B. 349, at 370.

the Dominion statute as expenses for the purpose of earning income.

A further question arises, Was the expenditure under consideration "exclusively" incurred in earning income? In *Ward and Company Limited* v. *Commissioner of Taxes* (1), the Privy Council had to consider a New Zealand case where the appellants, who were brewers and maltsters, had spent money in canvassing, advertising, printing, etc., with a view to defeating a prohibition proposal and then sought to deduct the same in computing their assessable income. The New Zealand statute, sec. 86 (1) (*a*), provided that no deduction should be made in respect of "expenditure or loss of any kind not exclusively incurred in the production of the assessable income." Their Lordships, putting aside the circumstance that the expenditure was not of such a nature as to produce income in the actual tax year in which it was incurred, agreed with the reasoning of the Court of Appeal of New Zealand that it was quite impossible to hold that the expenditure was incurred exclusively, or at all, in the production of the assessable income. Their Lordships said:

> The expenditure in question was not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing. The expense may have been wisely undertaken, and may properly find a place, either in the balance-sheet or in the profit and loss account of the appellants; but this is not enough to take it out of the prohibition in section 86 (1) (*a*) of the Act. For that purpose it must have been incurred for the direct purpose of producing profits. The conclusion may appear to bear hardly upon the appellants; but, if so, a remedy must be found in an amendment of the law, the terms of which are reasonably clear.

Under our statute, the expenditure must have been incurred "exclusively"—to use the words of the Privy Council in the above case, "for the direct purpose" of earning the income. The evidence makes it abundantly plain that the treating system adopted by the appellant was, in part at least, to prevent a diminution of the sales of the business from which income would be earned. Its sales, it was said, would fall away and its business greatly decrease if it failed to indulge in this voluntary treating system.

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

(1) (1922) 39 Times L.R. 90.

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The judgment of Crocket and Kerwin JJ. was delivered by

KERWIN, J.—The appellant company, carrying on the business of brewing and selling beer in Manitoba, filed a return of its income for the 1933 taxation period under the provisions of the *Income War Tax Act*. In assessing the company to income tax, the Minister disallowed a sum of $4,206.40, which appellant had inserted in its statement of operating expenses, and upon appeal to the Exchequer Court the Minister's decision was affirmed.

The great majority of the shares of the company were owned by A. W. Riedle who also controlled a number of other corporations each of which owned a hotel in Manitoba and each of which was licensed under provincial authority to sell beer by retail. Officers or employees of the appellant expended the sum in question at these and other licensed hotels and clubs for the purpose of treating frequenters of these premises to beer. As pointed out by the President of the Exchequer Court:

> Occasionally, it was said, if a person being treated expressed a preference for a beer other than that produced by the appellant, he would be supplied with the beer designated by him, but this would rarely occur;

that is, in practically all cases the beer purchased for the purpose of treating was beer of the appellant's manufacture. It appears that this is a practice adopted by the brewers in the province and continued because the brewers found that, if followed consistently, their sales would either be maintained or increased, whereas when the practice was discontinued, their sales would materially decrease. The evidence upon this point is uncontradicted. It was pointed out that the hotels controlled by Riedle used the appellant's draught beer exclusively, although carrying some beer bottled by other brewers, and that in these hotels nearly sixteen hundred dollars of the total sum in question was expended; the respondent's argument being that this amount particularly could not have been laid out or expended for the purpose of earning the income.

It is perhaps convenient at this stage to point out that by section 9 of the *Income War Tax Act* a tax is to be assessed, levied and paid upon "income," which by section 3 means, for our present purpose: "The annual net

profit or gain * * * being profits from a trade or commercial or financial or other business." By section 6:

> 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.

Nowhere in the Act is there a statement of what deductions are allowable in computing the annual net profit or gain but, if in any particular case they are shown to have been in fact and in law "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income," then they should be allowed.

In coming to a conclusion upon that question in this case, I find the many decisions referred to by counsel of little assistance, as the enactments under consideration in them are expressed in terms varying, if not entirely different, from the *Income War Tax Act*.

Now upon the evidence, it appears to me that the appellant company disbursed the sum in question for the purpose of earning income and not as a capital expenditure. As to the words "wholly" and "exclusively," it is not suggested that the appellant desired to give away its funds, or any part of them, nor is it contended that there was any fraud or bad faith, or that any part of the expenditures was fictitious. The learned President of the Exchequer Court held that the expenditure was not necessary but, with respect, I find it impossible to agree. As already mentioned, the practice followed by appellant is one adopted by the other brewers in Manitoba, and followed by all as something considered by them, not merely as advisable, but as obligatory, to increase, or at least sustain, the volume of their sales. Being considered thus in a commercial sense, I think it should be similarly held for the purposes of the Act.

There remains the question as to whether the money was thus laid out for the purpose of earning *the* income, that is, the income for the 1933 taxation period. In any consideration of this question, a certain degree of latitude must, I think, be allowed. For instance, in the case of a manufacturing company employing travellers to solicit business, meticulous examination of the latter's expense accounts might easily disclose that sums expended towards the end of one taxation period were not productive of

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orders or of the filling of the orders or of the payment for the goods supplied,—in the same period. That result should not prevent the company deducting such expenses in its returns under the Act. The statutory provisions may be given a reasonable and workable interpretation by holding that, as long as the disbursements fulfil the requirements already discussed, the taxpayer expended them "for the purpose," i.e., with the object and intent that they should earn the particular gross income reported for the period. In my opinion, the $4,206.40 was expended for that purpose in the circumstances of this case.

Finally, it was argued that the policy pursued by the appellant was an evasion, and in the manner of its procedure was a contravention, of the provisions of the *Government Liquor Control Act, 1928,* of Manitoba. Section 141 (1) (*a*) thereof provides as follows:

> Except as permitted by this Act or the regulations made thereunder, no person within the Province shall:
>
> (*a*) canvass for, receive, take or solicit orders for the purchase or sale of any liquor or act as agent or intermediary for the sale or purchase of any liquor, or hold himself out as such agent or intermediary.

and the contention is that the evidence discloses that the appellant's officers or employees visited the beer parlours in an endeavour to promote sales. Section 84, subsections 1 and 4, provides:

> (1) No beer licensee shall take, receive or accept anything except current money in payment for or on account of any beer supplied by such licensee, and no beer licensee shall directly or indirectly give or allow credit in whole or in part for or on account of any beer sold, supplied or to be supplied by such licensee nor advance any money for the purchase of such beer.
>
> (4) Any money, security or any deposit paid, given or pledged in contravention of this section, or the full value thereof, may be recovered in any court of competent jurisdiction by the person making the deposit, payment, gift or pledge, as aforesaid, from the licensee, free of all claims of the licensee in respect thereof, and in addition the beer licensee shall be liable to any penalty provided for the breach of this section.

With reference to these provisions, it is stated that a large part of the beer was bought on credit and the submission is that such a method is a direct contravention of the section. This refers to the evidence that, for each purchase made in hotels controlled by Riedle, instead of cash a chit was handed in and it then became a matter of accounting between the particular hotel corporation and the appellant, at whose office the main book-keeping of

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Kerwin J.

the hotel corporation was done. As to other hotels, the evidence is that on some occasions cheques were given by Riedle for the purchases.

In my view, it is unnecessary to decide these questions. This Court should not, in these proceedings, undertake the responsibility of determining the guilt or innocence of appellant under the provincial enactment. I assume the legality thereunder of the payments made and for the reasons given above would allow the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Dubienski & Popp.*
Solicitor for the respondent: *W. S. Fisher.*

1939

* June 6.
* June 27.

ANDREW PRITCHARD (DEFENDANT) ....APPELLANT;

AND

JOSEPH BOUCHER AND ETHEL BOUCHER (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Negligence—Collision at street intersection—One car making left hand turn—Statutory requirements—Highway Traffic Act, R.S.O., 1937, c. 288, s. 39 (1).

The action was for damages by reason of a motor car collision at a street intersection in Ottawa, Ontario. Defendant, whose car had been going easterly on L. avenue, was turning left at the intersection to go northerly on O. street, when his car, and plaintiffs' car going westerly on L. avenue, collided. At the trial the jury found that the accident was not caused by negligence of defendant, and the action was dismissed. Plaintiffs' appeal to the Court of Appeal for Ontario was allowed, and judgment given to plaintiffs for damages to be assessed at a new trial for that purpose. Defendant appealed.

Held: The judgment at trial should be restored. No error was shown in the trial judge's charge to the jury, the case was eminently one for a jury, and the jury could on the evidence properly make the finding which they did as aforesaid.

The requirements of s. 39 (1) of the *Highway Traffic Act,* R.S.O., 1937, c. 288, discussed in regard to defendant's duty in making the left hand turn in question. After defendant had entered and come within the intersection to the right of the centre line of L. avenue, he

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

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was obliged (besides observing the precautions required by s. 39 (1) and the law as to reasonable conduct in the circumstances) upon leaving the intersection to pass to the right of the centre line of O. street, but was not obliged, as an act necessary in itself, to continue beyond the centre of the intersection before turning to the left.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario which allowed the plaintiffs' appeal from the judgment of McTague, J., following the trial of the action with a jury, dismissing the action.

The action was for damages by reason of a motor car collision at a street intersection in Ottawa, Ontario, on May 29, 1937, at about 3.50 o'clock in the afternoon. Defendant, whose car had been going easterly on Laurier avenue, was (the green signal-light then being shown facing east and west) turning left at the intersection to go northerly on O'Connor street, when his car and that driven by the plaintiff Joseph Boucher (whose wife, the other plaintiff, accompanied him in the car), which car was going westerly on Laurier avenue, collided. At the trial, to the first question put to the jury, "Was the accident caused by the negligence of the defendant?" the jury answered "No" (and in view of that answer, they did not answer the other questions put to them); and judgment was given dismissing the action. Plaintiffs appealed to the Court of Appeal for Ontario. That Court allowed the appeal, set aside the verdict and judgment at trial, and ordered that a new trial with a jury be had, limited to an assessment of damages only, and that plaintiffs recover from the defendant the amount of the damages so assessed. Special leave to appeal to the Supreme Court of Canada was granted to the defendant by the Court of Appeal for Ontario.

T. N. Phelan K.C. and *J. D. Watt* for the appellant.

R. V. Sinclair K.C. and *Auguste Lemieux K.C.* for the respondent.

The judgment of the Court was delivered by

KERWIN, J.—This action arises out of a collision between two motor vehicles at the intersection of Laurier avenue and O'Connor street in the City of Ottawa. At the trial certain questions were submitted to the jury, to

the first of which only they found it necessary to give an answer. That answer was "No" to the question "Was the accident caused by the negligence of the defendant?" On appeal by the plaintiffs the Court of Appeal for Ontario delivered the following oral judgment:

> Appeal allowed with costs here and below as far as trial is concerned and goes back for trial on question of damages alone. Mr. Justice Gillanders expressed the opinion that there should be a general trial.

By special leave of that Court, the defendant now appeals.

Several points had been taken by the plaintiffs in their notice of appeal to the Court of Appeal but before us Mr. Sinclair suggested that the real grounds upon which the Court of Appeal must have proceeded were: (1) The trial judge erred in that part of his charge to the jury where he interpreted the relevant parts of what is now section 39, subsection 1, of the *Highway Traffic Act*. While the accident occurred in 1937, no change has been made in the applicable statutory provisions, and for convenience I refer, therefore, to the Revised Statutes of Ontario, 1937, chapter 288. (2) The verdict was such as no reasonable jury doing their duty could have returned.

These two grounds may well be considered together. Subsection 1 of section 39 is as follows:

> (1) Where two persons in charge of vehicles or on horseback approach a crossroad or intersection, or enter an intersection, at the same time, the person to the right hand of the other vehicle or horseman shall have the right-of-way.
>
> (*a*) The driver or operator of a vehicle within an intersection intending to turn to the left across the path of any vehicle approaching from the opposite direction may make such left turn only after affording a reasonable opportunity to the driver or operator of such other vehicle to avoid a collision. 1930, c. 48, s. 8 (1), *part*.
>
> (*b*) The driver or operator of a vehicle intending to turn to the right into an intersecting highway shall approach such intersection and turn as closely as practicable to the right curb or edge of the travelled portion of the highway. 1931, c. 54, s. 10, *part*.
>
> (*c*) The driver or operator of a vehicle intending to turn to the left into an intersecting highway shall approach such intersection as closely as practicable to the centre line of the highway and the left turn shall be made by passing to the right of such centre line where it enters the intersection, and upon leaving the intersection by passing to the right of the centre line of the highway then entered. 1931, c. 54, s. 10, *part;* 1933, c. 20, s. 4 (1).
>
> (*d*) The driver or operator of a vehicle upon a highway before turning to the left from a direct line shall first see that such movement can be made in safety, and if the operation of any other vehicle may be

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affected by such movement shall give a signal plainly visible to the driver or operator of such other vehicle of the intention to make such movement.

(*e*) The signal required in clause (*d*) shall be given either by means of the hand and arm in the manner herein specified or by a mechanical or electrical signal device which has been approved by the Department.

(*f*) Whenever the signal is given by means of the hand and arm the driver or operator shall indicate his intention to turn by extending the hand and arm horizontally from and beyond the left side of the vehicle. 1931, c. 54, s. 10, *part*.

In this connection it is important to note the definition of the word "intersection" in section 1 (*g*):

"Intersection" shall mean the area embraced within the prolongation or connection of the lateral curb lines or, if none, then of the lateral boundary lines of two or more highways which join one another at an angle, whether or not one highway crosses the other.

As applied to the scene of the accident, the intersection means the area embraced within the prolongation of the lateral curb lines on Laurier avenue and O'Connor street. According to the evidence of the defendant, who was proceeding easterly on Laurier avenue, he stopped his vehicle before entering the intersection,—because the red traffic light situated at the southeast corner of the two streets was showing,—bringing his vehicle to a stop on the south side of Laurier avenue and close to the centre line thereof. Upon the red light disappearing and the green light showing, he stated that he passed to the right of that centre line where it entered the intersection. If his evidence on this point was believed by the jury, he had complied with the first part of paragraph (*c*). Being then *within* the intersection as mentioned in paragraph (*a*) and intending to turn to the left across the path of the plaintiffs' vehicle which he saw approaching from the east on Laurier avenue, he was entitled to make such left turn "only after affording a reasonable opportunity (to the plaintiffs) to avoid a collision." By paragraph (*d*), the defendant was first to see that such movement could be made in safety, and since the operation of the plaintiffs' vehicle might be affected by such movement, he was obliged (paragraph (*e*)) to give a signal, plainly visible to the driver of the plaintiffs' vehicle, which signal was to be given either by means of the hand and arm in the manner specified by paragraph (*f*) or by a mechanical or electrical signal device which had been approved by the

Department of Highways. According to the evidence of the defendant, which the jury was entitled to believe, he gave the hand and arm signal mentioned in paragraph (*f*) "by extending the hand and arm horizontally from and beyond the left side of the vehicle." The defendant's explanation, which the jury could weigh against the evidence of the plaintiffs, was that he saw the plaintiffs' vehicle approaching at a distance of at least one hundred feet away and considered that he had ample time to cross in safety, and the jury, therefore, might very well adopt the view that the defendant had afforded the driver of the plaintiffs' vehicle the reasonable opportunity to avoid a collision mentioned in paragraph (*a*).

There was no obligation on the part of the defendant, after entering the intersection and before turning to the left, to keep to the south of the centre line of Laurier avenue until he reached the very centre of the intersection and then to keep to the centre of O'Connor street. According to the evidence of the defendant, he had complied with the first part of paragraph (*c*) of subsection 1 of section 39 and, so far as that paragraph is concerned, the only other obligation upon him was, upon leaving the intersection, to pass to the right of the centre line of O'Connor street. Any doubt as to the correct construction of this paragraph is swept aside by a consideration of the fact that as originally enacted in 1931, by chapter 54, section 10, it read as follows:

> (*c*) The driver or operator of a vehicle intending to turn to the left into an intersecting highway shall approach such intersection as closely as practicable to the centre line of the highway and *continue beyond the centre of the intersection before turning;*

and in 1933, by chapter 20, section 4, the words italicized were stricken out and words added so that the paragraph appears as it is now found in the Revised Statutes.

The trial judge explained paragraph (*c*) to the jury in this sense. He also not only called their attention to the other requirements of subsection 1 but reiterated them by saying:

> Let us summarize briefly: The man intending to turn to the left may do so, but he must afford a reasonable opportunity to the other man to avoid a collision; he must exercise that care.
>
> Secondly, he must come into the intersection in a certain way, and he must leave it in a certain way.

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> Thirdly, he must take due precautions to see that he is not going to run into someone else or permit someone else to run into him; and he must make the signal which is provided in this act by extending the left hand horizontally from the car (indicating).

He referred to the contradictions between the evidence on behalf of the parties as to whether these requirements were met by the defendant and also generally as to what was stated to have occurred. In the latter connection, in addition to having referred in the opening passages of his charge to what would be expected of a reasonable man under the circumstances as the jury would find them, he stated later:

> I do wish to emphasize to you that mere observance of what the statute provides is, in certain circumstances, not the whole duty. Always persists the obligation in the circumstances of a man conducting himself as an ordinary reasonable man would do.

No error being found in the charge, the case was eminently one for a jury and, with respect, we are of opinion that in the exercise of their duty the jury could very properly come to the conclusion that the accident was not caused by the negligence of the defendant.

We have had the advantage of a very complete argument by Mr. Lemieux on the other points taken by the plaintiffs in their notice of appeal to the Court of Appeal, but, after consideration, we are unable to discover in them any adequate ground upon which that Court could have set aside the verdict and judgment at the trial.

The appeal should be allowed and the judgment at the trial restored, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Henderson, Herridge, Gowling & MacTavish.*

Solicitor for respondents: *Auguste Lemieux.*

INTERNATIONAL METAL INDUSTRIES LTD. ..... } APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO ..... } RESPONDENT.

1939
* Feb. 27.
* March 21.

ON APPEAL FROM HIS HONOUR, JUDGE DENTON, A JUDGE OF THE COUNTY COURT OF THE COUNTY OF YORK, PROVINCE OF ONTARIO

Appeal—Jurisdiction—"Highest court of final resort having jurisdiction in the province"—Supreme Court Act, R.S.C., 1927, c. 35, s. 37 (as amended by I Geo. VI, c. 42).

In s. 37 (3) of the *Supreme Court Act* (R.S.C., 1927, c. 35, as amended by I Geo. VI, c. 42), the words "highest court of final resort having jurisdiction in the province" (from which court only, save as provided, an appeal lies to the Supreme Court of Canada) mean the highest court of appeal having jurisdiction generally in the province, and do not refer to the highest court in the province to which appeal can be taken in the particular case sought to be appealed to the Supreme Court of Canada.

An appeal to the Supreme Court of Canada from the decision of a County Court Judge in Ontario dismissing an appeal from the decision of a court of revision affirming an assessment made under a city by-law passed under the provisions of s. 120*a* (enacted in 1934, c. 1) of *The Assessment Act,* R.S.O., 1927, c. 238, was quashed for want of jurisdiction.

MOTION on behalf of the Corporation of the City of Toronto, respondent, for an order quashing the appeal herein from the decision of His Honour Judge Denton, a Judge of the County Court of the County of York, dismissing the appellant's appeal from the decision of the Court of Revision for the City of Toronto affirming an assessment of appellant in respect of income for the year 1936, made under a by-law of the city passed in 1934 under the provisions of s. 120*a* (enacted in 1934, c. 1) of *The Assessment Act,* R.S.O., 1927, c. 238. Corresponding provisions are now in R.S.O., 1937, c. 272, s. 123.

The first two grounds of the motion were: (1) that the *Assessment Act,* R.S.O., 1937, c. 272, s. 123, subs. 8, provides that no appeal shall lie from the decision of the County Court Judge; (2) that the judgment of His Honour Judge Denton is not a judgment of the highest court of

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

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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 1 Geo. VI, c. 42.

J. P. Kent K.C. for the motion.

H. F. Parkinson K.C. and *H. C. F. Mockridge contra.*

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

THE CHIEF JUSTICE—In *Farquharson* v. *Imperial Oil Co.* (1), Strong C.J. said:

> In the case of *Danjou* v. *Marquis* (2), 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 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 1 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 "highest court of last resort" by Strong C.J. in the passage quoted.

Pearce v. *City of Calgary* (3), cited on behalf of the appellant, was a decision of the Registrar upon the construction of section 41 of the *Supreme Court Act* (R.S.C., 1906, ch. 139) which has since been repealed. The phrase under consideration there was "the judgment of any court of last resort created under provincial legislation to adjudi-

(1) (1899) 30 Can. S.C.R. 188, at 202.

(2) (1879) 3 Can. S.C.R. 251.

(3) (1915) 54 Can. S.C.R. 1.

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cate concerning the assessment of property for provincial or municipal purposes." That decision has no relevancy to the question now decided.

The appeal is quashed with costs.

CANNON, J.—I would quash the appeal with costs.

Appeal quashed with costs.

Solicitors for the appellant: *Osler, Hoskin & Harcourt.*
Solicitor for the respondent: *C. M. Colquhoun.*

ROBERTSON ET AL. *v.* MURPHY

1939

* Feb. 7.
* March 21.

ON PROPOSED APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Appeal—Jurisdiction—"Judgment directing a new trial," Supreme Court Act (R.S.C., 1927, c. 35), s. 36.

An order made in the action directed that a demurrer pleaded in defence and certain other questions of law arising should be argued and decided before evidence was given or any issue of fact tried. After argument on said questions of law, judgment was given dismissing the action (except as against certain defendants whose position was not then under consideration), it being held in effect that no cause of action was disclosed by the statement of claim. The Court of Appeal for Manitoba, being of opinion that said questions of law should not have been disposed of before the trial, set aside the judgment, and directed that defendants should be entitled to raise on the trial of the action "any demurrer or points of law taken by them in their statement of defence" and that plaintiff should "have leave to amend his statement of claim as he may be advised."

Held: The judgment of the Court of Appeal was not a final judgment nor a "judgment directing a new trial" within the contemplation of s. 36 of the *Supreme Court Act* (R.S.C., 1927, c. 35); and there could be no appeal therefrom to the Supreme Court of Canada.

MOTION by certain of the defendants for an order granting special leave to appeal to this Court from the judgment of the Court of Appeal for Manitoba.

In the action the plaintiff alleged that he was a fireman and a member of the Brotherhood of Locomotive Firemen

PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

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and Enginemen and that a certain agreement covering reorganization of Seniority Districts of Engineers, Firemen, etc., had been wrongly interpreted and acted upon, and he claimed damages against certain defendants, certain declarations and other relief. Adamson J., of the Court of King's Bench for Manitoba, ordered that the demurrer contained in the statement of defence of certain defendants and certain questions of law arising in the action should be argued and decided before any evidence was given in the action or any question or issue of fact was tried. Argument was heard by Adamson J. on said demurrer and other questions of law and judgment was delivered thereon dismissing the action (except as against certain defendants whose position was not under consideration in the application). The plaintiff appealed to the Court of Appeal for Manitoba. That Court allowed the appeal and set aside the judgment of Adamson J. Its judgment provided that "notwithstanding this order and judgment" defendants should be "entitled to raise on the trial of this action any demurrer or points of law taken by them in their statement of defence"; and that plaintiff "have leave to amend his statement of claim as he may be advised." The view of the Court of Appeal was that the questions dealt with by Adamson J. ought not to have been disposed of before the trial. Special leave to appeal to the Supreme Court of Canada was refused on an application to the Court of Appeal for Manitoba, and the present application was made to this Court.

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

E. F. Newcombe K.C. contra.

The judgment of the Chief Justice and Rinfret, Crocket, Davis and Kerwin JJ. was delivered by

THE CHIEF JUSTICE.—This is an application for leave to appeal from the judgment of the Court of Appeal for Manitoba.

The question to be decided is whether the judgment is an appealable judgment under section 36 of the *Supreme Court Act*. Admittedly, it is not a final judgment, but it is argued that it is "a judgment * * * directing a new trial" within the meaning of that section.

By an order of the 16th of July, 1937, Mr. Justice Adamson directed that the

> demurrer contained in the statement of defence of the defendants other than Canadian National Railway Company, Ferguson and Hay and the following questions of law * * * shall be argued and decided before any evidence is given in the action or any question or issue of fact is tried and that the said questions of law be set down * * * for argument

on a date mentioned.

This order was obviously made under marginal rule 466 of the Manitoba Rules of Court.

The learned judge heard argument on all the questions and held in effect that no cause of action was disclosed by the statement of claim. By his formal judgment of the 17th of January, 1938, he dismissed the action against all the defendants other than the Canadian National Railway Company, Ferguson and Hay.

On appeal by the plaintiff to the Court of Appeal, that Court set aside the judgment of Mr. Justice Adamson and directed that the defendants should be at liberty to raise on the trial of the action "any demurrer or points of law taken by them in their statement of defence," and that the plaintiff should "have leave to amend his statement of claim as he may be advised."

The view of the Court of Appeal was that the questions dealt with by Mr. Justice Adamson ought not to have been disposed of before the trial.

We are satisfied that this judgment is not a "judgment * * * directing a new trial" within the contemplation of section 36. The application will, therefore, be dismissed with costs.

CANNON, J.—I would dismiss the motion with costs.

Motion dismissed with costs.

Solicitors for the applicants: *Hudson, Ormond, Spice, Swift* and *Macleod.*

Solicitors for the respondent: *Andrews, Andrews, Burbidge & Bell.*

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* May 29.

DOUGLAS H. ROSS ..... APPELLANT;

AND

NATIONAL TRUST COMPANY, LTD., ADMINISTRATOR DE BONIS NON WITH WILL ANNEXED OF THE ESTATE OF SARAH ANNE HODGSON, DECEASED (APPLICANT), AND OTHERS ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Vesting

The testatrix in her will devised property to her trustees in trust for conversion, the proceeds to be invested and the income therefrom to be paid to her husband (who predeceased her) during his life and after his decease "to be paid half yearly to my unmarried daughters share and share alike and after the marriage or decease of my last remaining single daughter my said Trustees shall divide the whole of my property held by them in Trust among all my children share and share alike." The question on construction of the will was whether the corpus of the testatrix' estate vested at her death in all her children or vested on the termination of the income interests (at the death of the last remaining unmarried daughter) in the only child of the testatrix then alive.

Held: The corpus of the testatrix' estate vested at the time of her death absolutely in all her children then alive, share and share alike. *Browne* v. *Moody,* [1936] A.C. 635, referred to.

APPEAL from the judgment of the Court of Appeal for Ontario affirming the judgment of Mr. Justice Middleton on an application by way of originating notice of motion on behalf of the administrator *de bonis non* with the will annexed of the estate of Sarah Anne Hodgson, deceased, for the opinion, advice and direction of the court on a question of construction of the will of the said deceased.

The will was dated September 23, 1889. It devised to the trustees of the will properties in trust for conversion, the proceeds to be invested and the income therefrom to be paid to the deceased's husband (who predeceased the testatrix) during his life and after his decease

to be paid half yearly to my unmarried daughters share and share alike and after the marriage or decease of my last remaining single daughter my said Trustees shall divide the whole of my property held by them in Trust among all my children share and share alike.

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

The husband of the testatrix predeceased her. The testatrix died on December 17, 1893. She left, surviving her, seven children (and no issue of any child who had predeceased her), six of whom were daughters, four of which daughters were unmarried, and they were not subsequently married. The last remaining unmarried daughter died on February 9, 1935. The only child of the testatrix then surviving was one married daughter, Helen Elizabeth Ross, who died on June 22, 1935, of whose estate the present appellant was the sole beneficiary.

The question submitted to the court was:

> Whether upon a true construction of the Will of the testatrix the corpus of her estate vested—
>
> (*a*) at her death in all the children of the testatrix in equal shares; or
>
> (*b*) on the termination of the income interests provided in the said Will in Helen Elizabeth Ross, the only child of the testatrix then alive.

The judgment of Mr. Justice Middleton declared that the corpus of the testatrix' estate vested at the time of her death absolutely in all her children then alive, share and share alike. His judgment was affirmed by the Court of Appeal. An appeal was brought to this Court.

F. Gardiner K.C. for the appellant.

G. R. Munnoch K.C. for certain respondents.

P. D. Wilson K.C., Official Guardian, representing certain infants.

After hearing argument for the appellant, and without calling on counsel for the respondents, the Court pronounced judgment orally, dismissing the appeal with costs.

THE CHIEF JUSTICE (for the Court) (oral)—It will not be necessary to call upon you, Mr. Munnoch.

Having regard to the judgment of the Judicial Committee, delivered by Lord Macmillan, in the case of *Browne* v. *Moody* (1), in which the judgment of this Court was reversed, and to the language employed in the particular testamentary disposition which we have to construe, we

(1) [1936] A.C. 635.

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Duff C.J.

have no doubt that the opinion of Mr. Justice Middleton, accepted as it was by the Court of Appeal, was right.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Parkinson, Gardiner & Willis.*

Solicitors for certain respondents: *Blake, Lash, Anglin & Cassels.*

The Official Guardian for infant respondents.

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* Jan. 17, 18.
* June 27.

DESS McCREADY (PLAINTIFF).....APPELLANT;

AND

THE CORPORATION OF THE COUNTY OF BRANT (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Highways—Negligence—Truck striking culvert wall on county road—Alleged dangerous conditions—Duty of municipality as to keeping in repair.

Plaintiff, while driving a truck on a straight stretch of a county road of defendant municipality about 7 p.m. on February 10, 1937, struck a wall of a culvert. He sued defendant for damages. He gave evidence that on account of pit holes in the road the rear end of the truck jumped and struck a rut which was on or near the edge of the travelled part of the road and prevented him from coming back until he struck the culvert wall. The trial judge gave judgment for plaintiff, holding that the accident was caused by, the narrowing of the travelled portion of the road from 22 or 24 feet to the 16-foot culvert, absence of warning signs, absence of wings approaching the culvert (the wing walls did not extend beyond the ground level), and the condition of the road surface (pit holes and rut). His judgment was reversed by the Court of Appeal for Ontario. Plaintiff appealed.

Held: Plaintiff's appeal dismissed. The above conditions did not constitute default of defendant to keep the road in repair within the meaning of s. 469 (1) of the *Municipal Act,* R.S.O., 1927, c. 233. The depressions were all caused by normal user of the highway, and in the circumstances and time of year defendant was not guilty of default in permitting them to exist. To hold that the rut was a

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

condition causing the road to be out of repair would be imposing too heavy a burden on county municipalities. Further, on the evidence the accident was the result of plaintiff's own lack of care.

The principle as to a municipality's duty to keep roads in repair discussed and cases referred to.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario which, reversing judgment of McFarland J. at trial, dismissed his action, which was brought against the defendant county municipality for damages by reason of a truck, which plaintiff was driving, striking a wall of a culvert on a county road, the plaintiff alleging negligence in defendant because of dangerous conditions on the road, causing the accident. The material facts and circumstances of the case are stated in the judgments now reported. The appeal to this Court was dismissed with costs.

W. Ross Macdonald K.C. for the appellant.

Peter White K.C. and *Miss G. E. M. Wilson* for the respondent.

The judgment of the Chief Justice and Rinfret, Kerwin and Hudson JJ. was delivered by

KERWIN J.—About seven o'clock in the evening of February 10th, 1937, the appellant (plaintiff) was driving his 1934 half-ton Chevrolet truck westerly on a county road under the jurisdiction of the respondent municipality. There was some wind but, although there were light snow flurries, there was nothing, according to the appellant, to obstruct his having a clear view of the highway for three hundred feet, the distance illuminated by the head-lights of his truck. He was alone, the truck was empty except for a bushel of apples, and he was travelling about twenty miles per hour. There was no ice or snow on the road, which the appellant said was "rough and pitted." When about fifty feet east of a culvert, the rear end of the truck "jumped, with the pit holes, to the south." Later in his evidence the appellant stated: "I hit another cross-rut; at least it was of dark construction. I seen it, but I couldn't say it was a rut. It hindered me from coming back." This rut was on or near the edge of the travelled part of the road. The truck struck the southerly

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cement wall erected on the culvert (and 3·9 feet in height from the floor of the culvert), and in this action the appellant seeks compensation for the injuries he sustained and for the damage done his truck as a result of the impact.

At the outset it should be emphasized that appellant's claim is based upon subsection 1 of section 469 of *The Municipal Act,* R.S.O., 1927, chapter 233:—

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

To succeed, he must show that there was a default on the part of the respondent to keep the highway in repair. In addition to what has already been narrated, the evidence discloses that about 1922 or 1923 the road in question had been re-graded and gravelled, and that in the autumn of 1936 the surface had been stabilized by the addition of calcium chloride to an average width of twenty feet, although near, and for some distance easterly from, the culvert, the travelled part of the road was wider. The colour of the walls of the culvert merged into the colour of the road surface and complaint was made that this, together with the fact that the culvert itself was about sixteen feet in width, constituted a trap for users of the highway, in the absence of lights or reflectors on the ends of the walls of the culvert and in the absence of signs giving warning of the presence of what is termed on behalf of the appellant "a narrow culvert or bridge."

The trial judge agreed with these contentions and found that the accident was caused by four things,—one of them being the narrowing of the travelled portion of the road from 22 feet or 24 feet to the 16-foot culvert, and another, the absence of signs or warnings. Yet another he described as "the entire absence of wings approaching the culvert." There were wing walls which, however, did not extend above the level of the ground. Unless the suggestion be that if there had been wing walls a few feet in height above such level, a traveller on the highway might more easily be able to discern the presence of the culvert, it is difficult to see how the presence or

absence of such wing walls had anything to do with the accident. In any event, these three matters have been mentioned merely to be put aside as I cannot agree that they constituted any default on the part of the respondent to keep the road in repair. The culvert was built on a stretch of straight roadway and no obligation existed to give warning of what might be expected by a motorist on a county road in Ontario.

The fourth matter mentioned by the trial judge requires more attention,—the condition of the surface of the road. Undoubtedly there were a number of depressions,—but all caused by the normal user of the highway. The evidence of the different witnesses did not vary materially as to their width or depth, and it is impossible to hold that the respondent was guilty of any default in permitting them to exist. They had been caused since the respondent's power maintainer had last been used on the road some time previous to January 1st, 1937, and such depressions are likely to occur in the wintertime when it would be impracticable to make and maintain the road surface smooth and even.

In speaking of the condition of the road, the trial judge found that the evidence had established "the fact that the accident was caused by the pit holes and the rut." This is the rut referred to by the appellant as having prevented him bringing the rear wheels of the truck back to the centre of the travelled portion of the road. Its presence was testified to by other witnesses called by the appellant, including a son and two daughters, one of whom took a photograph of the *locus* on the day following the accident, in the presence of the other two. The respondent's engineer and an insurance adjuster inspected the locality on February 18th and they say there was no rut,—calling what they saw a wheel mark. The respondent's officials were apparently of the opinion that the photograph must have been taken at a date later than February 19th when, because of a thaw, it was found possible for the man in charge of the maintainer to use the machine on the road. After perusing this photograph, the engineer testified that it showed an impression left by the dual wheels of the maintainer, which he identified from the appearance of a mark caused by a diagonal lug not in

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use on any truck. In substance he described what the photograph indicated as a mark and not a rut. He stated further that if the maintainer had made a rut of the depth described by the appellant's witnesses, it should and would have been removed by the respondent the same day. While the trial judge concluded that a rut existed at the time of the accident, he did not find that the maintainer had caused it; and I find it impossible, on the record, to make such a finding.

From this and indeed from the pleadings, and the whole course of the trial, it is apparent that the appellant never claimed or suggested that the rut or mark had been caused by the maintainer or by any vehicle under the control of the respondent. This consideration renders it unnecessary to determine whether a claim could be eked out against the respondent for misfeasance, irrespective of the statute.

Accepting, as did the trial judge, the evidence of the appellant's witnesses, the question remains as to whether this rut was a condition in or near the travelled portion of the road causing it to be out of repair. With respect, I think that question must be negatived. To hold otherwise would be imposing too heavy a burden on county municipalities. It is undoubted law that they are not insurers of the safety of the travelling public. The obligation of a municipality in Ontario has been considered in numerous cases in the courts of that province but the problem has always been to apply the principle as exemplified in the words of Chief Justice Armour in *Foley* v. *East Flamborough* (1):—

> I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied.

This statement of the rule was approved in this Court by Idington and Anglin JJ. in *Raymond* v. *Township of Bosanquet* (2). To the same effect are the remarks of Sir Charles Fitzpatrick, C.J., and Duff J. in *Oakville* v. *Cranston* (3), the decision in which is merely noted in 55 Can. S.C.R. 630. The divergence of judicial opinion in that case is indicative of the difficulty experienced in applying the principle to particular circumstances. The

(1) (1898) 29 O.R. 139, at 141. (2) (1919) 59 Can. S.C.R. 452.
(3) (1917) 55 Can. S.C.R. 630.

trial judge had deemed it unnecessary to fix the exact dimensions of the hole or depression which was the cause of the accident but had found that the municipality had not kept the portion of the road, in which it was found, in proper and sufficient repair. In the Court of Appeal for Ontario an appeal from this judgment was dismissed on an equal division of opinion. This Court affirmed the order of the Court of Appeal with Davies J. dissenting. Sir Charles Fitzpatrick stated:—

> Both parties agree that the criterion by which the liability of the corporation is to be measured is safety and convenience for travel, having regard to the physical characteristics of the road, the public needs, the season of the year and the climatic conditions.

The present Chief Justice put the matter thus:—

> There is no controversy touching the fundamental principle governing the determination of the issues in this litigation. The duty of the municipality * * * is to maintain its roads in a reasonable state of repair, in other words, in a reasonably safe condition in so far as that can be done by the exercise of due diligence—*Jamieson* v. *Edmonton* (1),—safe, that is to say, for people using them lawfully and reasonably, due regard always being had in deciding what is reasonable in both these connections to the nature of the locality, the season of the year, the weather and the frequency of travel.

In the case at bar, I conclude that the appellant was not keeping a sufficient lookout as he did not see the culvert wall until he was within twelve feet of it; and that he did not have proper control of the steering-wheel of the truck as, otherwise, the pit holes would have caused no difficulty. I agree with the three judges of the Court of Appeal for Ontario who, I assume, in reversing the trial judge, must have decided that there had been no default on the part of the respondent to keep the road in repair. The appeal should be dismissed with costs.

DAVIS J.—Counsel for the appellant in a very clear and forcible argument presented the appellant's claim against the respondent municipality, as indeed the claim was founded, on an alleged breach of the statutory duty of the municipality to keep in repair its highways. But in my opinion he put the duty far too high. The statutory imposition upon Ontario municipalities has remained unchanged from earliest times (except that in 1927, by chap. 61, sec. 50, by an amendment the provisions of the *Con-*

(1) (1916) 54 Can. S.C.R. 443.

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tributory Negligence Act were made applicable) and the municipal law has long been established in Ontario as to just what is that duty, though, of course, the application of the general statement to particular facts may at times occasion some difficulty. The classic statement has always been that of Chief Justice Armour in the *Township of East Flamborough* case (1), where it was stated at page 141 that a municipality must keep the highway

> in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety.

If that is done, "the requirement of the law is satisfied."

Garrow, J.A., in *Hogg* v. *Township of Brooke* (2), put the same principle in an equally clear statement when he said at p. 285:

> A corporation must, I think, at the peril of a charge of negligence, use the means at its command to supply that which the travelling public is entitled to demand, namely, an open and reasonably safe highway.

I am satisfied on the evidence that what is complained of here did not constitute want of repair within the statutory obligation. What was so much emphasized as a "rut" in the shoulder of the travelled portion of the road, caused undoubtedly by the wheel of some motor truck, was nothing different from the common variety of ruts so-called that the everyday motorist encounters on any country road. It would be, in my view, an unbearable burden upon our municipal corporations to impose so high a duty of repair as is contended for in this case.

But quite apart from this aspect of the case, the evidence is abundantly plain that the appellant was the author of his own injury. He had a clear, open, straight stretch of road before him. He had driven over it a few hours before as well as having driven up and down the same road the day before the accident. It was a bright night in February; he says his windshield was clear and that he was driving along the road carefully and that he could see, with his lights on, about three hundred feet ahead of him. There was no one else on the road. And yet, on his own evidence, when he came towards the small bridge over a culvert with the abutments standing three feet nine inches above the ground he ran right into

(1) (1898) 29 O.R. 139. (2) (1904) 7 Ont. L.R. 273.

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the abutment on his left side of the road and he admits that he did not see it until he was about twelve feet from it.

The Court of Appeal for Ontario unanimously concluded that the action could not succeed. They apparently thought the case too plain to require written reasons for their judgment.

The appeal should be dismissed with costs.

The application of the statutory onus provision of *The Highway Traffic Act*, R.S.O., 1927, ch. 251, sec. 42 (1) (now R.S.O., 1937, ch. 288, s. 48 (1)) that

> When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.

which was raised in *Groves* v. *County of Wentworth* (1) (a case on its facts in many respects similar to the facts of this case) and carefully considered by the Court of Appeal for Ontario in that case, was not raised in this case and consequently has not been considered by us in relation to the facts of this case.

Appeal dismissed with costs.

Solicitors for the appellant: *MacDonald & MacDonald.*
Solicitor for the respondent: *J. M. Harris.*

THE SUPERINTENDENT OF INSURANCE FOR CANADA *v.* THE DISCOUNT AND LOAN CORPORATION OF CANADA

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* Jan. 24, 25.
* June 27.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Appeal—Jurisdiction—Exchequer Court Act (R.S.C., 1927, c. 34), s. 83—"Actual amount in controversy" not exceeding "the sum or value of $500"—Appeal from judgment in Exchequer Court setting aside recommendation of Superintendent of Insurance imposing qualification or limitation on renewal of licence to loan company—Matter involved not susceptible of evaluation in terms of money.

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

(1) [1939] O.R. 138.

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APPEAL by the Superintendent of Insurance for Canada from the judgment of Maclean J., President of the Exchequer Court of Canada (1), allowing the appeal of The Discount and Loan Corporation of Canada, the present respondent, from the recommendation or ruling of the Superintendent of Insurance, in a report made by him to the Acting Minister of Finance for Canada under the provisions of the *Loan Companies Act,* R.S.C., 1927, c. 28, that the licence issued under said Act to said respondent corporation, which corporation was incorporated by special Act, 23-24 Geo. V, (Dom., 1933), c. 63 (amended by 24-25 Geo. V, c. 68), be renewed with a certain qualification or limitation with regard to charges to be made for expenses in connection with loans or renewals of loans under certain provisions in respondent's said special Act.

The facts and issues in question before the Exchequer Court are set out in the said judgment of Maclean J. (1). He held that the said qualification or limitation was not justified upon the circumstances and the said special Act, and that the Superintendent was not empowered, in the facts and circumstances of the case, to refuse to respondent an unconditional licence or to impose the qualification or limitation which he did upon the grounds taken by the Superintendent; further, that the matters alleged to be contrary to respondent's Act of incorporation were not of the character contemplated by the *Loan Companies Act* as a ground for refusing an unqualified licence. The ruling of the Superintendent was vacated and set aside.

On appeal to the Supreme Court of Canada, after hearing argument of counsel, the Court reserved judgment, and on a subsequent day pronounced judgment that the appeal fails for want of jurisdiction and is dismissed with costs. The following reasons were delivered:

THE COURT—In our opinion this appeal is precluded by section 83 of the *Exchequer Court Act.*

It is not shown that, in the "judicial proceeding" in the Exchequer Court out of which the appeal arises, "the actual amount in controversy" exceeds "the sum or value of $500." We think the matter immediately and

(1) [1938] Ex. C.R. 194; [1938] 4 D.L.R. 225.

directly involved in the appeal to the Exchequer Court from the recommendation of the Superintendent of Insurance is not susceptible of evaluation in terms of money.

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Appeal dismissed with costs, for want of jurisdiction.

S. M. Clark K.C. and *Alastair Macdonald* for the appellant.

L. A. Forsyth K.C. for the respondent.

LILLIAN C. SERSHALL, ADMINISTRATRIX OF THE ESTATE OF ALAN LOUIS SERSHALL (PLAINTIFF) ..... APPELLANT;

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* March 20, 21, 22.
* June 27.

AND

TORONTO TRANSPORTATION COMMISSION (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Collision between street car and milk-wagon at street intersection—Responsibility for accident—Findings of jury—Interpretation of findings—Evidence—Negligence and responsibility in law—Proximate cause of accident—Duty of appellate court when asked to reverse decision, on the evidence, of trial tribunal.

The action was for damages for the death of the driver of a horse-driven milk-wagon through collision at a street intersection in the city of Toronto. Defendant's street car, proceeding easterly along D. street (a "through" highway), struck the wagon as it was crossing the tracks. At the trial the street car motorman testified that when he saw the horse approaching the D. street line he shut off the power, "fanned his brakes" (braked car to check speed) and after slackening the car down sounded the gong; that the horse after entering D. street started to turn eastward but was jerked by the reins so that it crossed the tracks; that when he saw the horse was going to cross he applied the emergency brake. The case was tried with a special jury, who found that the motorman was guilty of negligence causing the collision, in that, as stated in their answer to question 2 submitted to them, "the evidence indicates that he was conscious of danger when he fanned his brakes and at that time did not bring his car under such control that it could have been stopped, if necessary, in time to have avoided the

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

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collision"; and that deceased was not guilty of any negligence that caused or contributed to the collision; and plaintiff recovered judgment. This judgment was reversed by the Court of Appeal for Ontario, [1938] O.R. 694, which held that there was no reasonable evidence to support the finding against defendant's motorman, and that it did not constitute a finding of negligence in law, and that all the evidence indicated clearly that the deceased was guilty of negligence which was the proximate and effective cause of the accident. Plaintiff appealed.

Held (Crocket and Kerwin JJ. dissenting): Plaintiff's appeal should be allowed and the judgment at trial restored.

Per the Chief Justice: The jury's answer to question 2 should not be read as referring solely to the motorman's evidence or as founding the inference that he was "conscious of danger when he fanned his brakes" upon the fact that he fanned his brakes alone, or upon the motorman's evidence alone; it was stating an inference from the whole of the evidence. Considering all the evidence, there was evidence from which the jury might or might not conclude, according to their view of it, that the motorman realized what the deceased was doing (that he was in the act of crossing the street) in time to avoid a collision if he acted with reasonable promptitude. The jury taking the view that the motorman became aware of what the deceased was doing in time to enable him to bring his car under sufficient control to let the horse and wagon pass, and that his failure to do so was unreasonable and negligent, it was for the jury to say, on the whole evidence, whether, notwithstanding deceased's conduct, the motorman's negligence was the sole cause of the accident and whether deceased should be acquitted of contributory negligence in the legal sense (*Calgary* v. *Harnovis*, 48 Can. S.C.R. 494; *Long* v. *Toronto Ry. Co.*, 50 Can. S.C.R. 224; *Loach's* case, [1916] 1 A.C. 719; *Columbia Bitulithic* v. *B.C. Elec. Ry.*, 55 Can. S.C.R. 1; *Leech* v. *Lethbridge*, 62 Can. S.C.R. 123; *Athonas* v. *Ottawa Elec. Ry. Co.*, [1931] S.C.R. 139; *Nixon* v. *Ottawa Elec. Ry. Co.*, [1933] S.C.R. 154).

Per Davis J.: Though lack of care on the part of deceased was closely relevant to the enquiry for the jury, the vital question was: whose negligence was the direct cause of the collision? The jury were the tribunal of fact. Their verdict should not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it. The jury were entitled, upon all the evidence, to find, as they did, that defendant was solely to blame. (*The Eurymedon*, [1938] P. 41, at 49-50, cited).

Comment with regard to the practice adopted in the case, in the jury visiting the *locus* and other places for inspections. *Seneviratne* v. *The King*, [1936] 3 All E.R. 36, at 51, referred to.

Per Hudson J.: There was evidence on which, if taken together with what may well have been unspoken impressions properly influencing the minds of the jurors when seeing and hearing the witnesses, and taking into account the jurors' special qualifications in this case, they could reasonably come to the conclusion at which they arrived. (*Clarke* v. *Edinburgh & District Tramways Co.*, 1919 S.C. (H.L.) 35,

at 36; *Powell* v. *Streatham*, [1935] A.C. 243, at 257, cited as to the duty of a court of appeal when asked to reverse the decision of a trial tribunal).

Per Crocket J., dissenting: The evidence established indisputably that the emergency out of which the accident arose was created by negligence of deceased. Only a valid unequivocal finding that the motorman, notwithstanding deceased's negligence in creating the danger, could by the exercise of due care have avoided the collision would justify fixing responsibility upon defendant. Such a finding of ultimate negligence against the motorman could not in the light of the evidence be fairly and reasonably spelled out of the jury's answers. Their answer to question 2 involved acceptance of the motorman's evidence that he fanned his brakes when he saw the horse approaching the street line, and also implied that the mere fact that he did so established that he must have then become conscious of some danger which made it his immediate duty to bring his car under such control that it could be stopped in time to avoid a collision in case he should find that deceased was actually going to take the risk of crossing in front of the street car. The assumption that under the circumstances there was such duty is not justifiable, and a finding of negligence based thereon is not valid. Also the jury's answer to question 2 cannot, having regard to the entire testimony, fairly be taken as involving a rejection of the motorman's statement as to the horse starting to turn eastward. The jury's finding exonerating deceased from all blame for the collision was perverse. The only verdict reasonably possible upon the evidence, including those portions of the motorman's evidence which the jury must, upon a fair interpretation of their answer to question 2, be taken to have accepted, was that the motorman could not by the exercise of reasonable care and skill have avoided the collision which followed deceased's unquestionable negligence in entering and blindly crossing a through highway without stopping, and that the collision was therefore caused solely by deceased's own fault.

Per Kerwin J., dissenting: The evidence was such that no jury with a proper appreciation of their duties could make the finding they did. Further, the fact that the motorman, upon seeing the horse and wagon, took the precaution to "fan" his brakes is not evidence that he was negligent in not anticipating that deceased would cross the tracks in front of the on-coming street car. The jury's finding that deceased was not guilty of negligence was perverse.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1), allowing the defendant's appeal from the judgment of Roach J. upon the verdict of the jury at trial in favour of the plaintiff.

The action was brought to recover damages by reason of the death of the plaintiff's husband as the result of a collision between a milk-wagon which he was driving and a street car of the defendant at about 8.30 a.m. on January

(1) [1938] O.R. 694; [1938] 4 D.L.R. 369.

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28, 1938, at the intersection of Dupont street and St. George street in the city of Toronto. The circumstances of the accident are set out and the evidence thereon discussed in the judgments now reported.

The plaintiff was the administratrix of the deceased's estate and sued to recover under the *Fatal Accidents Act* and also, on behalf of deceased's estate for deceased's loss of expectation of life, under the *Trustee Act*.

The case was tried before Roach J. and a special jury. The jury, in answers to questions submitted to them, found that the motorman of the street car was guilty of negligence that caused or contributed to the collision, in that

> the evidence indicates that he was conscious of danger when he fanned his brakes and at that time did not bring his car under such control that it could have been stopped, if necessary, in time to have avoided the collision with the milk-wagon.

and that the deceased was not guilty of any negligence that caused or contributed to the collision. They assessed the damages of the plaintiff under the *Fatal Accidents Act* at $10,000 and under the *Trustee Act* (for the deceased's loss of expectation of life) at $5,000. Judgment was given for the plaintiff accordingly.

The defendant appealed to the Court of Appeal for Ontario. That Court allowed the appeal and dismissed the action, holding that there was no reasonable evidence to support the finding against defendant's motorman, and that it did not constitute a finding of negligence in law, and that all the evidence indicated clearly that the deceased was guilty of negligence which was the proximate and effective cause of the accident (1).

The plaintiff appealed to this Court.

R. Roy McMurtry and *Ernest J. R. Wright* for the appellant.

T. N. Phelan K.C. and *A. H. Young K.C.* for the respondent.

THE CHIEF JUSTICE.—I do not read the jury's answer to question No. 2 as referring solely to the evidence of the motorman, or as founding the inference that the motorman was "conscious of danger when he fanned his brakes"

(1) [1938] O.R. 694; [1938] 4 D.L.R. 369.

upon the fact that he fanned his brakes alone, or upon the evidence of the motorman alone. I read it as stating an inference from the whole of the evidence.

The motorman says that, seeing the horse emerging into Dupont street, he fanned his brakes and threw off his power, or, as he also puts it, he "immediately checked" his "speed and fanned" his "brakes".

The jury evidently accepted as a fact that the motorman "fanned his brakes". I think the fact that he did so in the circumstances mentioned, together with the circumstance that he gave this evidence, was something which the jury might take into account together with all the other facts in evidence in considering the question whether, when his attention was attracted to the horse and wagon, he did in fact become "conscious of danger". The jury were not bound to accept the motorman's evidence as a whole, or to reject it as a whole. It was for them to decide whether the "excuse" put forward by him was his real reason for not acting sooner, and if not, what significance was to be ascribed to his asseveration that he had no other "excuse".

Considering the motorman's admissions on cross-examination, together with the evidence of Miss McArthur, Mrs. Bateman and Edwards, there was evidence from which they might or might not conclude, according to their view of it, that the motorman realized what the deceased was doing, that is to say, that he was in the act of crossing the street, in time to avoid a collision if he acted with reasonable promptitude.

Edwards' evidence is most important. He says the horse and wagon crossing Dupont street constituted an obstacle preventing him turning his car from Dupont street into St. George street, but at that time the street car was at such a distance, that it alone would have presented no obstacle to making this turn.

If the jury took the view, which I think they have expressed, that the motorman became aware of what the deceased was doing in time to enable him to bring his car under sufficient control to let the horse and wagon pass, and that his failure to do so was unreasonable and negligent, it was for them to say, on the whole evidence, whether notwithstanding the conduct of the deceased, the motorman's negligence was the sole cause of the accident and

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whether the deceased should be acquitted of contributory negligence in the legal sense (*Calgary* v. *Harnovis* (1); *Long* v. *Toronto Rly. Co.* (2); *Loach's* case (3); *Columbia Bitulithic* v. *B.C. Electric Rly.* (4); *Leech* v. *Lethbridge* (5); *Athonas* v. *Ottawa Electric Rly. Co.* (6); *Nixon* v. *Ottawa Electric Rly. Co.* (7)).

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

CROCKET J. (dissenting)—The evidence establishes beyond controversy that the emergency, out of which this tragic accident arose, was created by the negligence of the intestate himself in driving his horse and milk wagon from the south into a through east-west highway without stopping at the street line, when the windows of the wagon were so frosted as to prevent his seeing to the west, and then proceeding blindly to cross the street railway tracks when standing with his right foot on the outside step below the middle right side door and it was impossible for him to see the approaching eastbound tramcar, by which the wagon was hit and overturned.

The crucial issue between the parties as developed on the trial was as to whether, notwithstanding the indisputable negligence on the part of the intestate in entering and proceeding to cross Dupont street as he did, the tramcar motorman by the exercise of due care on his part could have avoided the collision. If he could have prevented it by exercising due care and failed to do so, his negligence in that regard would, of course, be its real and sole cause; otherwise the calamitous result would obviously be attributable only to the negligence of the deceased in creating an unavoidable danger. If the emergency were created by negligence on the part of both the intestate and the motorman and neither by exercising proper care could have avoided the result which followed, it would be a clear case of contributory negligence, and the jury's duty to apportion the damages under the provisions of the *Negligence Act* according to the degree of fault attach-

(1) (1913) 48 S.C.R. 494.
(2) (1914) 50 S.C.R. 224.
(3) *British Columbia Electric Ry Co. Ltd.* v. *Loach*, [1916] 1 A.C. 719.
(4) (1917) 55 Can. S.C.R. 1.
(5) (1921) 62 Can. S.C.R. 123.
(6) [1931] S.C.R. 139.
(7) [1933] S.C.R. 154.

ing to each. Only a valid unequivocal finding that the motorman, notwithstanding the negligence of the deceased in creating the danger, could by the exercise of due care have avoided colliding with the milk wagon would justify the fixing upon him of the sole responsibility for the unfortunate result.

The substantial question upon which, in my view, the decision of this appeal turns is whether or not such a finding of ultimate negligence against the motorman can in the light of the evidence be fairly and reasonably spelled out of the jury's answers to the three written questions which the learned trial judge submitted to them after conferring with the opposing counsel. These three questions and the answers thereto were as follows:

1. Was the motorman guilty of any negligence that caused or contributed to the collision? Answer Yes or No.

A. Yes.

2. If so, in what did such negligence consist? Answer fully.

A. The evidence indicates that he was conscious of danger when he fanned his brakes and at that time did not bring his car under such control that it could have been stopped, if necessary, in time to have avoided the collision with the milk wagon.

3. Was the deceased Allen Sershall guilty of any negligence that caused or contributed to the collision? Answer Yes or No.

A. No.

The important answer is the one to question 2, by which the jury purported to state what the particular negligence on the part of the motorman was that caused or contributed to the collision.

As knowledge of the motorman's own account of what transpired in relation to the operation of the tramcar and the movement of the horse and wagon immediately preceding the collision is so obviously essential in order to fully understand the import of this answer, I think the material features of his evidence should first be stated.

The tramcar had made its last stop at Huron street, which, according to the scale of the streets plan in evidence, is about 270 feet west of St. George street, measuring from curb to curb. The motorman says that when he left Huron street he went gradually from zero to about 18 to 20 miles per hour and attained his greatest speed (18 to 20 miles) when he was about half way to St. George street. When the front of the tramcar was $2\frac{1}{2}$ to 3 car lengths, roughly speaking, from the west sidewalk

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of St. George street (which would be from 112½ to 135 feet), he first observed the horse and wagon on St. George street. The horse was then walking north on that street about 4 feet south of the south sidewalk of Dupont street, a shade to the east, as far as he could see, from the centre of St. George street. When he saw the horse approaching the Dupont street line he threw off his controller, i.e., shut off the power, "started to brake (his) car up to check (his) speed"—fan his brakes, as he explained, and after slackening the car down sounded the gong. He estimated that immediately after shutting off the power and fanning the brakes his speed had been reduced to about 12 to 15 miles per hour. By this time, he said, the tram was about 1½ car lengths from the west side of St. George street, (67½ feet), as near as he could give it, not professing to state it exactly but only as his best judgment. At that moment the horse and wagon were coming up to the sidewalk (Dupont street), the horse's head being about the north edge of the Dupont street southerly sidewalk. There, he said, the horse started to turn east (on Dupont street) and proceeded in that direction until its head was jerked to the left by someone pulling the reins, when it "pulled on the load and came across the track at a trot in a northwesterly direction." The horse's head when it was jerked and it started to trot, he estimated, was about 3 or 4 feet clear of the southerly rail of the street car track, which the plan shows is about 11½ feet from the southerly curb at Dupont street. It seems to have been taken for granted by all that the length of the horse would be about 8 feet. At that moment, he testified, he was about a car length (practically 45 feet) from the path of the horse. Up to that moment, he swore, he had no indication whatever that the horse might cross the track. He immediately slapped the emergency on as fast as he humanly could and held it right over. While the car was slowing down the horse was coming across the track in a northwesterly direction at an angle in front of him and he said it was impossible for him to stop the car before he reached the path where the horse and wagon were crossing the track but that the car moved only about 1 or 2 feet after the impact, which took place between the front and rear wheels of the wagon, he thought about the middle of the wagon step.

In cross-examination he was asked if it was not a fact that the only reason he had for not stopping sooner than he did was that the horse first turned to the east at the point where it did and answered that he had no other excuse. To a further question as to whether when he fanned his brakes he put a little pressure on the brake valve and dropped a little sand he answered "No." Asked if he could tell what his speed was when the car passed the west curb of St. George street or was approaching the west curb approximately, he said he could give a rough idea and imagined it was going about 4 miles per hour.

There seems to be no doubt that the collision occurred at or a little beyond the prolongation of the centre line of St. George street, which, according to the plan, measures 34 feet 6 inches.

It should be particularly noted that, according to the motorman's evidence, when he fanned his brakes he was about 2½ to 3 car lengths or from 112½ to 135 feet west of the west sidewalk of St. George street and that when he applied the emergency brake he was about a car length or 45 feet from the path of the horse, which at that moment, when its head was jerked and it started to trot to cross the track, was about 3 or 4 feet clear of the southerly rail.

Reverting now to the jury's answer to question 2, it is manifest in the first place that it involves the acceptance of the motorman's evidence regarding the fanning of his brakes when he first observed the horse walking north on St. George street about 4 feet south of the south line of Dupont street. It implies also, to my mind, that the mere fact that he fanned his brakes at that time established that he must have then become conscious of some danger, which made it his immediate duty to bring his car under such control that it could be stopped in time to avoid a collision in case he should find that the driver of the horse and milk wagon was actually going to take the risk of crossing the street car track in front of him. Indeed, the whole finding, it seems to me, is founded upon that assumption and would, if there were no other objection to it, be invalid as consonant with neither legal principles nor common sense.

Surely it cannot reasonably be assumed that at any time a motorman driving a tramcar along a through high-

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way in such a city as Toronto sees from a distance of 112 to 135 feet a vehicle approaching the street line, he must take it for granted that the vehicle is actually going to cross the tram line without stopping, and at once bring his car under such control that it could be instantly stopped if this should actually turn out to be the case. If this finding, so obviously based upon that assumption, is to be recognized as a valid finding of negligence, it is difficult to see how the ever-increasing public demand for rapid transit in our larger cities can be satisfactorily met by street car systems at all. In any such case there is surely more likelihood of the vehicle turning right than there is of its entering the through street in flagrant violation of both the city by-law and the provincial *Highway Traffic Act* and proceeding without stopping at all directly across the tram car line regardless of the latter's dominant right of way.

In the case at bar the motorman swore that when the horse reached the southerly line of Dupont street it started to go round the corner to the right when it was suddenly jerked to the left by a pull of the reins and instantly was within about 3 or 4 feet of the southerly rail. Then and then only, according to his evidence, was it that he realized that the horse and wagon were going improperly to cross the track and it was at that moment that he applied the emergency brake.

The answer to question 2 which, as I have said, indicates an acceptance of the motorman's evidence as to the fanning of his brakes, cannot, in my opinion, having regard to the entire testimony, fairly be taken as involving a rejection of the motorman's statement that the horse on reaching the corner of the curb started turning east. In this connection a witness for the plaintiff, Lloyd, another milk delivery driver of the same company, disclosed in cross-examination that the deceased sometimes in the course of his morning rounds had coffee with him at a restaurant on the south side of Dupont street about 150 to 200 feet east of St. George street and that usually when they came to the restaurant for coffee they left their horses around the corner on Davenport street, 25 or 30 feet away, where they were given something to eat. When asked, however, if this occurred more or less regularly, he replied, "Not regularly, no." It is difficult to conceive what stronger

confirmation there could be of the motorman's statement about the horse starting to turn east or how a jury, conscious of its duty to find a true verdict according to the evidence, could ignore this significant fact, disclosed by one of the plaintiff's own witnesses, and reject the positive statement of the motorman merely because the only other witness, who was specifically asked about it (Miss Rumsey, a passenger on the street car), said she did not notice the horse starting to turn east, though she did see the reins jerked and the horse hurried across the track. To anyone at all familiar with the peculiarly knowledgeable habits of horses constantly employed on regular delivery routes the fact disclosed by Lloyd would, I should think, commend itself as almost infallible proof of the horse's tendency and desire to turn east at this particular corner towards the restaurant and the place where it was frequently provided with food. I am not disposed, therefore, to read into this dubious answer, which the jury made to question 2, a rejection of the motorman's evidence that he saw the horse starting to turn east—a fact which would surely seem to afford a much more convincing explanation of the real danger with which the motorman was confronted when he so suddenly and alertly applied his emergency brake than the highly improbable hypothesis that it was apparent to him even before the horse entered Dupont street that its driver was going to pay no attention either to the city by-law or the provincial statute or to the tramcar's undoubted right of way and take the risk of crossing ahead of him.

The answer not only contradicts the assumption, upon which it is so obviously based, but it is, in my opinion, manifestly inconsistent in itself. While it plainly implies that the actual cause of the collision was the motorman's inability to stop his car in time to avoid hitting the milk wagon, the only negligence it finds against him in that connection is that "when he fanned his brakes" he did not then "bring his car under such control that it could have been stopped, *if necessary,* in time to have avoided the collision." If this means anything it means that the necessity of the motorman's having to stop his car at all was not apparent when he fanned his brakes and did not become apparent until it was too late to avoid the collision. That surely is not a valid finding of negligence against

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the motorman either causing or contributing to the collision. No doubt if the motorman had disabled himself by a prior negligent act or omission from stopping his car by the use of his emergency brake his antecedent negligence might well be linked with his inability to thus stop the car as the proximate cause of the collision. But how could he reasonably be said to be guilty of any negligence at all when he fanned his brakes after shutting off his power and reduced his admittedly moderate speed of 18 to 20 miles per hour to 12 or 15 miles per hour if at that time there was no reason for him to anticipate that the use of the emergency brake to avoid a collision would be necessary at all? The "danger" of which the jury found him to be conscious at that time, was quite apparently the mere possibility that the milk delivery driver *might* venture across the street and the railway line ahead of the approaching tramcar in defiance of the provisions of the city by-law and the provincial statute and the tramcar's right of way. The real danger with which the motorman was confronted when he applied the emergency brake was the eventual occurrence of this extraordinary and naturally unexpected and remote contingency. It was then impossible for him to avoid the collision, as the finding of the jury so clearly implies.

For the reasons which already, I think, sufficiently appear, I have concluded that the answer to question 3, by which the jury completely exonerated the intestate from all blame for the collision, is wholly unjustified. I agree with the appeal court that the finding must in the circumstances be considered perverse.

The only verdict reasonably possible upon the undisputed facts disclosed in the evidence and upon those portions of the motorman's own testimony, which the jury must upon a fair interpretation of their answer to question 2 be taken to have accepted, was that the motorman could not by the exercise of reasonable care and skill have avoided the unfortunate result, which followed the deceased's unquestionable negligence in entering and blindly crossing a through highway without stopping, and that the collision therefore was caused solely by the deceased's own fault.

I would dismiss the appeal with costs if demanded.

DAVIS J.—This was a case of a collision between a street car and a horse-driven milk wagon at the corner of Dupont and St. George streets in the City of Toronto. The driver of the milk wagon was killed and this action was brought by his widow as administratrix against the Toronto Transportation Commission for damages, alleging negligence in the operation of the street car which was owned and operated by the Commission. The plaintiff claimed damages under *The Fatal Accidents Act* on behalf of dependents and also damages under *The Trustee Act* on behalf of the deceased's estate for loss of expectation of life.

The case was essentially one of fact. It was tried with a special jury in Toronto. The jury not only heard a great deal of testimony from eye-witnesses, but they visited the *locus* and went to the street car barns and inspected and examined the street car in question, and they also inspected and examined the particular milk wagon. This was done, not only in the presence of the solicitors for both parties, but apparently with their full support. Each, no doubt, expected to gain by this procedure and in fact they raise no complaint now. I should not care to be taken, however, as approving the practice of a jury of twelve spending, as we were told by counsel during the argument, most of a morning during the course of a trial visiting different places and making inspections and examinations of their own. They are very apt to become separated in little groups and to discuss different angles of the case among themselves in groups. I cannot see any real difference between such a practice in a civil from that of a criminal case, and would refer to the observations in the Privy Council in a judgment delivered recently by Lord Roche in the criminal case of *Seneviratne* v. *The King* (1). It was there said, at p. 51, that it is clear that precautions must be taken to secure that everything done upon such a view being had must be absolutely fair and impartial, and that no questions must be asked and answered in the absence of the other party, and that the jury must, as far as possible, be kept together and not be given the opportunity of discussing the matter in groups or making separate experiments in the matter of

(1) [1936] 3 All E.R. 36.

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sounds, etc. I merely refer to this aspect of the trial of the present case so that it may not be taken that I approve of the practice adopted. But it was adopted; it is not suggested that it was not at the request of both parties. At any rate, it was not made the ground of any objection.

The jury found that the operator of the street car was solely to blame. The Court of Appeal set aside the judgment entered upon the verdict on the ground that, in their opinion, there was no reasonable evidence to support the finding against the defendant's motorman and that it does not constitute a finding of negligence in law and that all the evidence indicates clearly that the deceased was guilty of negligence which was the proximate and effective cause of the unfortunate casualty which resulted in his death. From that judgment appeal has been taken to this Court.

It is not permissible for us to analyze all the conflicting evidence in the case in an endeavour to come to our own conclusions on the facts. It is not our duty or our right to re-try the case; the special jury was in this case the tribunal of fact. We have only to ask ourselves whether or not the jury, acting reasonably and justly, could have reached the conclusion they did upon the evidence.

I am satisfied that if the jury accepted, as I think they must have accepted, the evidence of Miss McArthur and others who corroborated her on vital points, they could very fairly and reasonably have arrived at the conclusion they did. While there is a great deal of conflicting evidence, there was evidence upon which the jury was entitled to conclude, as they did, that the direct cause of the death of the driver of the milk wagon was not any act of negligence on his part but the failure of the operator of the street car—seeing the horse and wagon in the path of his car—to reduce the speed of the car at a time and to such an extent that the collision would have been avoided.

Miss McArthur was a passenger in the street car and had a full view of the situation which confronted the motorman. She was sitting very near the vestibule of the car and was looking out the front windows of the car.

She appears to have seen everything that the motorman himself saw or ought to have seen. The accident happened about eight-thirty o'clock in the morning. Miss McArthur was on her way to her work. She was a graduate of the University of Toronto and had taken a teachers' course at the Ontario College of Education but was at the time secretary to Mr. R. S. Robertson, K.C. (now the Chief Justice of Ontario). She was a well-educated, intelligent young woman, and one can quite understand any jury accepting her story as perhaps more exact than that of some other witnesses.

It was cold—zero weather; the street car was travelling easterly on Dupont street (on the southerly tracks); the horse and wagon had entered Dupont street from St. George street on the south; milk had been delivered at the house on the southeast corner of Dupont and St. George streets. When Miss McArthur first saw the horse and wagon they were "just entering Dupont street" from St. George. The horse was out on Dupont street; she did not think it had then reached the car tracks but was only a few feet from them. The driver of the milk wagon, she says, was evidently in the act of making a left-hand turn. The horse and wagon was the only object moving in or about the intersection. The glass windows in the milk wagon were completely frosted and closed. There was nothing to obstruct in any way the view of the motorman. The front of the street car was then, Miss McArthur says, half-way between Huron and St. George streets. The motorman said that as near as he could describe it, when he first observed the horse and wagon the front of his car was two and a half to three car lengths from the west sidewalk of St. George street. Miss McArthur says the motorman did not slow down—there was no perceptible diminution of speed. "We came very close to the wagon and the wagon seemed to clear—the instant before we hit, he (the motorman) jammed on his brakes very suddenly. I would say that with a fraction of a second more, we would have cleared the milk wagon." Miss McArthur says that she could see it (i.e., the horse and wagon) herself "for some time before we hit it." She says the motorman "finally" acted quickly, but "he didn't act soon enough. * * * He jammed on his brakes very quickly." She did not hear any gong sounded.

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The effect of the evidence of Miss McArthur is that the motorman had a full view of the horse and wagon in a position of danger and did not slow down his speed until it was too late.

Mr. Geoffrey Edwards, a partner in the firm of Edwards, Morgan & Co., of Toronto, Chartered Accountants, was motoring down town on the morning of the accident; he had come down Poplar Plains road from St. Clair avenue and had turned west on to Dupont street in order to proceed down town via St. George street. St. George street does not extend north beyond Dupont street. He had only a short block to go on Dupont street from Poplar Plains road before he could turn down St. George street. On Dupont street he was travelling in the opposite direction to that of the street car, and therefore had a view of the accident from a position opposite to that of Miss McArthur in the street car. He said that after he had gone along Dupont street "a few feet, not very far along," he saw the street car "down in the distance, some distance down the track, and I saw a milk cart either entering or about to enter the intersection of St. George and Dupont streets." He proceeded along Dupont street a little farther west and then stopped on the northerly pair of street car rails. He stopped his car, he says, "about fifty odd feet from where the accident happened." He observed at that time that "the street car was coming towards me and the milk wagon was crossing from St. George street, making a curve to the left, apparently to go west on Dupont street." The milk wagon, he says, was "almost clear of the north rail" (obviously he means of the two southerly rails on which the street car was travelling easterly) "when the street car struck it." He was asked in cross-examination:

> Q. When you arrived at the east side of St. George street, the street car was so near the intersection that you didn't consider it prudent to try to pass in front of it?

And his answer was:

> A. As a matter of fact, my reaction was that the milk wagon was the chief obstacle in the way of my getting around. * * * Had it not been for the milk wagon I could have made my turn. It might have been running it slightly close with the street car, but I couldn't say.

Having seen the street car, as he said, "down in the distance" and that the milk wagon was the chief obstacle

which made him stop his car before turning into St. George street, the plain inference was open to the jury that there was a considerable distance at that time separating the milk wagon from the approaching street car.

Miss Rumsey, who was the only eye-witness of the accident except the motorman called by the respondent, was a passenger in the street car. She was sitting on one of the cross seats which are some distance back from the vestibule of the car. She says that, judging from the speed of the street car, she would expect it "could stop pretty quickly." Having seen the horse and wagon, she said she "looked to see what the motorman was doing."

Q. And when did you look to see what the motorman was doing?
A. Well, when I realized that the horse was going to keep on coming through.
Q. You realized that the horse was going to keep on coming through and you wanted to see what the motorman was going to do?
A. Yes.

As to the motorman's statement that he thought that the horse and wagon were going to turn east on Dupont street rather than attempt to cross, she was asked this question:

Was there any indication of any kind to you that it was going to turn east, from your observation?

To which she answered:

I didn't think so. I thought it was coming straight on through.

The evidence of the motorman was that he "fanned the brakes" at a point when the street car was about one and a half car lengths from the west side of St. George street, "as near as I could give it. I am not stating it exactly."

In the case of *The Eurymedon* (1), Lord Justice Greer laid down several rules at pp. 49-50. It is sufficient if I quote two of these rules. The first is this:

(i) If, as I think was the case in *Davies* v. *Mann* (2), one of the parties in a common law action actually knows from observation the negligence of the other party, he is solely responsible if he fails to exercise reasonable care towards the negligent plaintiff.

And the second rule is this:

(ii) Rule No. (i) also applies where one party is not in fact aware of the other party's negligence if he could by reasonable care have become aware of it, and could by exercising reasonable care have avoided causing damage to the other negligent party.

(1) [1938] P. 41. (2) (1842) 10 M. & W. 546.

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After some discussion with counsel at the conclusion of his charge, the trial judge recalled the jury and explained to them contributory negligence at some length. No objection was taken by counsel for the respondent to what was then said by the learned judge. In part he said:

> In other words, negligence that has no relation to, or was not a factor contributing to, the collision simply has no place in our consideration. The negligence that you may find must be negligence that caused or contributed to the collision.

The jury found that the motorman was guilty of negligence that caused the collision:—

> The evidence indicates that he was conscious of danger when he fanned his brakes and at that time did not bring his car under such control that it could have been stopped, if necessary, in time to have avoided the collision with the milk wagon.

The jury also found specifically that the deceased driver of the milk wagon was not guilty of any negligence that caused or contributed to the collision. They might have found the deceased driver of the milk wagon guilty of contributory negligence, but that was for them to say. They might have taken what may appear to others to be a broad common-sense view of the case that both parties contributed to the result; but that is not to say that they were not entitled to regard the two negligences as successive rather than simultaneous. They were carefully and fully directed upon that aspect of the case. Although lack of care on the part of the deceased driver of the milk wagon was closely relevant to the inquiry, the vital question was: Whose negligence was the direct cause of the collision? And the special jury were the tribunal of fact.

The verdict of a jury should not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it. The jury in this case were entitled on the evidence to find as they did that the defendant was solely to blame.

Counsel for the respondent contended that in assessing the damages under the *Trustee Act* and the *Fatal Accidents Act,* the effect of the jury's verdict is to allow the plaintiff a duplication of damages. Mr. Justice Gillanders pointed out in his judgment in the Court of Appeal that

the learned trial judge had charged the jury that there must be no overlapping of damages, and after illustrating to the jury how that might come about he had pointed out to them that in determining the plaintiff's loss under the *Fatal Accidents Act* they must take into consideration the benefits that would accrue to her under the *Trustee Act,* and consequently, the jury having been specifically instructed to avoid duplication, the assessment of damages was not open to attack on that ground.

The accident had occurred and the action had been commenced before sec. 3 of *The Trustee Amendment Act, 1938,* 2 Geo. VI, ch. 44, had been enacted on April 8th, 1938. That amendment to subsec. (1) of sec. 37 of the *Trustee Act,* R.S.O., 1937, ch. 165, provided

> that if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso shall not be in derogation of any rights conferred by *The Fatal Accidents Act.*

Counsel for the respondent further contended that there had been an election by the plaintiff to take compensation under the *Workmen's Compensation Act* and that the learned trial judge erred in refusing to admit further evidence in that regard. The point was carefully considered in the Court of Appeal and that Court agreed with the trial judge that the evidence did not establish that the plaintiff had made any election as contemplated by the Act, and with that I entirely agree.

I would allow the appeal and restore the judgment at the trial, with costs to the appellant throughout.

KERWIN J. (dissenting)—The Court of Appeal for Ontario allowed an appeal by the defendant, the Toronto Transportation Commission, from the judgment of Roach J. entered against the Commission upon the verdict of a special jury, and dismissed the action. The basis of the judgment of the Court of Appeal, as expressed by Mr. Justice Gillanders, is that there was no reasonable evidence to support the finding of the jury against the Commission's motorman. The plaintiff now appeals.

In answer to question No. 2, the jury found that the respondent's motorman was guilty of negligence, which they explained as follows:—

> The evidence indicates that he was conscious of danger when he fanned his brakes and at that time did not bring his car under such control that it could have been stopped, if necessary, in time to have avoided the collision with the milk wagon.

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Each case must be determined upon its own circumstances, and without detailing the evidence, I am of opinion that it is such that no twelve men with a proper appreciation of their obligations and duties could make the finding set out above. Furthermore, in my opinion the fact that the motorman, upon seeing the horse and wagon, took the precaution to "fan" his brakes is not evidence that he was negligent in not anticipating that the deceased would drive across the south part of Dupont street and into the path of the oncoming street car. The finding of the jury that the deceased was not guilty of contributory negligence is in itself perverse and confirms my view that the answer to the second question is such that no jury doing their duty could have returned.

I would dismiss the appeal with costs, if demanded.

HUDSON J.—This action was tried before Mr. Justice Roach and a jury. On application of the defendants the jury was a "special jury" and to this extent the defendants chose their own forum. The evidence was very lengthy and contradictory. From the record it appears that the jurors displayed a keen and intelligent interest in the facts and in the law applicable thereto. They also examined the *situs* and the vehicles concerned in the accident. After a charge to the jury to which no exception is taken by the defendants, they brought in a verdict that the defendant's motorman was guilty of negligence, that caused or contributed to the collision. The answers of the jury were as follows:

1. Was the motorman guilty of any negligence that caused or contributed to the collision? Answer Yes or No.

A. Yes.

2. If so, in what did such negligence consist? Answer fully.

A. The evidence indicates that he was conscious of danger when he fanned his brakes and at that time did not bring his car under such control that it could have been stopped, if necessary, in time to have avoided the collision with the milk wagon.

3. Was the deceased Allen Sershall guilty of any negligence that caused or contributed to the collision? Answer Yes or No.

A. No.

On this finding a judgment was entered against the defendants for $15,000 damages. This verdict was set aside by the Court of Appeal.

The duty of a court of appeal when asked to reverse the decision of a trial tribunal has been the subject of

much discussion in the courts during recent years but, at the risk of repetition, I will quote two statements which, although given in appeals from a trial judge, apply with even greater force to an appeal where the tribunal of fact, as here, was a special jury.

In *Clarke* v. *Edinburgh and District Tramways Co.* (1), Lord Shaw of Dunfermline said:

> 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.
>
> The present is a street accident case without any undue complications, and I do not see any reason for departing from this ordinary, simple, salutary rule. In the judgments of the Court below I have some doubt whether sufficient stock has been taken of this doctrine, or whether sufficient deference has been paid to the judgment of the learned Lord Ordinary.

and Lord Macmillan in the case of *Powell* v. *Streatham* (2), himself quoting Lord Loreburn, Lord Chancellor, in *Kinloch* v. *Young* (3), stated:

> But this House and other Courts of appeal have always to remember that the Judge of first instance has had the opportunity of watching the demeanour of witnesses—that he observes, as we cannot observe, the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any Court of appeal. Even the most minute study by a Court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say.

(1) 1919 S.C. (H.L.) 35, at 36.
(2) [1935] A.C. 243, at 257. (3) 1911 S.C. (H.L.) 1, at 4.

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Hudson J.

In the present case the Court of Appeal for Ontario, after reviewing the evidence, came to the conclusion that the verdict of the jury was clearly wrong. With respect, I cannot agree with their view. It seems to me that there was evidence on the record, if taken together with what may well have been unspoken impressions properly influencing their minds and taking into account the special qualifications of the jurors here, they could reasonably come to the conclusion at which they arrived. I do not feel that I would be justified in approving of a reversal of their finding and would, therefore, set aside the judgment in appeal and restore the judgment in the court below, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Chitty, McMurtry, Ganong & Wright.*

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

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* Feb. 2, 3.
* May 12.

CANADIAN NATIONAL RAILWAYS COMPANY ..... APPELLANT;

AND

THE BELL TELEPHONE COMPANY OF CANADA AND THE MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railway—Board of Railway Commissioners—Works by railway company authorized by Board pursuant to special statute—Removal of plant and equipment belonging to utilities companies, necessitated by execution of these works—Allocation of costs of such removal by Board—Rule of practice by the Board in analogous cases—Rule applied by order of Board appealed from—Leave to appeal granted by Board—Questions of law—Jurisdiction of the Supreme Court of Canada—Section 52 (3) of the Railway Act.

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

Under the provisions of the *Canadian National Montreal Terminals Act, 1929,* the Governor in Council was authorized to "provide for the construction and completion by the Canadian National Railway Company * * * of terminal stations and offices" etc.; and, more particularly, of viaducts, elevated railways and grade separations between certain streets, mentioned in the Act, situated in the city of Montreal. By order of the 27th of June, 1929, the Governor General in Council provided for "certain terminal facilities, grade separation and other works" in the city of Montreal, as shown upon plans mentioned in the Order in Council; and for the execution of those works, orders of the Board of Railway Commissioners were required in respect of grade separation at street crossings. These orders were applied for by the appellant company and made. As the latter company proceeded with these works, the removal of plant and equipment of the respondents was found from time to time to be necessary; and orders to such effect were accordingly obtained from the Board, the question of the allocation of the costs involved in carrying out the orders being reserved for further consideration by the Board. By a subsequent order of the Board, now under appeal to this Court, it was directed that the appellant should "reimburse the respondents for their reasonable and necessary expenditure incurred and paid in the removal and replacement of their facilities" necessitated by reason of the construction of the works authorized by the several orders of the Board. Leave to appeal to this Court was given by the Board to the appellants in respect of certain questions (contained in full in the judgment now reported) which, in the opinion of the Board, "involve questions of law," but the order did not state that these questions were "in the opinion of the Board * * * questions of law."

Held, dismissing the appeal from the order of the Board of Railway Commissioners, that there is no rule or principle of law inconsistent with the findings and decisions of the Board to which the questions relate.

Held, also, that the questions submitted by the order of the Board were, *ex facie,* not questions of law.

On the assumption that the questions should be read in the following sense: Are the rulings of the Board to which the questions relate inconsistent with any rule of law by which the Board is bound as such?

According to the opinion of the majority of the Board, the works authorized by it, the execution of which necessitated the expenditures to be allocated, were incidental or subsidiary to the primary and controlling purpose of reconstituting the terminal facilities of the appellant; and accordingly, the majority of the Board held that, under a rule upon which the Board had habitually acted in the allocation of costs in analogous cases, such costs ought to be borne by the appellant company.

Held that the question whether the Board in a given case has properly appreciated its own rule of practice, or the consideration upon which that rule is based, cannot be a question of law within the meaning of section 52 (3) of the *Railway Act,* nor can the question, whether in a given case the Board has properly appreciated the facts for the purpose of applying the rule, be a question of law.

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CANADIAN NATIONAL RY. CO. v. BELL TELEPHONE CO. OF CANADA AND MONTREAL L.H. & P. CONS.

APPEAL, by leave of the Board of Railway Commissioners, from an order made by the Board on May 19th, 1937, which directed the appellant to pay the respondents the expense incurred by them pursuant to orders of the Board in adjusting their telephone and electric light and power plant and equipment to certain works of grade separation carried out by the appellant under orders of the Board at the following street crossings in the city of Montreal: Mountain, Guy, St. Remi, Charlevoix and Hibernia. The appeal is on the following questions which in the opinion of the Board involved questions of law:

1. Whether the Board was right in holding that the effect of the *Canadian National-Montreal Terminals Act, 1929,* was to merge the whole question of grade separation in the general scheme for improvement and rearrangement of the railways' terminal facilities in Montreal.

2. Whether there was evidence to justify the Board's opinion and finding that the "protection, safety and convenience of the public" was not the paramount consideration for the works at the crossings in question, but that they were undertaken as part of a comprehensive scheme for the readjustment and improvement of the terminal facilities of the railway in the city of Montreal.

3. Whether there was evidence to justify the Board's opinion and finding that the paramount purpose of the works at Guy, Mountain, St. Remi, Charlevoix and Hibernia street crossings was not the "protection, safety and convenience of the public" within the meaning of the rule as to the allocation of costs laid down in the case of *Toronto* v. *Bell Telephone Company et al.* (1), and other decisions of the Board.

I. C. Rand K.C. for appellant.

P. Beullac K.C. and *N. A. Munnoch* for the respondent The Bell Telephone Company of Canada.

H. Hansard for the respondent The Montreal Light, Heat & Power Consolidated.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This is an appeal by the Canadian National Railways Company by leave of the Board of Railway Commissioners from an order of the Board of

(1) (1935) 43 Can. Ry. Cas. 214.

the 19th of May, 1937, in respect of questions which the Board declares by its order, in the opinion of the Board, involve questions of law.

It is convenient, first of all, to state in a summary way the circumstances and the nature of the application upon which the order of the Board proceeded and the character of the questions raised by the controversy between the parties. By the *Canadian National Montreal Terminals Act, 1929,* the Governor in Council was authorized to

> provide for the construction and completion by the Canadian National Railways Company (hereinafter called the Company) of terminal stations and offices, local stations, station grounds, yards, tracks, terminal facilities, power houses, pipes, wires and conduits for any purpose, bridges, viaducts, tunnels, subways, branch and connecting lines and tracks, buildings and structures of every description and for any purpose, and improvements, works, plants, apparatus and appliances for the movement, handling or convenient accommodation of every kind of traffic, also street and highway diversions and widenings, new streets and highways, subway and overhead streets, and also approaches, lanes, alleyways, and other means of passage, with the right to acquire or to take under the provisions of section nine of this Act or otherwise lands and interest in lands for all such purposes, all on the Island of Montreal in the Province of Quebec, or on the mainland adjacent thereto, as shown generally on the plan or plans thereof to be from time to time approved by the Governor in Council under the provisions of section seven of this Act; the whole being hereinafter referred to as "the said works," and a short description whereof for the information of Parliament but not intended to be exhaustive, being set out in the schedule hereto.

Subsections (*b*), (*d*), (*e*) and (*f*) of the schedule, with which the order of the Board is particularly concerned, are as follows:

> (*b*) Viaduct and elevated railway between Inspector and Dalhousie Streets, and St. David's Lane and Nazareth Street to near Wellington Street, and thence along Wellington Street to Point St. Charles Yard and Victoria Bridge, crossing over existing streets, and with connections to existing railway facilities and Harbour Commissioners' trackage;
>
> (*d*) Grade separation by means of elevated, or depressed, or underground tracks, or streets, as may be determined on the existing railway between Bonaventure and Turcot and connection to the viaduct referred to in paragraph (*b*);
>
> (*e*) Grade separation by means of elevated, or depressed, or underground tracks, or streets, as may be determined between St. Henri and Point St. Charles;
>
> (*f*) Railway from Longue Pointe yard to the North west and thence Southwest to connect with the existing railway at and near Eastern Junction.

By section 3, the Company was authorized to issue securities in respect of the construction and completion of the works authorized on the guarantee of the Government of Canada to an amount not exceeding $50,000,000.

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By order of the 27th of June, 1929, the Governor General in Council provided, under the authority of this statute (which I shall refer to as the Terminals Act) for "certain terminal facilities, grade separation and other works" as shown upon plans mentioned in the Order in Council; and for the execution of those works orders of the Board of Railway Commissioners were required in respect of grade separation at street crossings. These were applied for by the Company and made.

As the Company proceeded with these works, the removal of plant and equipment of the respondents was found from time to time to be necessary; and orders to such effect were accordingly obtained from the Board. In each case the order provided that the question of the allocation of the costs involved in carrying out the order should be reserved for further consideration by the Board.

By the order now under appeal, it was directed that the appellants should

> reimburse the respondents for their reasonable and necessary expenditure incurred and paid in the removal and replacement of their facilities

necessitated by reason of the construction of the works authorized by the several orders of the Board.

The question for determination by the Board was, of course, whether the costs with which this order deals should be borne by the appellants or wholly or in part by the respondents. And the general principle by which the Board conceived itself to be governed in determining that question is lucidly stated by the learned Chief Commissioner in the following passages from his judgment:

> The general principle upon which the Board has acted for many years may be briefly stated as follows: When an application is made for grade separation by a railway company, or by a municipality, either for the greater convenience or facility of the applicant in the movement of traffic or for the rearrangement of streets and which may ultimately result in affording greater protection and safety to the public who use the crossing, the Board deems that the matter of greater convenience or improved facility to the applicant constitutes the main purpose of the application, and that improved crossing protection is merely incidental to the main purpose. In such cases where the removal of the plant and equipment of utility companies is ordered, the cost of such removal is placed upon the applicant. Upon the other hand, where the paramount reason for grade separation appears to be the protection, safety, and convenience of the public in the use of the crossing, and where the removal of the plant and equipment of utility companies becomes necessary, the Board has decided in many cases that under such circumstances the cost of removal and erection of equipment should

be borne by the utility companies. While it is true that utility companies neither create nor aggravate the danger at grade crossings, nor do they benefit from grade separation, the Board has always considered that where the project is in reality *pro bono publico,* utility companies should bear the expense of moving their plant and equipment for the free use of streets enjoyed by them.

* * *

In my opinion the first question to be decided in regard to these applications is whether the work performed by the railway was essentially designed for the protection and convenience of the public at the various grade crossings in the city of Montreal which were affected by the general scheme, or whether the whole work was not one designed for the readjustment and improvement of the terminal facilities of the railway company in the city of Montreal. If the work was designed essentially for the purpose of grade crossing protection, in my opinion, following the authorities upon the subject and the general practice in such matters of this Board, the applicants cannot reasonably claim to be reimbursed for the cost of removal of their plant and equipment from the streets affected. They should each be called upon to contribute the cost of such removal for the purpose of granting protection and safety to the public at grade crossings. But, on the other hand, if the paramount purpose of the scheme authorized by the Act above referred to was the readjustment and improvement of the terminal facilities of the railway company in Montreal, the protection at grade crossings being only incidental to the general purpose, then I consider that, under the authorities and the practice of this Board, the railway company should pay the cost of the removal of plant and equipment as a part of the cost of the work authorized by Parliament.

The conclusion is stated as follows:

My view of the situation in regard to the questions which arise in the present applications is that the protection, safety and convenience of the public was not the paramount consideration which caused these works to be undertaken, but that they were undertaken, as stated in the judgment of the Privy Council, as a part of a comprehensive scheme for the readjustment and improvement of the terminal facilities of the railway in the city of Montreal. Any protection of railway crossings which might ultimately result from the carrying out of the work was purely incidental to the general scheme. It may have been to some extent a contributing factor but it certainly was not the paramount consideration.

I think the whole terminal scheme should be considered as a single definite project for the betterment of the railway terminal facilities in Montreal. The estimates submitted covered the whole undertaking. The whole work was to be financed by the railway under the provisions of the Terminals Act, save in respect of contributions which might be made as provided in sections 7 and 8 of the Act.

In my opinion each of the applicants is entitled to be reimbursed for its reasonable and necessary expenditure incurred and paid in the removal and replacement of its facilities pursuant to the orders made from time to time by the Board. I think the applicants are also entitled to be paid interest upon the various amounts expended by them from the date of such payments until the date of repayment at the rate of 3½ per cent per annum.

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The appeal, as already observed, comes before us in virtue of an order of the Board giving to the appellants leave to appeal in respect of certain questions which, in the opinion of the Board, "involve questions of law." Before coming to an examination of the questions, it is convenient to advert to certain legal considerations.

The jurisdiction of the Board of Transport Commissioners in respect of the works provided for by the Terminals Act was settled by a judgment of the Judicial Committee of the Privy Council affirming a judgment of this Court in *Bell Telephone Co.* v. *Canadian National Railways* (1). In that judgment the contention was rejected that the sections of the *Railway Act* dealing with highway crossings were displaced by the Terminals Act. Lord Macmillan, delivering the judgment of the Judicial Committee, said (at p. 573):

> The fact of the matter is that the purpose of the Terminals Act was to give Parliamentary sanction to the scheme as a whole and to provide means for raising the necessary capital * * * These essentials being secured by the Act, everything else is left to be worked out by the already existing machinery available for the purpose.

The Board of Railway Commissioners is a statutory court, but it succeeded to all the powers, authorities and duties of its predecessor, the Railway Committee of the Privy Council; and it is endowed with legislative powers (powers which in their nature are legislative) as well as large administrative powers.

It having been decided by the judgment mentioned (*Bell Telephone Co.* v. *Canadian National Railways* (1)) that the works provided for by the Terminals Act and the subsequent Order in Council are subject to the jurisdiction and authority of the Board of Railway Commissioners, and particularly to the powers of the Board under sections 39, 256, 257, and 259, it follows, and this is not at all disputed, that the Board had jurisdiction under the second subsection of section 39 to deal with the subject of the allocation of costs in question before it.

As Lord Macmillan observed in delivering the judgment of the Privy Council in *Canadian Pacific Railway* v. *Toronto Transportation Commission* (2), section 39 is

(1) [1933] A.C. 563. (2) [1930] A.C. at 697.

obviously an administrative provision. The whole passage is important and should be quoted verbatim:

> Section 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an order of the Railway Board. It does not even prescribe that the interest must be beneficial or that the affection must not be injurious. The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision.

These observations are concerned with the effect of the first paragraph of section 39, but they are also applicable to the second paragraph. It is equally true that the last mentioned paragraph affords no criterion or rule or canon by which the Board is to be guided in allocating costs. Its jurisdiction is restricted in two respects: first, where it is otherwise expressly provided the Board is not competent to act; and, second, orders under this subsection can only be made

> on a company, municipality or person interested in or affected by the order directing the works

(*Toronto* v. *Toronto* (1); *Canadian Pacific Railway* v. *Toronto Transportation Commission* (2).

Subject to this, the Board is invested by the statute with jurisdiction and charged with responsibility in respect of such orders. The law dictates neither the order to be made in a given case nor the considerations by which the Board is to be guided in arriving at the conclusion that an order, or what order, is necessary or proper in a given case. True, it is the duty of all public bodies and others invested with statutory powers to act reasonably in the execution of them, but the policy of the statue is that, subject to the appeal to the Governor in Council under section 52, in exercising an administrative discretion entrusted to it, the Board itself is to be the final arbiter as to the order to be made.

Turning now to the questions in respect of which leave to appeal was given. The order is that the Canadian National Railways are

> granted leave to appeal to the Supreme Court of Canada * * * upon the following questions which, in the opinion of the Board, involve questions of law, viz.:

(1) [1920] A.C. 436. (2) [1930] A.C. 696.

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1. Whether the Board was right in holding that the effect of the *Canadian National Montreal Terminals Act, 1929,* was to merge the whole question of grade separation in the general scheme for improvement and rearrangement of the railway's terminal facilities in Montreal.

2. Whether there was evidence to justify the Board's opinion and finding that the "protection, safety and convenience of the public" was not the paramount consideration for the works at the crossings in question, but that they were undertaken as part of a comprehensive scheme for the readjustment and improvement of the terminal facilities of the railway in the city of Montreal.

3. Whether there was evidence to justify the Board's opinion and finding that the paramount purpose of the works at Guy, Mountain, St. Remi, Charlevoix, and Hibernia Street crossings was not the "protection, safety and convenience of the public" within the meaning of the rule as to the allocation of costs laid down in the case of *Toronto* v. *Bell Telephone Company et al.* (1), and other decisions of the Board.

This order is made under the authority of section 52 (3) which is in these words:

> 3. An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law, or a question of jurisdiction, or both, upon leave therefor having been first obtained from the Board * * * and after notice to the opposite party stating the grounds of appeal; and the granting of such leave shall be in the discretion of the Board.

It will be observed that the order does not state that the questions in respect of which leave to appeal is granted are questions of law in the opinion of the Board. The order declares that "they involve the questions of law."

The phrase "question of law" which the Legislature has employed in this enactment is *prima facie* a technical phrase well understood by lawyers. So construed "question of law" would include (without attempting anything like an exhaustive definition which would be impossible) questions touching the scope, effect or application of a rule of law which the courts apply in determining the rights of parties; and by long usage, the term "question of law" has come to be applied to questions which, when arising at a trial by a judge and jury, would fall exclusively to the judge for determination; for example, questions touching the construction of documents and a great variety of others including questions whether, in respect of a particular issue of fact, there is any evidence upon which a jury could find the issue in favour of the party on whom rests the burden of proof. The determination of such a question seldom depends upon the application

(1) 43 Can. Ry. Cas. 214.

of any principle or rule of law, but upon the view of the judge as to the effect of the evidence adduced. Nevertheless, it falls within the category described by the phrase "question of law." My own opinion is that, having regard to the provisions of section 44, the phrase "question of law" in section 52 does not embrace such questions: whether (that is to say) there is any evidence to support a given finding of fact. Section 44 is in these words:

> In determining any question of fact, the Board shall not be concluded by the finding or judgment of any other court, in any suit, prosecution or proceeding involving the determination of such fact, but such finding or judgment shall, in proceedings before the Board, be *prima facie* evidence only.
>
> 2. The pendency of any suit, prosecution or proceeding, in any other court, involving questions of fact, shall not deprive the Board of jurisdiction to hear and determine the same questions of fact.
>
> 3. The finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive.

The effect of this section is that where a question of fact is within the jurisdiction of the Board, then the determination of that question of fact by the Board is final and conclusive. I do not think it is consistent with this provision, according to its true intendment, that the determination by the Board of an issue of fact within its jurisdiction should be susceptible of review on appeal to this Court, even by leave of the Board. The Board is not bound by the ordinary rules of evidence. In deciding upon questions of fact, it must inevitably draw upon its experience in respect of the matters in the vast number of cases which come before it as well as upon the experience of its technical advisers. Thus, the Board may be in a position in passing upon questions of fact in the course of dealing with, for example, an administrative matter, to act with a sure judgment on facts and circumstances which to a tribunal not possessing the Board's equipment and advantages might yield only a vague or ambiguous impression.

The questions submitted by the order of the Board are, *ex facie,* not questions of law. The order stated that they involve questions of law but, as already observed, the questions of law are not defined. It may be, perhaps, admissible to read the questions in this sense: Are the rulings of the Board to which the questions relate inconsistent with any rule of law by which the Board is bound as such?

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Examining the questions from that aspect, it is necessary, in order to ascertain the effect of them to read them by the light of the reasons given by the learned Chief Commissioner with which Mr. Commissioner Stoneman agreed. Read by that light, it immediately becomes clear that they present phases of a single question: the question, namely, whether the principle explained by the Chief Commissioner, which the Board has, in analogous cases, applied in the allocation of costs, has been properly applied in this case.

As already pointed out, the basis of the conclusion at which the Board arrived was that the works authorized by the Board, the execution of which necessitated the expenditures to be allocated, were incidental or subsidiary to the primary and controlling purpose of reconstituting the terminal facilities of the appellants in Montreal for the purpose of modernizing and improving them. From this it followed, the Board held, that under the rule upon which the Board had habitually acted in the allocation of costs in analogous cases, such costs ought to be borne by the Railway Company.

It has already been observed that, while it is, no doubt, the duty of the Board of Railway Commissioners to act reasonably in discharging the responsibility involved in the exercise of its powers and not arbitrarily and capriciously, the *Railway Act* does not afford any rule or guide, nor does the law afford any rule or guide, by which the Board is or can be governed in determining what, in the circumstances of any particular case, is the reasonable order to make under subsection 2 of section 39 in respect of the allocation of costs. The Board itself has adopted a principle fully explained in the passages quoted from the judgment of the Chief Commissioner which it has followed in making orders as to costs where works ordered by the Board in connection with highway crossings have involved in their execution the removal of the plants of what are commonly known as public utility companies. It is entirely within the competence of the Board to lay down and follow such a rule of practice which, no doubt, it has found to be a just and reasonable rule. But such a rule of practice is not and cannot be a rule of law binding on the Board as such and precluding the Board from departing from it when experience shows that the rule

fails to take into account some factor which has been overlooked, or has not hitherto emerged, or where special circumstances require such a departure. In truth, it is plain that the rule upon which the Board has proceeded is one which is incapable of precise definition; and the application of it necessarily, as the Board proceeds from case to case, may involve not only an appreciation of the facts but an appreciation of the considerations upon which the rule itself rests.

But the question whether the Board in a given case has properly appreciated its own rule of practice, or the considerations upon which that rule is based, cannot be a question of law within the meaning of section 52 (3); nor can the question whether in a given case the Board has properly appreciated the facts for the purpose of applying the rule be such a question. That is so because, to repeat what has already been said, there is no statutory rule and there is no rule of law that prescribes the considerations by which the Board is to be governed in exercising its administrative discretion under section 39(2). The consequences of the opposite view of the powers of this Court under section 52 may be illustrated by reference to subsection 6, which is in these words:

> On the hearing of any appeal, the Court may draw all such inferences as are not inconsistent with the facts expressly found by the Board, and are necessary for determining the question of jurisdiction, or law, as the case may be, and shall certify its opinion to the Board, and the Board shall make an order in accordance with such opinion.

A negative answer to the questions before us would, apparently, in view of this enactment, have the practical effect of giving statutory force to the rule expounded by the Board in the case referred to in the third question. Obviously, the intention of Parliament was to charge the Board with responsibility in respect of this subject of allocation of costs, and there can be no ground for supposing that subsection 3 of section 52 was intended to make it possible to bring before this Court for determination as questions of law questions which, in pith and substance, are within the administrative discretion of the Board and in respect of which the Board, subject to the appeal to the Governor in Council, is charged by the Act with exclusive responsibility.

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The answer to these questions as a whole (read in the sense above explained) is, therefore, that there is no rule or principle of law inconsistent with the findings and decisions of the Board to which the questions relate.

It may not be improper to add this: There was in my opinion evidence before the Board upon which the findings of fact referred to in the questions could be based, although, as I have said, that is not, as I think, a matter which can be brought before this Court as a question of law under section 52 of the *Railway Act*.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *I. C. Rand.*

Solicitors for the respondent The Bell Telephone Company of Canada: *Beullac, Munnoch & Venne.*

Solicitors for the respondent The Montreal Light, Heat & Power Consolidated: *Brown, Montgomery & McMichael.*

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* Jan. 31; Feb. 1, 2.
* May 12.

THE BELL TELEPHONE COMPANY OF CANADA ..... APPELLANT;

AND

CANADIAN NATIONAL RAILWAY COMPANY ..... RESPONDENT.

THE CONSUMERS' GAS COMPANY OF TORONTO AND THE BELL TELEPHONE COMPANY OF CANADA ..... APPELLANTS;

AND

CANADIAN NATIONAL RAILWAY COMPANY, THE CORPORATION OF THE CITY OF TORONTO AND THE CORPORATION OF THE TOWNSHIP OF SCARBOROUGH.. RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

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

APPEALS by leave of the Board of Railway Commissioners for Canada from two orders of the Board, one dated October 26, 1937, which directed *inter alia* that the appellant The Bell Telephone Company of Canada be required to remove its poles and equipment from Eighteenth street in the Town of New Toronto, and another order of the Board, dated November 4, 1937, which directed that the appellants in the second appeal remove their respective plants and equipment from Victoria Park avenue as soon as the Canadian National Railway Company would be ready to proceed with the work of constructing the subway authorized by order of said Board, dated June 3, 1937; that the work of removing such plants and equipment be undertaken by the appellants respectively and that the cost of removing and restoring the same be paid by the respective appellants.

The questions involved in these appeals are the same as those contained in the appeal of *Canadian National Railway Company* v. *The Bell Telephone Company of Canada et al.*, reported *supra* p. 308; and they have been dealt with in principle in the judgment rendered in that appeal.

P. Beullac K.C. and *N. A. Munnoch* for the appellant The Bell Telephone Company of Canada.

W. B. Milliken K.C. for the appellant The Consumers' Gas Company of Toronto.

I. C. Rand K.C. for the respondent Canadian National Railway Company.

F. A. A. Campbell K.C. for the respondent The Corporation of the City of Toronto.

H. E. Beckett for the respondent The Corporation of the Township of Scarborough.

The judgment of the Court was delivered by:

THE CHIEF JUSTICE—The questions involved in these appeals are expressed in identical terms. Questions 1, 2 and 4 have been dealt with in principle in the judgment in *The Canadian National Railways* v. *The Bell Telephone Co. and The Montreal Light, Heat & Power Co.*. (Reported *supra* p. 308).

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THE BELL TELEPHONE CO. OF CANADA v. CANADIAN NATIONAL RY. CO. — THE CONSUMERS' GAS CO. OF TORONTO *et al.* v. CANADIAN NATIONAL RY. CO. *et al.* — Duff C.J.

The only substantial question of law involved in these appeals is the question whether the Board "had jurisdiction to order the utility companies named to move their facilities . . . without compensation." The decision of that question is governed by the judgment of the Judicial Committee of the Privy Council in *The Bell Telephone Co.* v. *Canadian National Railway Company* (1).

The appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellant The Bell Telephone Company of Canada: *Beullac, Munnoch & Venne.*

Solicitors for the appellant The Consumers' Gas Company of Toronto: *Mulock, Milliken, Clark & Redman.*

Solicitors for the respondent Canadian National Railways of Canada: *I. C. Rand.*

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

Solicitor for the respondent The Corporation of the Township of Scarborough: *Hollis E. Beckett.*

(1) [1933] A.C. at 579.

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* Feb. 3, 6.
* May 12.

HIS MAJESTY THE KING (PLAINTIFF) . . APPELLANT;

AND

IMPERIAL TOBACCO COMPANY OF CANADA LIMITED (DEFENDANT) . . . RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Moneys allegedly collected by manufacturer under colour of the Special War Revenue Act in excess of amount due by him—Action by the Crown to recover same, plus penalty—Section 119 of the Special War Revenue Act, R.S.C., 1927, c. 179 and amendments thereto.

The appellant brought an action against the respondent, a manufacturer, under the provisions of section 119 of the *Special War Revenue Act,*

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

to recover the sum of $68,132.54, being $67,632.54 as moneys allegedly collected by the latter, under colour of the Act, in excess of the sum it was required to pay to the appellant as consumption or sales tax and $500 penalty. The Exchequer Court of Canada dismissed the claim for such excess taxes on the ground that that part of section 119 providing for the payment thereof to the appellant was *ultra vires* the Dominion Parliament, and His Majesty appealed to this Court; but the claim for $500 penalty was maintained by the trial judge and the respondent entered a cross-appeal from that judgment.

Held that, according to the facts as found in the record, the respondent company had not infringed the provisions of section 119 of the Act, even if consideration was given by this Court to some evidence, not properly admissible, as to the conduct of the respondent company prior to the coming into force of section 119. In view of such finding, it was unnecessary for the Court to deal with the question of the validity of such section.

Appeal dismissed and cross-appeal allowed.

Judgment of the Exchequer Court of Canada ([1938] Ex. C.R. 177) reversed.

APPEAL and CROSS-APPEAL from the judgment of the Exchequer Court of Canada, Angers J. (1), dismissing the appellant's claim for $67,632.54 under section 119 of the *Special War Revenue Act*, but giving judgment for a sum of $500 as penalty for infraction of the terms of the section.

John G. Ahearn K.C. for the appellant.

L. A. Forsyth K.C. and *C. Sinclair K.C.* for the respondent.

The judgment of the Chief Justice and Rinfret, Kerwin and Hudson JJ was delivered by

KERWIN J.—Section 119 of the *Special War Revenue Act* enacts as follows:

> Everyone liable under this Act to pay to His Majesty any of the taxes hereby imposed, or to collect the same on His Majesty's behalf, who collects, under colour of this Act, any sum of money in excess of such sum as he is hereby required to pay to His Majesty, shall pay to His Majesty all moneys so collected, and shall in addition be liable to a penalty not exceeding five hundred dollars.

Imperial Tobacco Company of Canada, Limited, is a manufacturer and importer of cigars, cigarettes, tobacco, etc., and at all relevant times was the holder of the annual licence prescribed by section 95 of the Act. It

(1) [1938] Ex. C.R. 177.

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was liable under the Act to pay and did pay to His Majesty the King certain amounts as consumption or sales tax; but it is alleged that it collected, under colour of the Act, sums of money in excess of the amounts it was liable to pay (and did pay), and a claim was made in the Exchequer Court under section 119 for such sums and for the penalty. It was there determined that certain excess taxes had been collected under colour of the Act, and judgment was given for the penal sum of five hundred dollars. The claim for such excess taxes was, however, dismissed on the ground that that part of section 119 providing for the payment thereof to His Majesty was *ultra vires* the Dominion Parliament. His Majesty now appeals from the dismissal of that claim and the Company cross-appeals from the judgment against it for the penalty.

Section 119 came into force on June 28th, 1934; the claim for excess taxes covers the period from July 1st of that year to December 31st, 1935, and relates to taxes payable by the Company as a manufacturer and as an importer. The taxes were imposed by subsection 1 of section 86 of the Act (as enacted by the Statutes of 1932, c. 54, sec. 11) on the sale price on all goods

(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

and

(*b*) imported into Canada, payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption.

For the purpose of calculating the amount of the tax, "sale price" was defined in section 85 (*a*) (as enacted by the statutes of 1932-3, c. 50, sec. 15), which included the statement that "in the case of imported goods, the sale price shall be deemed to be the duty paid value thereof." The expression "duty paid value" was defined by section 85 (*b*) (as enacted by the statutes of 1932-3, c. 50, sec. 15) as follows:—

"duty paid value" shall mean the value of the article as it would be determined for the purpose of calculating an ad valorem duty upon the importation of such article into Canada under the laws relating to the Customs and the Customs Tariff whether such article be in fact subject to ad valorem or other duty or not, and in addition the amount of the customs duties, if any, payable thereon: Provided that in computing the "duty paid value" of tea purchased in bond in Great Britain the amount of the customs duty payable on tea for consumption in

Great Britain shall not be included in the value of such tea for purposes of this Part; and that in the case of goods subject to the excise taxes imposed by Parts X and XII of this Act, the amount of such taxes shall be included in the duty paid value.

It is admitted by counsel for the appellant that section 119 is not retroactive. What the Company did after that section came into force, during the period in question, is beyond dispute. With reference to cigarettes, cigars, tobacco and cigarette papers, it continued to use the price list issued by it the previous January. On the cover of that price list was the statement "Price includes sales tax" and in the body of the document, opposite the names of the various brands, appeared the cost thereof to its customers per thousand, pound, roll or carton, under the heading: "Direct price plus 2% per M" or "per lb.," or "per roll," or "per ct'n," as the case might be. It billed its customers for purchases made by them at the rate quoted in the price list and added 2% to the total of the invoices opposite the wording "plus 2%." At the foot of the invoices was the legend,—"Price includes freight and sales tax." It thus made its price a "tax included" or composite price, in accordance with a legitimate business practice well understood by the officers of the National Revenue Department of the Government and admitted by them as being in accordance with the Act. As an example, one hundred thousand cigarettes were invoiced at $766 plus 2% or $15.32, making a total price to the customer $781.32. Upon that composite price the Company paid a sales tax, at the current rate of 6%, of $44.22, ascertained by taking $6/106$ of $781.32.

It is not suggested that the Company was liable under section 86 to pay more than this in taxes but, as already mentioned, the claim is that the Company collected, under colour of the Act, more than it was liable to pay. Upon that footing, evidence was tendered and admitted, subject to objection, of what the Company had done prior to the coming into force of section 119. I fail to understand how such evidence was properly admissible. Disregarding it, there is nothing in the record to justify even a suspicion that the Company infringed the provisions of section 119 as all it did was to tell its customers that the price of its goods, both manufactured and imported, was 2% more than a quoted figure.

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That conclusion renders it unnecessary to consider the attack made upon the validity of the statute and might well suffice to dispose of the matter. However, in view of the nature of the claims advanced by the appellant, it appears only right to say that the evidence, if admissible, fails to establish them. The evidence covered various periods when the rate of taxation was 1%, 4% and 6% respectively, according to the following table:—

Statute	Date of coming into force	Rate
20-21 George V, c. 40, s. 2	May 2, 1930	1%
21-22 George V, c. 54, s. 11	June 2, 1931	4%
22-23 George V, c. 54, s. 11	April 7, 1932	6%

During all this time the Company sold its goods at a composite price and its invoices bore the legend already referred to "price includes freight and sales tax."

Dealing first with manufactured goods, when the rate was 1%, one hundred thousand cigarettes were invoiced at $975 and upon that the Company paid, as taxes, 1/101 or $9.66. The same practice was followed when the rate was increased from 1% to 4% except that the tax paid was 4/104 or $37.50, upon the like quantity of cigarettes. When, however, the rate was increased to 6%, the Company notified its customers by circular dated April 7, 1932, that it had found it necessary to add 2% to the invoices for all its goods. Considerable importance was attached by appellant to that circular and it is therefore reproduced textually:—

April 7, 1932.

To our Customers:—

You are aware of the increase in the Sales Tax, from 4% to 6%, and other forms of taxation made effective to-day by the Federal Budget of yesterday.

We had hoped that in view of the abnormal tax burdens put upon the tobacco industry, the Government would be able to give some special consideration to it and not impose this added tax.

Last June when the Sales Tax was increased from 1% to 4%, we absorbed this whole amount and did not increase our prices; but with this additional tax burden, we have found it necessary to add 2% to our invoices for all of our goods, effective to-day.

We are preparing a re-sale price list for the jobbing trade and feel that in fairness, they cannot expect to maintain the same margin of profit that they have enjoyed in the past, and will have to share part of this burden, and our suggested re-sale prices have been made up accordingly.

Yours very truly,

Imperial Tobacco Company of Canada, Limited.

Accordingly, from April 7th, 1932, to August 17th, 1932, the invoices bore a notation "add 2% on a/c sales tax," with the appropriate amount added to the total of the invoice. From August 18th, 1932, the notation was "plus 2%"—again with the addition of the appropriate amount. The 2% added as a result of either of the notations "on a/c sales tax" or "plus 2%" made the total $944.50, upon which the Company paid sales tax of $56.29, i.e., $6/106$ of $944.50. In November, 1932, the price was reduced from $975 to $766 which with the addition of the 2% made a total of $781.32. Upon this latter sum, the tax calculated at $6/106$ of $781.32, or $44.23, was paid.

The appellant's submission is that the Company unalterably adopted as its sale price, upon which it could impose a percentage, the net sum received by it before the addition of the 2% when the rate of taxation was 4%, that is $975 less the tax, $37.50, or $937.50; and that therefore the sale price, after the addition of the 2% should be $937.50 plus $18.75, or $956.25, upon which the tax at 6% would be $57.37 instead of $56.29 as actually paid. Counsel for the appellant does not suggest that the Company should have paid $57.37 but argues that, if the Company had merely intended to increase the price of its goods by 2%, it would have adopted the system of invoicing above suggested; and urges that the fact that it did not do so leads to the conclusion that the 2% was not added as an increase to the sale price but was for the purpose of collecting an additional amount as tax from the customer.

No valid reason has been advanced as to why the sale price should be taken as $937.50—when the rate was 4%, rather than $965.34,—when the rate was 1%. If the latter figure were adopted, then when the rate became 6% the amount of the tax would be $57.92, which is less than was actually paid; and it is not contended that the Company should have paid any such amount. And what was to happen when the Company in November, 1932, reduced its quoted list price from $975 to $766? No suggestion could be made,—no suggestion was made, that the tax should be computed, under those circumstances, on $937.50. Moreover, the circular of April 7th, 1932, and the notations on the invoices of "add 2% on a/c sales

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tax" or "plus 2%" make it clear that, with respect to manufactured goods, the Company instead of collecting any sum of money in excess of such sum as it was required to pay under the Act, merely increased the price of its goods.

A fortiori the same result follows with respect to imported goods. The Company invoiced imported goods in the manner already described with reference to manufactured goods. In accordance with section 86 (1) (*b*), the Company had already paid the tax on the duty paid value at the time the imported goods were taken by it out of bond, at the rate then in force. No further sales tax was thereafter payable by the Company with respect to these imported goods. The duty paid value was deemed to be the sale price for the purpose of calculating the amount of the tax but did not necessarily bear any relation to the actual cost to the Company, or to the price at which it might determine the goods would be sold to its customers. In fact, in many cases the duty paid value upon which the sales tax was paid was more than the amount paid to the Company by its customers, including the 2%.

The appeal should be dismissed, the cross-appeal allowed, and the action dismissed, with costs throughout.

CANNON J.—I agree with my brother Kerwin and I would dismiss the appeal, allow the cross-appeal and dismiss the action, with costs throughout.

Appeal dismissed with costs;
Cross-appeal allowed with costs.

Solicitor for the appellant: *John G. Ahearn.*

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

THE CANADIAN SHREDDED WHEAT COMPANY, LTD. (PETITIONER)..... } APPELLANT;

AND

KELLOGG COMPANY OF CANADA, LTD. (OBJECTING PARTY) ..... } RESPONDENT.

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* May 26.
* June 27.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade mark—Petition under s. 29 of Unfair Competition Act (Dom., 1932, c. 38)—Registration sought of certain words as trade mark—Effect of prior proceedings and decision therein dealing with same words previously registered as trade mark—Res judicata.

Appellant on May 5, 1938, presented a petition to the Exchequer Court of Canada, under s. 29 of the *Unfair Competition Act* (Dom., 1932, c. 38) for a declaration to enable appellant to register the words "Shredded Wheat" as a trade mark. Maclean J., dealing with certain points of law raised in a statement of objections by respondent, dismissed the petition, [1939] Ex. C.R. 58, one ground of dismissal being that the issues raised therein were *res judicata* by reason of the judgment of the Judicial Committee of the Privy Council, 55 R.P.C. 125 (affirming judgment of the Court of Appeal for Ontario, [1936] O.R. 613, affirming judgment of McTague J., [1936] O.R. 281), which held, in an action commenced in June, 1934, by appellant against respondent for alleged infringement of appellant's trade marks of the same words registered in March, 1928, and April, 1929, that said trade marks were not valid; that the words were purely descriptive of the product and had not acquired a secondary meaning as indicating goods exclusively manufactured by appellant.

Held: The dismissal of the petition should be affirmed. The said judgment of the Judicial Committee of the Privy Council in the former action clearly proceeded (as regards the issue of passing off raised in the action) on the footing that its findings were valid as of the date of the commencement of that action in June, 1934. *Res judicata* applied unless there were special user or special circumstances since June, 1934, on which could be based appellant's general plea that the words in question had at the date of the present petition acquired the essential secondary signification to entitle it to have the words registered as a trade mark. In the allegations in the petition no distinction was drawn as to the manner or circumstances of appellant's user of the words since June, 1934, and appellant's preceding long user thereof. Moreover, the effect of a certain undertaking by respondent at the outset of said former action was to give appellant a practical monopoly for nearly four years from June, 1934; and the effect of such a monopoly is, generally speaking, that in the absence of competition there is no occasion in anybody's mind for adverting to distinctiveness in respect of the maker or

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

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seller of the goods (*Cellular Clothing Co.* v. *Maxton,* 16 R.P.C. 397, at 409; *Siegert* v. *Findlater,* 7 Ch. D. 801, at 813, referred to). On the allegations in the petition and the admitted facts, and there being no averment of special user or special circumstances as aforesaid, no reasonable ground is disclosed for granting the petition. As to appellant's contention that there was no estoppel by *res judicata* because in the present proceedings respondent appeared in a character (as a member of, and on behalf of, the public) different from that in which it was sued (in its personal character) in said former proceedings—*held,* that that was a technical point to which effect ought not to be given in the circumstances (*Reichel* v. *Magrath,* 14 App. Cas. 665).

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing appellant's petition, made under s 29 of the *Unfair Competition Act* (Dom., 1932, c. 38), for a declaration that it has been proved to the satisfaction of the Court that the words "Shredded Wheat"

have been so used by your petitioner as to have become generally recognized by dealers in and users of the class of wares in association with which they have been used, as indicating that your petitioner assumes responsibility for their character and quality and their place of origin, and that, having regard to the evidence adduced, your petitioner is entitled to registration thereof, pursuant to its application and that such registration should extend to the whole of Canada.

In 1896 one Perky obtained a grant of Canadian letters patent covering a new product which he had invented, and a process and machine by means of which the new product was prepared or produced; and in 1901 he obtained a grant of Canadian letters patent for "improvements in and relating to machines for making biscuits and other articles," which patent covered the machine which was used for the production of biscuit shapes, composed of the new product (the subject of the prior patent aforesaid) which issued from the rollers on to a travelling band. The said new product was called and was known by the name of shredded wheat. In 1904 appellant was incorporated under the laws of the Province of Ontario and acquired the good will of the business in Canada of the company which was at that time importing the product into Canada and selling it there. Appellant built a factory for its manufacture at Niagara Falls, Ontario, and in 1905 commenced and has ever since continued to manufacture the product in Canada and to sell

(1) [1939] Ex. C.R. 58.

it there. The said patents expired in 1914 and 1919 respectively. On March 20, 1928, the words "Shredded Wheat" were registered as appellant's trade mark to be applied to the sale of biscuits and crackers; and on April 3, 1929, the same words were registered as its trade mark to be applied to the sale of cereal foods cooked or prepared for consumption (1).

In June, 1934, appellant commenced an action in the Supreme Court of Ontario against respondent (and one Bassin), claiming an injunction to restrain alleged infringement of appellant's said trade marks and for damages. The action was dismissed by McTague J. (2). An appeal from his judgment was dismissed by the Court of Appeal for Ontario (3). An appeal from its judgment was dismissed by the Judicial Committee of the Privy Council (4); it was held that appellant's said trade marks "Shredded Wheat" were not valid trade marks; that the words were purely descriptive of the product and had not acquired a secondary meaning as indicating goods exclusively manufactured by appellant. (It was also held that "passing off" by the defendants, which was also an issue in the action, had not been shown).

On May 5, 1938, appellant filed the present petition above mentioned under s. 29 of the *Unfair Competition Act*. Appellant alleged that on the same date (May 5, 1938) it filed a request for cancellation of the earlier registrations aforesaid, such cancellation to take effect upon the re-registration.

Notice of the filing of the present petition was published in the Canada Gazette. Respondent filed a statement of objections. Paragraphs 7, 19, 20 and 21 of the statement of objections read as follows:

> 7. The objecting party submits that by virtue of these proceedings and judgment [proceedings in said action commenced in June, 1934, and judgments therein, and ending in the said judgment of the Judicial Committee of the Privy Council of February 4, 1938] the validity of the trade mark "Shredded Wheat" and the issues raised in the petition are *res adjudicata* and that the petition should be denied and no further proceedings taken with respect thereto.

(1) For the above and further details, see the judgment of the Judicial Committee of the Privy Council, (1938) 55 R.P.C. 125, hereinafter mentioned.

(2) March 30, 1936, [1936] O.R. 281.

(3) November 30, 1936, [1936] O.R. 613.

(4) February 4, 1938, 55 R.P.C. 125.

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19. The provisions of section 29 of the *Unfair Competition Act* are only applicable in an action or proceeding already pending in the Exchequer Court of Canada, and cannot be made available to a party by filing a petition.

20. The provisions of section 29 of the *Unfair Competition Act* are not applicable to an application to register a trade mark, but only in relation to the validity of a trade mark already registered.

21. The existence upon the register of the registrations referred to in paragraph 6 of the petition [aforesaid registrations by appellant of trade mark "Shredded Wheat"] form a bar to the petition.

An order was made (by consent) in the Exchequer Court of Canada that the points of law raised by said paragraphs 7, 19, 20 and 21 of the statement of objections should be set down for hearing and disposition before the Court. After the hearing, judgment was rendered by Maclean J., President of the Court, dismissing the appellant's petition (1). The present appeal was then brought to this Court.

It is stated in the judgment of this Court (now reported) that

> On the argument before this Court the respondents did not rely on paragraphs 20 and 21 of the statement of objections and, as regards paragraph 19, in the view we take, we find it unnecessary to consider it.

With regard to the question of *res judicata* raised by said paragraph 7 of respondent's statement of objections, a contention of appellant in support of the present petition was, that the fact that the Judicial Committee of the Privy Council decided that in 1928 and 1929 the words "Shredded Wheat" were merely descriptive and not registrable, is not inconsistent with the contention that those words have now acquired, through use, the necessary character to permit registration under the provisions of s. 29 of the *Unfair Competition Act*. Another contention of appellant was that in the former proceeding the present respondent was sued in its personal character but in opposing the petition now in question it does not appear in its personal character but in the character of a member of the public; that in an action under the provisions of s. 29 of the *Unfair Competition Act*, a statement of objections, by whomsoever presented, is a statement of objections on behalf of the public, and is not personal to the objecting party, and in a legal point of view it is a mere accident that in this case the objecting

(1) [1939] Ex. C.R. 58.

party was a party to a former litigation; that it is well settled that a party who, though identical in name, litigates in different characters in the two proceedings, is, in contemplation of law, two separate and distinct persons; that therefore the parties to the judicial decision relied upon as creating the *res judicata* were not the same persons as the parties to the present proceedings; and there can be no estoppel by *res judicata.*

Aimé Geoffrion K.C., *A. H. Elder K.C.* and *E. G. Gowling* for the appellant.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—The appellants presented a petition on the 5th day of May, 1938, to the Exchequer Court of Canada praying a declaration that the words "Shredded Wheat" had

> been so used by your petitioner as to have become generally recognized by dealers in and users of the class of wares in association with which they have been used, as indicating that your petitioner assumes responsibility for their character and quality and their place of origin, and that, having regard to the evidence adduced, your petitioner is entitled to registration thereof, pursuant to its application and that such registration should extend to the whole of Canada.

The proceedings were taken with a view to obtaining a registration of the words mentioned as a trade mark under section 29 of the *Unfair Competition Act.* The respondents filed particulars of objections and paragraph 7 of those particulars is in these words:

> 7. The objecting party submits that by virtue of these proceedings and judgment the validity of the trade mark "Shredded Wheat" and the issues raised in the petition are *res adjudicata* and that the petition should be denied and no further proceedings taken with respect thereto.

By consent, an order was made directing that the points of law raised by paragraphs 7, 19, 20 and 21 in the statement of objections should be heard and disposed of before the trial. The allegations in paragraphs 4, 5 and part of 6 were admitted. These allegations are as follows:

> 4. On the 1st of June, 1934, the petitioner commenced an action in the Supreme Court of Ontario for an injunction to restrain infringement of the petitioner's alleged trade mark consisting of the words "Shredded Wheat," registered at Folio 43550 of Register No. 198 and at Folio 46703 of Register No. 214, during the course of which action evidence was

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taken from some twenty-seven witnesses representing consumers, retail grocers and wholesale grocers from every province of Canada with the exception of Ontario and Quebec, with respect to which provinces a formal admission was made on behalf of the objecting party that similar witnesses from those provinces would, if examined on commission, testify to the same effect, the said witnesses being produced in an effort by the petitioner to establish that a secondary meaning had been acquired for the words "shredded wheat" to distinguish the product of the petitioner.

5. The aforesaid action in the Supreme Court of Ontario came on for trial before Mr. Justice McTague, who dismissed the action in a judgment dated the 30th day of March, 1936. Upon appeal being taken to the Court of Appeals for Ontario, the said Court of Appeals dismissed the appeal in a judgment dated the 30th of November, 1936.

6. A further appeal was taken by the petitioner to the Judicial Committee of the Privy Council, before whom the case was argued on December 9th, 10th, 13th, 14th and 15th, 1937, as a result of which a judgment was delivered by Lord Russell of Killowen on the 4th day of February, 1938, reported at page 127 of Volume 55 of the Reports of Patent, Design and Trade Mark Cases, . .

On the argument before this Court the respondents did not rely on paragraphs 20 and 21 of the statement of objections and, as regards paragraph 19, in the view we take, we find it unnecessary to consider it.

There can be no doubt as to the effect of the proceedings recited in paragraphs 4, 5 and 6. It is set forth explicitly in the judgment of the Judicial Committee, delivered by Lord Russell of Killowen, that the words "Shredded Wheat" were aptly descriptive of the plaintiffs' goods, that is, the appellants' goods, in appearance as well as in substance; and, moreover, that the words "Shredded Wheat" constituted the name by which these goods were known; and further, their Lordships concurred in the finding of the learned trial judge that the words had never acquired the secondary meaning of being distinctive of goods manufactured exclusively by the appellants.

On the issue of the validity of the trade mark, it was only material that these propositions of fact should hold as of the date of the registration of the trade mark; but, on the issue of passing off, it was obviously material that they should be valid as of a later date. Indeed, it would not be an unfair interpretation of their Lordships' judgment to read it as proceeding upon the footing that these findings of fact held as of the date of the trial. In the view I take it is not necessary, however, to go into this. It is quite clear that their Lordships' judgment proceeds,

as regards the issue of passing off, on the footing that they were valid as of the pertinent date, that is to say, the date of the commencement of the action.

There is, of course, no dispute about this. Nor is there any dispute that, as between the appellants and the respondents in their private and individual capacity, these findings are binding and conclusive.

It is argued, however, and this is the basis of the appeal, that these propositions are not conclusive upon the issue raised, as the appellants contend, by the allegations in section 7 of the statement of objections, namely, that at the date of the petition, some four years after the commencement of the action, and two years after the date of the trial, the proceedings referred to had conclusively established by findings binding on the parties that the words Shredded Wheat had not acquired a secondary meaning in a sense entitling the appellants to have them registered as their trade mark; and, second, that, if these findings were binding as between the appellants and the respondents in their private and personal capacity, the respondents now appear in a different capacity, namely, as representing the public and, in that capacity, they are not bound.

Mr. Geoffrion's argument is that the sole issue raised by section 7 is the issue of *res judicata* in the strict sense; and, admitting, as he is obliged to admit, the effect of the findings as such, they are, he argues, inconclusive upon the precise point as to the meaning acquired by the words in question at the date of the petition and in any case inconclusive as between the appellants and the respondents in the capacity in which they now appear. It follows, he argues, that the point of law before the learned trial judge ought to have been decided in his favour. He was never called upon, he insists, to meet any other issue and ought not to have had his petition dismissed as an abuse of the process without having an opportunity of meeting the respondents on that ground.

Mr. Biggar has called our attention to the fact that, at the outset of the litigation,—that is to say, in June, 1934—the appellants applied for an injunction. An undertaking was given by the respondents which precluded them from selling the whole wheat biscuits, of the sale of which the appellants complained, "until the final disposition

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of the action," which was finally disposed of by His Majesty's order of the 4th day of February, 1938, about two months before the appellants' petition was lodged; the effect of this undertaking being to give the appellants a practical monopoly.

It is necessary now to advert briefly to the allegations in the petition.

The petitioners allege that, continuously since the year 1905, they have carried on the business of manufacturing and selling cereal foods in Canada, and that this business was theretofore (from 1898) carried on by their predecessors; that the words Shredded Wheat "have always been used as a trade mark by them and their predecessors in association with such products"; that since commencing business, and especially during the past ten years, the petitioners have spent large sums of money in advertising and have sold many millions of dollars worth of goods in association with this trade mark; that the words have become a symbol adapted to distinguish the wares of the petitioners in such a manner that they are the petitioners' trade mark. The petition terminates by a general allegation, in paragraph five, that the words Shredded Wheat have been used by the petitioners in such a manner and have received general recognition of such a character as to entitle the petitioners to have the words registered as their trade mark.

Now, it will be observed that the alleged user of the words Shredded Wheat as the trade mark of the petitioners and their predecessors is a user which goes back to the year 1898; that no distinction is drawn as to the manner or circumstances of this user in the four years following the commencement of the action in the Supreme Court of Ontario in 1934 and the preceding thirty-five or thirty-six years. I do not think the allegations in the petition, fairly read, can be said to raise the issue whether or not the words Shredded Wheat (having for thirty-five years prior to June, 1934, been used as aptly descriptive and as the name of the goods of the appellants and their predecessors by them and their purchasers and not used or known as their trade mark) had acquired, by virtue of the user of them in the four years succeeding June, 1934, the secondary meaning of being distinctive of goods manufactured exclusively by the appellants. During these

particular four years the appellants had a monopoly in the manufacture and sale of these goods in consequence of the undertaking referred to. The effect of the existence of such a monopoly is, generally speaking, that in the absence of competition there is no occasion in the mind of anybody for adverting to distinctiveness in respect of the maker or seller of the goods. Theoretically, of course, the user might be of such a character, or accompanied by such circumstances, as to produce a different effect. But given the admitted facts here, in the absence of such special user or special circumstances, it would appear to be indisputable that the general allegation with which the petition concludes, namely, that these words had at the date of the petition acquired the essential secondary signification, is and must be quite baseless. On the point as to the effect of the monopoly, I refer to *Cellular Clothing Co.* v. *Maxton* (1) and Lord Davey's observations there, cited by Mr. Justice McTague and adopted by the Judicial Committee; and also to the judgment of Lord Justice Fry (*Siegert* v. *Findlater* (2)) adopted by Lord Davey.

The only difficulty in the appeal arises from the manner of the proceedings in the court below. There was not, in point of form, an application to strike out the petition as frivolous and as an abuse of the process of the court; and I am by no means clear whether the parties intended to proceed under rule 149 or 151, or both. The petition could not have survived the summary proceeding if taken a year ago. Having fully considered Mr. Geoffrion's formidable objections, we are not, I think, precluded from doing substantial justice now.

It would not, I am inclined to think, be an unfair interpretation of the proceedings in the Exchequer Court to read them as a submission to the trial judge of the question whether on the admitted facts, including, of course, the undertaking of June, 1934, there was any issue raised by the petition which ought to be permitted to be tried; and there can, as I have said, be only one answer to that question.

But, there is another way in which the position can be put and that is that the admissions should be treated as included in the allegations of the petition. So treating

(1) (1899) 16 R.P.C. 397, at 409. (2) (1878) 7 Ch. D. 801 at 813.

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them, the allegations as a whole, including these admissions, there being no averment of special user or special circumstances in the last four years, disclose no reasonable ground for relief; and amendment is, of course, out of the question.

As to the point that the respondents are here in a different character from that in which they appeared in the Ontario action, that is a technical point to which effect ought not to be given in the circumstances (*Reichel* v. *Magrath* (1)).

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Wainwright, Elder & McDougall.*

Solicitors for the respondent: *Smart & Biggar.*

BESSIE L. SHAW ..... APPELLANT;

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* May 24, 25
* Oct. 3.

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—"Income" within s. 3 of Income War Tax Act, R.S.C., 1927, c. 97—Clause (b) of said section—Monthly instalments payable under insurance policy.

By an insurance policy applied for by appellant and dated October 26, 1927, the insurance company agreed that on the death of appellant's husband it would pay to appellant $700 each month for 120 months and should she survive that period it would continue to pay her $700 monthly during her life. An option was given to commute all instalments into a single cash payment of $71,400. The total of the premiums paid during the husband's lifetime, over and beyond dividends aggregating $6,815.15 which accrued on the policy and were applied against premiums, was $37,039.85. Appellant's husband died

(1) (1889) 14 App. Cas. 665.

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

on November 23, 1933. Appellant did not elect to take the single cash payment of $71,400; and she was paid the monthly instalments. For those received in 1934 (in all, $8,400) she was assessed for that year for income tax under the *Income War Tax Act,* R.S.C., 1927, c. 97. She appealed against such assessment.

Held (reversing judgment of Maclean J., President of the Exchequer Court of Canada, [1939] Ex. C.R. 35): The assessment should be set aside. The payments sought to be taxed did not fall within the definition of "income" in s. 3 of said Act, reading that section as a whole and on particular examination of clause (*b*) therein.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing an appeal from the decision of the Minister of National Revenue affirming the assessment of appellant for income tax under the *Income War Tax Act,* R.S.C., 1927, c. 97, in respect of the sum of $8,400 received in monthly instalments of $700 each during the year 1934 under a certain policy of insurance.

The policy was applied for by appellant and was issued by the Sun Life Assurance Company of Canada and was dated October 26, 1927. By it the Company agreed that on the death of appellant's husband (therein called the assured) it would pay to appellant (therein called the owner and therein called the beneficiary) the sum of $700 and a like monthly instalment in each succeeding month until 120 monthly instalments in all should have been paid; that should appellant still survive after the payment of the 120 monthly instalments it would continue to pay to her the sum of $700 monthly so long as she survived thereafter. It was agreed that when the first instalment under the policy became due the person or persons legally entitled to receive said first instalment should have the option of commuting all instalments into a single cash payment of $71,400 ("provided always that this option cannot be exercised by the beneficiary or payee unless the owner shall have filed with the Company a written request to that effect, or shall have so expressed his desire by will").

The annual premiums were paid on the policy, being $6,265 in each year and amounting in all to $43,855, but less the dividends accrued on the policy during the husband's life time, amounting in all to $6,815.15, which were

(1) [1939] Ex. C.R. 35.

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applied against the premiums from time to time due; thus the actual premiums paid in cash after crediting such dividends amounted to $37,039.85.

Appellant's husband died on November 23, 1933. Appellant did not elect to exercise the option of commuting the monthly instalments into a single cash payment of $71,400, and consequently the monthly instalments stipulated in the contract have been paid to appellant since her husband's death. In the year 1934 she received the sum of $8,400, in respect of which she was assessed for income tax and she appealed against such assessment. By the judgment now reported the appeal from the judgment of Maclean J. aforesaid dismissing appellant's appeal from the decision of the Minister affirming the assessment, was allowed, and the assessment set aside, with costs throughout.

I. F. Hellmuth K.C. and *H. C. F. Mockridge* for the appellant.

F. P. Varcoe K.C. and *J. R. Tolmie* for the respondent.

The judgment of the Chief Justice and Crocket and Hudson JJ. was delivered by

THE CHIEF JUSTICE—The charging section is section 9. There is no question that the appellant falls within one or more of the classes of persons to whom this section applies and the appeal really turns upon the question whether the payments which have been held to be taxable fall within the statutory definition of "income."

The defining section is section 3 and that section must be read as a whole. First of all, there is a declaration that, "for the purposes of this Act, 'income' means the annual net profit or gain or gratuity," whether as being a "fixed amount," such as wages or salary, or "unascertained," such as fees or emoluments, profits from a business or calling or from an office or employment, or a "profession or calling," or from a trade, manufacture or business. Then the section proceeds to say that income "shall include the interest, dividends or profits * * *

from money at interest" or "from stocks, or from any other investment"; and finally,

also the annual profit or gain from any other source including

(*a*) the income from but not the value of property acquired by gift, bequest, devise or descent; and

(*b*) the income from but not the proceeds of life insurance policies paid upon the death of the person insured, or payments made or credited to the insured on life insurance endowment or annuity contracts upon the maturity of the term mentioned in the contract or upon the surrender of the contract;

and certain other classes of annual payments with which we are not concerned.

It should be observed, first of all, that the annual profit or gain which paragraphs (*a*) and (*b*) treat as income is the "income" from a specified source which is treated as not of an income nature. In (*a*) this source is "property acquired by gift, bequest, devise or descent" and the declaration that such income is "income for the purposes of the Act" is accompanied by a declaration that the value of such property is not included within the classes of annual profit or gain designated by the term "income" for the purposes of the statute.

Going to (*b*), the income, on the natural reading of the paragraph which is "income for the purposes of the Act" is the income from the proceeds of life insurance policies paid upon the death of the person insured, that is to say, upon the contingency of the death of such person. And here again, this declaration is accompanied by a declaration that such proceeds are not included under the term "income" nor are "payments made or credited on life insurance endowment or annuity contracts" or certain other specified payments.

Paragraphs (*a*) and (*b*) both specify sources the income from which is taxable and at the same time declare that these sources of income are not themselves embraced within the designation "income for the purposes of the Act."

The learned trial judge, in the course of his judgment, says it is evident that section 3 (*b*) contemplates the taxation of income derived from life insurance contracts and annuity contracts. With great respect, this proposition is, I think, stated rather too absolutely. Grammatically, this is the way, I think, in which paragraphs (*a*) and (*b*) are related to the second member of section 3:

and shall include * * * and also the annual profit or gain from any other source including (*a*) the income from * * * property acquired

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in the designated ways; "but not the value of" such "property." That is to say, the value of such property is explicitly excluded from the category of income. Then, coming to (*b*), "income" includes for the purposes of the Act,

> the annual profit or gain from any other source including
> (*b*) the income from * * * the proceeds of life insurance policies paid upon the death of the person insured

but not the proceeds of such policies or,

> payments made or credited to the insured on life insurance endowment or annuity contracts upon the maturity of the term mentioned in the contract or upon the surrender of the contract.

"Not * * or" has in this context its ordinary meaning "neither * * nor."

It is clear enough to me that upon a strict reading of these provisions, the payments sought to be taxed do not fall within them. It is no part of our duty in construing and applying a taxing statute to ask ourselves what might have been in the draughtsman's mind or to accept the impression received from a casual inspection of the enactment to be applied. It is our duty to analyze such enactments with strictness and, in the case of a definition such as this, to apply it only to those cases which plainly and indubitably fall within it when strictly read.

There is an additional consideration which ought not to be overlooked. It will be observed that in paragraphs (*a*) and (*b*) the word "income" is repeated. The section is defining "income" and, in defining "income," it says that "income" "includes the annual net profit or gain from any source including the income" from certain specified sources. The legislature, it seems to me, is at pains to emphasize the distinction between income and the source of income. The income derived from the capital source is income for the purposes of the Act. The source is not income for the purposes of the Act. If, therefore, you find something which is the proceeds of a life insurance policy paid upon the death of the insured, or payments made or credited in the circumstances defined in (*b*), then you have something which is not "income for the purposes of the Act" by the explicit declaration of the statute itself.

Broadly speaking, the statute seems to be emphasizing the intention not to tax anything that is not of an income nature. But defined classes of benefits received—property acquired by gift, testamentary or *inter vivos* and the proceeds paid on the contingency of the death of the insured under an insurance policy as well as defined classes of payments under specified classes of contracts—are explicitly declared not to be income.

As regards the ten annual payments of $8,400 each, which come to an end at the expiration of ten years from the death of the insured, it seems impossible to escape the conclusion that each of these payments contains a very considerable element of capital. $71,400 was agreed upon between the parties as the capitalized value of these payments plus any additional payments if the beneficiary should live longer; and I should have said, even apart from the provisions of the statute, that there is at least as much to be urged in favour of the view that these payments are of a capital nature as that they are of an income nature. There has been no attempt to segregate capital from income and the Crown does not put its case on the ground that some part, at least, of these payments are of an income nature.

The appeal should be allowed and the assessment set aside with costs throughout.

DAVIS, J.—The facts in this case are not in dispute; they were set forth in a statement signed by the solicitors for both parties.

The appellant, Mrs. Bessie L. Shaw, of Toronto, in October, 1927, took out a policy of insurance with the Sun Life Assurance Company of Canada on the life of her husband, George Baldwin Shaw, who subsequently died November 23rd, 1933. Mrs. Shaw herself made the application for the insurance and named herself as the sole beneficiary thereof. The annual premium was $6,265, and the total cash premiums paid upon this policy during the husband's lifetime, over and beyond dividends of $6,815.15 which accrued upon the policy from time to time and had been applied against premiums, amounted to $37,039.85. Mrs. Shaw survived her husband and under the terms of the policy she became entitled on her husband's

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death to the sum of $700 "and a like monthly instalment on the same day in each succeeding month until one hundred and twenty monthly instalments in all shall have been paid." There is no question that under the policy 120 monthly instalments, aggregating $84,000 were to be paid irrespective of whether Mrs. Shaw survived her husband or not. $84,000 is a sum, definite and fixed, which is to be paid by instalments. The policy specifically provided that if Mrs. Shaw should die before her husband, the amount of the annual premium would thereafter be reduced from $6,265 to $4,522.

The Company further agreed that if Mrs. Shaw was still living "after the payment in full of the 120 monthly instalments mentioned above," it would continue to pay to her the sum of $700 monthly on the same day in each month as that on which the preceding instalments became due "so long as she may survive thereafter."

The Company further agreed that when the first instalment under the policy became due the person or persons legally entitled to receive the said first instalment should have the option of commuting all instalments into a single cash payment of $71,400; but it was provided that this option could not be exercised by the payee unless Mrs. Shaw "shall have filed with the Company a written request to that effect, or shall have so expressed (her) desire by will."

Mrs. Shaw did not exercise the option to accept a single cash payment of $71,400. The monthly payments have been made to her by the company and the sole question for determination in this appeal is whether or not the Minister of National Revenue is entitled to assess the $8,400 received in the taxation period 1934 as income of the appellant liable to taxation within the provisions of the (Dominion) *Income War Tax Act* and amendments.

Mrs. Shaw was so assessed and appealed to the Minister against the assessment. The Minister affirmed the assessment on the ground that under the provisions of the policy Mrs. Shaw had the option of commuting all payments into a single cash payment of $71,400 and that, as she refrained from exercising the option and by reason of the nature of the monthly payments received by her, the payments constitute income by virtue of the pro-

visions of sec. 3 and other provisions of the *Income War Tax Act*, and that the provisions of sec. 5 (*k*) of the Act allowing an exemption in respect of income derived from certain annuity contracts there mentioned do not apply to this particular case.

On appeal by Mrs. Shaw from the Minister's decision to the Exchequer Court of Canada, the Minister in his pleading took the position that in effect Mrs. Shaw purchased an annuity contract with the proceeds of the said insurance policy and that in that sense an annuity contract with the company was created when, on the death of her husband, she refrained from exercising her option to take a single cash payment, and that the assessment had been affirmed by the Minister on the ground that

> the annuity payments are income under sec. 3 of the Act and are not the proceeds of the insurance policy on the life of the appellant's husband, the proceeds of such policy having been utilized to purchase the said annuity contract and that the annuity contract in question is not within sec. 5 (*k*), being not similar to the type of contract issued by the Dominion or provincial governments.

By an amended pleading the Minister took the position that if sec. 5 (*k*) applies, which was not admitted but denied, then the exemption is $5,000 rather than $1,200 as previously alleged by him, the annuity contract alleged by him having been entered into prior to May 26th, 1932, which was the date of an amendment made to sec. 5 (*k*) by sec. 6 of ch. 43 of the Statutes of 1932, reducing the exemption in respect of income derived from annuity contracts with the Dominion Government or like annuity contracts from $5,000 to $1,200.

The President of the Exchequer Court held that the instalment payments made by the company to the appellant were not proceeds of a life insurance policy within the meaning of paragraph (*b*) of sec. 3 of the *Income War Tax Act* and accordingly determined that, having regard to the other provisions of said sec. 3, the said instalment payments were income within the meaning of that section. Counsel for the appellant submitted to this Court that the learned President was in error in so holding and that the instalment payments received by the appellant during the period 1934 (aggregating $8,400) were part of the proceeds of the said policy of life insurance and accordingly exempt from taxation under the provisions of said sec. 3.

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This may be a convenient place to set out the pertinent portions of sections 3 and 5 of the statute.

3. For the purposes of this Act, "income" means the annual net profit or gain * * * ; and shall include * * * and also the annual profit or gain from any other source including

* * *

(*b*) the income from but not the proceeds of life insurance policies paid upon the death of the person insured, * * *

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

* * *

(*k*) Twelve hundred dollars only, being income derived from annuity contracts with the Dominion Government or like annuity contracts issued by any Provincial Government or any company incorporated or licensed to do business in Canada.

It is income that is being taxed and not capital. The governing words of sec. 3, in so far as life insurance policies are concerned, are "and also the annual profit or gain from any other source including." I am unable to read the provision as bringing into charge something which, when its true nature is looked at, is of a capital nature which otherwise would not have been chargeable. Obviously the whole of the $8,400 annual payment, with which this appeal is solely concerned, was not "profit or gain." The appellant had paid in premiums during her husband's lifetime $37,039.85 over and beyond dividends credited in the sum of $6,815.15. She might die before the annual payments had returned to her an amount equal to what she had paid. It is true that the policy assures annual payments for ten years certain, but in the event of the appellant's death before the expiration of the ten-year period, the subsequent payments could not be regarded as income to her—they would pass under her will or upon an intestacy. It may well be that on a strict actuarial accounting some part of each of the $8,400 annual payments may be income, but obviously a comparatively small portion. But the Crown does not put forward a claim on that basis. Its contention is that the whole of the annual payment of $8,400 is an annuity and taxable as income from (rather than the proceeds of) the life insurance policy.

I would allow the appeal with costs throughout and vary the assessment of the appellant for the taxation year in question by deleting the said item of $8,400.

KERWIN J.—Mrs. Bessie L. Shaw appeals from a judgment of the Exchequer Court confirming the assessment levied upon her under the *Income War Tax Act* for the 1934 taxation period. Mrs. Shaw is the widow of G. B. Shaw, upon whose life a policy of insurance was taken out with the Sun Life Assurance Company of Canada. No importance is to be attached to the fact that the appellant signed the formal application for this policy nor to the fact that the premiums (less the annual dividends declared by the Insurance Company on the policy) were apparently paid out of appellant's funds,—funds to which she became entitled by reason of the transfer to her by her husband of certain shares in the capital stock of an incorporated company. In my opinion the same result would follow if G. B. Shaw had applied for the policy and if he had paid the premiums.

By the policy, the appellant, who is referred to therein as "the owner" and also as "the beneficiary," is to be paid $700 per month for one hundred and twenty months and, if she should survive after the payment in full of the one hundred and twenty monthly instalments, she was to be paid by the Company $700 monthly so long as she might survive thereafter. The policy further provides:—

> It is further agreed that when the first instalment under this policy becomes due, as above, the person or persons legally entitled to receive said first instalment shall have the option of commuting all instalments into a single cash payment of Seventy-one Thousand Four Hundred Dollars and the payment of this amount shall completely discharge the Company from all liability in connection with this contract; provided always that this option cannot be exercised by the beneficiary or payee unless the owner shall have filed with the Company a written request to that effect, or shall have so expressed his desire by will.

Mr. Shaw died November 23rd, 1933; the appellant did not exercise the option conferred on her by this clause and the Insurance Company has therefore paid her $700 each month. The question is whether she is assessable to income tax with respect to the sum of $8,400 so received by her during the year 1934.

This question depends upon the proper construction of section 3 of the *Income War Tax Act*, R.S.C., 1927, chapter 97, the relevant parts of which are as follows:—

> For the purposes of this Act, "income" means the annual net profit or gain or gratuity, * * * and also the annual profit or gain from any other source including
>
> * * *

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(*b*) the income from but not the proceeds of life insurance policies paid upon the death of the person insured, or payments made or credited to the insured on life insurance endowment or annuity contracts upon the maturity of the term mentioned in the contract or upon the surrender of the contract.

My view of the meaning of these words is that Parliament intended to exempt from income tax:—

I. The proceeds of life insurance policies paid upon the death of the person insured.

II. Payments made or credited to the insured on life insurance endowment or annuity contracts

(*a*) upon the maturity of the term mentioned in the contract, or

(*b*) upon the surrender of the contract.

It is arguable that the payments referred to relate to life insurance contracts or endowment contracts or annuity contracts and not to life insurance endowment contracts or life insurance annuity contracts (whatever that expression may mean), as has been suggested. It is unnecessary to come to any definite conclusion on that question because it is evident that the distinction to be drawn is between "proceeds * * * paid *upon the death of the person insured*" and "payments made or credited *to the insured.*" The instalments here in question were not paid to the insured, and the latter part of paragraph (*b*) may, therefore, be disregarded.

In view of the evident intention to tax the annual profit or gain from any source, the monthly instalments paid to the appellant would, I think, be taxable unless they fall within the first part of paragraph (*b*) of section 3 as being "the proceeds of life insurance policies paid upon the death of the person insured." The income that is to be included under paragraph (*b*) is the income from the proceeds of such life insurance and the income from the payments made or credited to the insured. In my opinion the monthly instalments are as much proceeds of life insurance policies as any single cash payment and they are "paid upon the death of the person insured" just as much as the single cash payment of $71,400 would have been had the appellant exercised the option given her by the policy.

Counsel for the respondent attached considerable importance to paragraph (*k*) of subsection 1 of section 5 of the Act. It could never have been intended by Parliament, he argued, that twelve hundred dollars only, being income derived from annuity contracts with the Dominion Government, etc., should be exempt, and that the total of the monthly instalments received by Mrs. Shaw under the policy should be exempt. But it is quite clear, from the evidence of Mr. Blackadar given in the Exchequer Court in this case, that this policy is an entirely different thing from the annuity contracts issued by the Dominion Government. Whatever considerations may have moved Parliament to enact clause (*k*) of subsection 1 of section 5 in 1930 and 1932, with reference to agreements to pay an annuitant certain sums during his lifetime, can have no bearing, it seems to me, upon the question as to what are proceeds of life insurance policies paid upon the death of of the person insured, as mentioned in clause (*b*) of section 3. It is quite true that any income from these proceeds is taxable and that, therefore, there is more likely to be a large taxable income if a beneficiary under such a policy takes a lump sum in satisfaction of her claim, but all this is *nihil ad rem.*

The appeal should be allowed and the assessment of the monthly instalments for 1934 set aside, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Osler, Hoskin & Harcourt.*

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

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* April 25.
* May 12.

FRANK ARTHUR WEXLER .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

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

Criminal law—Charge of murder—Accused acquitted at trial—Appeal by the Crown under section 1013 (4) Cr. C.—New trial ordered—Non-direction by trial judge on grounds not raised at the trial—No exception taken by the Crown to the trial judge's charge—Whether section 1013 (4) Cr. C. applicable.

The appellant was tried on a charge of having murdered one Germaine Rochon in Montreal. The case presented by the Crown against the accused at the trial was that he had intentionally shot the deceased with the intention to kill her. The defence relied upon the testimony given by the appellant himself, that the shooting was the result of an accident. The trial judge instructed the jury, that if they believed the account given by the accused he was entitled to be acquitted. Such instruction was accepted as satisfactory by counsel 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. The jury rendered a verdict of not guilty. The Crown appealed to the appellate court of Quebec, under the provisions of section 1013 (4) of the Criminal Code. A new trial was directed by that court on the ground that the trial judge had erred in his charge by omitting to instruct the jury, first, that from certain facts disclosed by the testimony of the appellant, the jury might have convicted the accused of murder under section 259 (*c* and *d*) Cr. C., and second, that the accused having in his charge a loaded firearm and being bound to take reasonable precautions to avoid danger to human life, the jury might have convicted the accused of manslaughter under section 247 and 252 (2) Cr. C. These grounds, raised by the Crown before the appellate court, were not considered nor suggested at the trial. The accused appealed to this Court.

Held that the appeal should be allowed, the order granting a new trial be set aside and the verdict of the jury acquitting the appellant be restored.

Subsection 4 of section 1013 Cr. C. was not intended to confer jurisdiction upon an appellate court to set aside a verdict of acquittal on a trial for murder in such circumstances as those in this case and so entitle the Crown to an order for a new trial in order to present an entirely new case against the accused.

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

APPEAL by the appellant from a judgment of the Court of King's Bench, appeal side, province of Quebec, setting aside a verdict of acquittal rendered by a jury in a trial for murder and ordering a new trial.

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

Antoine Senécal K.C. and *Alexandre Chevalier* for the appellant.

John E. Crankshaw K.C. for the respondent.

The judgment of the Chief Justice and of Davis J. was delivered by

THE CHIEF JUSTICE.—I have had the benefit of reading the judgment of my brother Kerwin and with that judgment I agree. I desire particularly to emphasize the course of the trial, and as I conceive it, its bearing upon the application of section 1013 (4) of the Criminal Code.

The appellant was indicted of murder by the killing of Germaine Rochon on the 29th of June, 1938. The appellant and the deceased Germaine Rochon were alone together in his apartment in the house of one Donato when she was killed by a bullet discharged from a pistol. To Donato and his wife who entered almost immediately afterwards and found the woman dead and the appellant shot through the chest, he said, in effect, "I shot her and then shot myself but she made me do it."

The appellant, after long treatment in the hospital, recovered and gave evidence at the trial on his own behalf. He testified that he was holding the pistol in his hand intending to shoot himself when the woman, realizing his intention, seized the weapon and, in the confusion which followed, it "went off," the bullet entering her body and killing her; and that he then turned the pistol upon himself.

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

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Duff C.J.

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. Mr. Crankshaw, who appeared for the Crown, both at the trial and in this court, with the candour and sense of duty we should expect from him, stated that this was the only issue which counsel intended to put before the jury and did in fact put before them.

To the conduct of the trial, as a trial of that issue, no objection was or could be taken.

The principal grounds of appeal were: first, that the testimony of the appellant is susceptible of the interpretation that the accused intentionally discharged the weapon with the purpose of killing himself; and that it was by accident that the deceased was killed by the bullet intended by the accused for himself; and that, accordingly, the jury ought to have been instructed that if they so found they might convict the accused of murder in virtue of section 259 (*c*) of the Criminal Code; and

Second, the jury ought to have been instructed that the accused, having in his charge a loaded firearm that in the circumstances was calculated to endanger human life, in the absence of precaution or care, he was under a duty to take the necessary precautions to avoid such danger, and that if they thought the death of the deceased was due to his failure to perform such duty they might convict him of manslaughter.

It was not suggested at the trial that the evidence of the accused was susceptible of the interpretation which is the basis of the first of these grounds. Such an interpretation of his evidence occurred to nobody. Nor did it occur to the Crown to suggest that a verdict of manslaughter might be rested upon the second ground.

The Crown asked the jury to reject the story told by the accused as a fabricated story and to find that he intentionally shot the deceased with the purpose of killing her. The Crown, by the appeal to the Court of King's Bench, in effect asked to have the verdict on this issue set aside, and to be permitted to present to another jury a case based upon the testimony of the accused and upon a construction of it which did not occur to anybody until after the verdict had been pronounced. At the new trial, of course, there would be nothing to prevent the Crown advancing the same case as at the former trial and supporting it by fresh evidence.

I do not think subsection 4 of section 1013 was intended to confer jurisdiction to set aside a verdict of acquittal on a trial for murder in such circumstances. The point is not merely that the Crown did not take exception to the learned judge's charge. The conduct of the trial with respect to the single issue of fact which was raised by the case put forward by the Crown was admittedly unimpeachable. The jury were told by the Crown that the determination of that issue in favour of the accused would entitle him to an acquittal. To set aside a verdict of acquittal in such circumstances, merely because the case for the Crown might, on a possible view of the evidence, have been put upon another footing would, it appears to me, introduce a most dangerous practice; a practice not, I think, sanctioned by the statute.

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

KERWIN J.—On a charge of having murdered Germaine Rochon on June 29th, 1938, the appellant Wexler was tried and acquitted. On appeal by the Crown to the Court of King's Bench, appeal side, of the province of Quebec, a new trial was directed on the ground that the trial judge had erred by omitting in his charge any reference to paragraphs (*c*) and (*d*) of section 259 of the

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Criminal Code, and also to section 247 and paragraph 2 of section 252 of the Code. Wexler now appeals to this Court.

It appears from the evidence that for some time prior to June 29th, 1938, Wexler had been drinking heavily and had on several occasions formed the intention of committing suicide but that at the last moment he had, on each occasion, desisted. He was on intimate terms with Germaine Rochon, who several times had stayed with him in a boarding-house in two rooms consisting of a bedroom and sitting-room. He had been in possession of a revolver for some months before June 29th, 1938, and on the 28th of that month he purchased a box of cartridges. On the day in question the revolver was loaded with five of these cartridges and it, together with the remainder of the cartridges, were in his rooms. He stated that he had definitely made up his mind on June 28th to shoot himself. The girl spent that night with Wexler and all of the 29th down to the time of the shooting. The accused testified that he desired to do away with himself when he was alone; that he asked the girl to leave and that she went to the telephone and the bathroom and returned to the bedroom. While the evidence is not quite clear, I adopt the trial judge's understanding of it,—that Wexler was in the sitting-room and that he brought the loaded revolver with him from the sitting-room to the bedroom where the girl was, with his finger on the trigger. Notwithstanding his desire to commit suicide when he was alone, Wexler's explanation of this last action of his is that he wanted to say good-bye. His account of what happened subsequently is as follows:—

> Well, she seemed to see me playing with the revolver and I had gone over to the counter to take a drink and I was afraid that if I would wait I would not be able to kill myself once more as I tried before so I told her, I said "Good-bye." I said "Good-luck" and I had the gun and she came over and said something—I cannot remember exactly what—but she grabbed hold of the gun and started to pull it and I fell with her on the bed. I do not remember exactly but the gun went off. Whether it went off while we were on the bed or before I cannot say for sure and after that she just got up like with a queer sort of a shock and walked towards the other door. I followed her so as to help her. I knew she was shot and she lay down and I could not pick her up. When I saw that I said "There is no use to wait any more" and I took the gun and pulled it and I do not remember much after that.

The case made by the Crown against the accused at the trial was that he intended to, and did kill the girl. The defence was that so far as the girl was concerned the affair was an accident. At no stage of the trial was the claim put forth that Wexler, while in the act of discharging the revolver at himself with intent to commit suicide, shot the girl. As appears from the evidence at the trial and from the charge of the learned trial judge, and as admitted by counsel for the Crown, no such claim was ever considered. Thus we find that after referring to the fact that Crown counsel had defined "murder," the judge stated in his charge:—

> I think it is better for me to repeat it. You know what murder is. It is the killing of a human being, with malicious intent, with malice aforethought: Article 259 says that "Homicide may be culpable and non-culpable, will be murder, in the following cases,"

and he then proceeded to read paragraphs (*a*) and (*b*) of section 259 of the Criminal Code. He continued:—

> I need not say that in this case, if the accused, when he shot the girl, intended to kill her, it is murder; if you come to that conclusion, because it is the first paragraph, if the offender means to cause the death of the person killed—when he used the revolver and intended to kill—and as a matter of fact, did kill her, it is murder.
>
> There are two other paragraphs in Article 259, but we are not interested in them; it is usually applied to other cases.

Counsel for the Crown, at the conclusion of the charge, stated that he had no objection to it.

However, before the Court of King's Bench and before this Court, it was urged that if Wexler, while discharging the revolver at himself, shot the girl, it would be murder, and that the trial judge should have so instructed the jury. Reliance was placed in the Court below and in argument before us on the charge to the jury in the case of *Edward Hopwood* (1). From the report of the case, it appears:—

> The defence put forward by the appellant, who refused to be represented by counsel at the trial, was that he was shooting at himself, that the deceased tried to stop him, and that there was a struggle, in the course of which she was accidentally shot. The judge directed the jury that even if they accepted this defence it would constitute murder if the shot which killed her was intentionally fired for the purpose of killing himself, but the jury found the appellant guilty of shooting the woman intentionally.

It is not necessary that we should pass upon the correctness of the statement that "it would constitute murder

(1) [1913] 8 Cr. A.R. 143.

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if the shot which killed her was intentionally fired for the purpose of killing himself," but, in any event, each word of it is significant and its real meaning may easily be overlooked. That meaning becomes clearer upon a perusal of a report of the proceedings on the last day of the trial on page 3 of the *Times* newspaper of December 12th, 1913, where it is stated:—

> Mr. Justice Avory, in summing up, explained the law applicable to the case and said that the questions for the jury were: (1) Did the prisoner intentionally discharge a loaded firearm at the deceased woman with intent to kill her or to do her grievous bodily harm? or (2) did he intentionally discharge it at himself with intent to kill himself and did the shot intended for himself kill the deceased? If either of these was the true view of these facts then the prisoner was guilty of murder. The third question for the jury was, Is it possible to accept the theory that the pistol went off by accident during a struggle to prevent him discharging it at himself, and was the death of the woman caused by his unlawful attempt to commit suicide? If so, they might find him guilty of manslaughter. If the death was not caused either of those ways then they might find the prisoner not guilty.

In that case, as explained in the report (1), the jury found the prisoner guilty of murder under the first heading referred to by Mr. Justice Avory. We do not know the exact particulars in Hopwood and in any event, circumstances vary to such a degree that except for any principle that may be involved, it is impossible to determine one case by a reference to the evidence in another.

It may be a difficult question to decide in any particular case whether there is any evidence that an accused has proceeded beyond a mere intention to an actual attempt to commit suicide. In this appeal we are not concerned with that problem nor with the one whether the Crown is bound by the failure of Crown counsel to point out to the trial judge an alleged omission in his charge on a question of law. The real point for determination is whether, after an accused person has been tried on a charge of murder and acquitted, the Crown is entitled to an order for a new trial in order to present an entirely new case against him.

An appeal is given the Crown by the 1930 amendment to section 1013 of the Code "on any ground of appeal which involves a question of law alone." Assuming, without deciding, that the pertinent question here is one of law, the Crown's contention is not entitled to prevail.

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While Wexler had on June 28th formed the intention of committing suicide on June 29th, it was never suggested during the whole course of the trial, by cross-examination or otherwise, that the shot that killed Germaine Rochon had been intentionally discharged by the accused at himself with intent to kill himself, or that the death of the girl was caused by an attempt on Wexler's part to commit suicide. Similarly, the possession by Wexler of the revolver was not relied upon to raise a duty on his part to avoid danger to human life, under section 247; nor was the issue presented as to whether he would, in that event, fall under the terms of subsection 2 of section 252.

The appeal should be allowed and the order granting a new trial set aside.

CROCKET J.—I agree that in the circumstances disclosed by the trial record in this case, where the only issue raised by the Crown was as to whether the fatal shot was fired at the deceased intentionally, as claimed by the Crown, or whether the revolver went off accidentally, as claimed by the accused, and that issue was placed squarely before the jury in terms of which the Crown counsel expressly approved, section 1013 (4) of the Criminal Code cannot properly be relied upon to enable the Attorney-General to avail himself of grounds in the Appeal Court, which were never mooted upon the trial, for the purpose of sending the accused back to a new trial on a murder indictment. So far as the offence of murder was concerned, I think the learned trial judge's direction, having regard to the course of the trial, was unexceptionable, viz., that if the jury believed the accused's explanation of the shooting to be true, he was entitled to be acquitted of the charge of murder. There can be no doubt that the jury believed the accused's explanation and acquitted him for that reason. To subject him now, after he had been put in jeopardy, taken the stand in his own behalf and been acquitted on that indictment, to a new trial thereon on the ground that he might have been convicted of manslaughter if the Crown counsel had not failed to put this feature of the case forward on the trial would, it seems to me with all respect, be such a manifest injustice as

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Parliament could not well be deemed to have intended when it enacted this drastic amendment to the Criminal Code.

For these reasons I have concluded that the appeal should be allowed and the verdict of the jury restored.

Appeal allowed.

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* May 22.
* June 27.

THE COMMISSIONER OF PATENTS....APPELLANT;

AND

AIR REDUCTION COMPANY, INC.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Procedure—Conflicting claims in two applications for patent (s. 22 of Patent Act, R.S.C., 1927, c. 150, as amended in 1932, c. 21)—Rights determined by judgment in Exchequer Court and patent issued accordingly—Position of applicant whose claims had been disallowed—Alleged abandonment of application through failure to prosecute it within six months "after any action thereon of which notice shall have been given to the applicant" (Patent Act, 1935, c. 32, s. 31).

The judgment of Maclean J., President of the Exchequer Court of Canada, [1939] Ex. C.R. 65, holding that the application for patent in question had not been abandoned and directing that it be given further consideration by the Commissioner of Patents in accordance with the practice of the Patent Office, was affirmed.

In the provision in s. 31 of *The Patent Act, 1935* (c. 32), that upon failure of the applicant for a patent to prosecute his application within six months "after any action thereon of which notice shall have been given to the applicant, such application shall be deemed to have been abandoned," the phrase "action thereon" (which means "action" on an "application for a patent") is not an apt description of a judgment of the Exchequer Court in exercise of the Court's authority under s. 22 of the *Patent Act* (R.S.C., 1927, c. 150, as amended in 1932, c. 21); it means something done by the Patent Office. Where, in proceedings under said s. 22, rights as to claims in conflict in two applications for patent had been determined by judgment in the Exchequer Court, which was followed by issue of patent to the applicant whose claims had by that judgment been allowed, it was *held* that the applicant whose claims had by that judgment been disallowed, though it had notice of the judgment and took no steps in the Patent Office within six months thereafter, yet could not be said to have abandoned its application, in the absence of any notice having been given to it of "action" by the

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

Patent Office. (The issue of the patent as aforesaid was an "action" within the above phrase in s. 31, and had there been evidence of notice thereof to the applicant whose claims had been disallowed, s. 31 would have come into play).

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), allowing the present respondent's appeal from the decision of the Commissioner of Patents holding that a certain application for patent for invention had been abandoned.

In January, 1932, an application was filed by Joshua and others for a patent of invention relating to "the Conversion of Olefines into Alcohols"—serial No. 385,527. This was assigned to The Distillers Co. Ltd.

In June, 1932, an application was filed by Metzger for a patent of invention relating to "Manufacture of Alcohols"—serial No. 390,541. This was assigned to Air Reduction Co., Inc., the present respondent.

The Commissioner of Patents was of opinion that there was apparent conflict between the two applications. The applicants deposited affidavits as required by s. 22 of the *Patent Act* (R.S.C., 1927, c. 150, as amended by Statutes of 1932, c. 21). On August 23, 1934, the Commissioner advised that on the facts stated in the affidavits he would allow the claims in conflict to Metzger, assignor to Air Reduction Co. Inc., unless within a certain time (later extended) action be taken as provided in s. 22 (4) of the *Patent Act* (as amended as aforesaid). Accordingly, proceedings were commenced in the Exchequer Court in February, 1935, in which The Distillers Co. Ltd. appeared as plaintiff and Air Reduction Co. Inc. appeared as defendant.

On October 30, 1936, an Order for Judgment was made in the Exchequer Court as follows:—

This action having come on this day before this Court on motion for judgment on behalf of the defendant, by consent, upon hearing read the pleadings and the consent to judgment signed by the Solicitors for both parties and upon hearing what was alleged by Counsel for the defendant, no one appearing for the plaintiff;

THIS COURT DOTH ORDER AND ADJUDGE that as between the parties hereto, the defendant is entitled to the issue of a patent on its application, serial number 390,541, containing claims directed to the subject matter of the invention therein described.

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the plaintiff is not entitled to the issue of a patent on its application, serial number

(1) [1939] Ex. C.R. 65.

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385,527, containing claims directed to the subject matter in conflict with subject matter claimed in defendant's application for patent, serial number 390,541.

A certified copy of said judgment was sent to the Comsioner of Patents on November 25, 1936. A patent issued accordingly, dated March 16, 1937.

On July 13, 1938, the solicitor for Air Reduction Co. Inc. forwarded to the Commissioner of Patents an assignment dated October 28, 1935, by The Distillers Co. Ltd. to Air Reduction Co. Inc. of all the right, title and interest of The Distillers Co. Ltd. in and to the invention set forth and described in the specification of the application, serial No. 385,527. He also forwarded to the Commissioner of Patents copies of new claims "drawn to restrict the claims in such a manner that they may be distinguished from" the allowed claims of the Metzger application. He asked that the claims in application, serial No. 385,527, be cancelled and the new claims be inserted in lieu thereof. In reply (August 6, 1938) the Commissioner stated:

> In reply I beg to advise that the Office holds the application abandoned. The Judgment of the Exchequer Court No. 16026 of October 30th, 1936, ordered and adjudged that the plaintiff, The Distillers Company, Limited, was not entitled to the issue of a patent in its application Serial No. 385,527, containing claims directed to the subject matter in conflict with application Serial No. 390,541. As all the claims were found in conflict there remained no claims of record in the present case, and the applicants in application Serial No. 385,527 did not present any amendment following the Judgment which was made of record in the case of the 25th of November, 1936.

and in a letter of August 20, 1938 (replying to a further letter from the solicitors of Air Reduction Co. Inc.), the Commissioner further stated:

> The judgment of the Court confirmed the award of the Office which was communicated to the then attorney of record on the 23rd of August, 1934, and the judgment becomes, therefore, equivalent to an action by the Office, the status of the case being determined by the court action. The Office holds that action may be taken in such case at any time within six months from the date of the Order of the Court and that application Serial No. 385,527 became abandoned at the expiry of six months from the 30th of October, 1936, that is on the 30th of April, 1937, and absolutely abandoned at the expiry of one year from that date.
>
> As the conflicting application matured to patent on the 16th of March, 1937, your clients had ample time after knowledge of the issued patent was open to the public to file an amendment in the above application.

and in reply to a further letter of the solicitors, he wrote on September 22, 1938, holding that the application must be considered absolutely abandoned.

Air Reduction Co. Inc. appealed from the Commissioner's decision to the Exchequer Court of Canada. Its appeal was allowed by Maclean J. (1). In his judgment he stated that all that was decided in the conflict proceedings by the Court was that the claims of Distillers Company were refused and those of Air Reduction were allowed; that the application of Distillers Company was not disallowed or voided, and conceivably its specification might contain such disclosures as would warrant the grant of claims to invention which had not been hitherto claimed, and which might be distinguishable from the claims awarded to Metzger in the conflict proceedings; that the conflict proceedings took the applications out of the Patent Office temporarily, for the Court to decide to whom belonged the claims said to be in conflict; they were then remitted back to the Patent Office for action in accordance with the Order of the Court. He held that Distillers Company was entitled to notification of the effect of the judgment of the Court in the conflict proceedings, and until that notice was received the six months could not commence to run against that applicant; that the judgment of a Court cannot be construed as official action taken by the Patent Office.

By the formal judgment in the Exchequer Court the appeal was allowed and it was ordered and declared that application serial number 385,527 had not been abandoned and it was directed that the same be given further consideration by the Commissioner of Patents in accordance with the practice of the Patent Office.

On an application under s. 83 of the *Exchequer Court Act*, leave to appeal to the Supreme Court of Canada was granted by a Judge of this Court.

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

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This appeal turns upon the application of section 31 of the *Patent Act:*

31. Each application for a patent shall be completed and prepared for examination within twelve months after the filing of the applica-

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tion, and in default thereof, or upon failure of the applicant to prosecute the same within six months after any action thereon of which notice shall have been given to the applicant, such application shall be deemed to have been abandoned, but it may be reinstated on petition presented to the Commissioner within twelve months after the date on which it was deemed to have been abandoned, and on payment of the prescribed fee, if the petitioner satisfies the Commissioner that the failure to prosecute the application within the time specified was not reasonably avoidable. An application so reinstated shall retain its original filing date.

Section 22 of the *Patent Act* (Ch. 150, R.S.C., 1927, as amended by ch. 21, Stats. of 1932) is in these terms:

(1) Where the Commissioner has before him two or more applications, each of which he considers would be allowable if each did not contain one or more claims describing as new and claiming an exclusive property or privilege in things or combinations so nearly identical that separate patents to different patentees should not be granted on such applications, he shall forthwith notify each of the applicants of the apparent conflict and transmit to each a copy of all the conflicting claims, together with a copy of this section.

(2) Each of the applicants, within a time to be fixed by the Commissioner, shall either avoid the conflict by the amendment or cancellation of his claims or deposit with the Commissioner in a sealed envelope duly endorsed an affidavit setting out the date at which he conceived the idea of the invention described in the claims in conflict, the date and mode in which the idea was first formulated and/or disclosed by him in writing or verbally and the dates and nature of the successive steps subsequently taken by him to develop and perfect the said invention from time to time up to the date of the filing of his application for patent.

(3) No envelope containing any such affidavit as aforesaid shall be opened nor shall the affidavit be permitted to be inspected unless there continues to be a conflict between two or more applicants, in which event all the envelopes shall be opened contemporaneously and the Commissioner shall transmit copies of the affidavits to the several applicants, at the same time stating to which of them he would, on the facts stated in the several affidavits, allow the claims in conflict.

(4) The claims in conflict shall be rejected or allowed accordingly unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court of Canada for the determination of their respective rights, in which event the Commissioner shall suspend further action on the applications in conflict until in such action it has been determined either

(i) that there is in fact no conflict between the claims in question, or

(ii) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him, or

(iii) that a patent or patents, including substitute claims approved by the Court, may issue to one or more of the applicants, or

(iv) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him.

(5) The Commissioner shall, upon the request of any of the parties to a proceeding under this section transmit to the Exchequer Court of Canada the papers on file in his office relating to the applications in conflict.

The judgment of the Exchequer Court in the action brought by the Distillers Co. Ltd., pronounced on the 30th day of October, 1936, disposed of all questions with which the Air Reduction Co., Inc., were concerned and they accordingly became entitled to their patent; which was, in fact, issued on the 16th of March, 1937.

There can be no question that the applicants, who at the time were The Distillers Co., Ltd., had notice of the judgment of the Exchequer Court. The proper inference from the facts is that of this judgment, which was a consent judgment, the plaintiff's solicitors of record had notice and notice to them was notice to the plaintiffs.

The phrase "action thereon" (which means "action" on an "application for a patent") as employed in section 31, is not an apt description of a judgment of the Exchequer Court in exercise of the Court's authority under section 22; and I think, notwithstanding its inexactitude, that it means something done by the Patent Office. I think the issue of the patent was such "action" and if there had been evidence of notice to the applicant, section 31 would have come into play.

Whatever may be said with regard to the judgment of the Exchequer Court, there is, it is quite clear enough, no evidence that notice of this "action" by the Patent Office was "given to the applicant."

An assignment of October, 1935, from the Distillers Co., Ltd., to the respondents is put in evidence, but it was not registered and the Distillers Company continued for a year to be parties of record in their own action. Registration did not take place until some time in 1938, considerably over a year after the issue of the patent. There does not appear to be evidence from which an inference can be drawn that notice to the respondents involved notice to the Distillers Company, who at the pertinent time were the "applicant" within the meaning of section 31.

The appeal should be dismissed. No order as to costs.

Appeal dismissed.

Solicitors for the appellant: *Ewart, Scott, Kelley, Scott & Howard.*

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

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*Jan. 23, 24.
*June 27.
*Oct. 3.

EDWARD G. KINKEL AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

BERNARD N. HYMAN (PLAINTIFF) .... RESPONDENT;

AND

PORCUPINE UNITED GOLD MINES, INC. (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Breach of agreement by defendants in not calling meeting at which a favourable vote on a certain question was necessary to enable plaintiff to exercise option given him conditionally by defendants—No evidence of reasonable probability of favourable vote, had the meeting been called—Value to plaintiff of option lost—Judgment for nominal damages.

Appeal—Jurisdiction—"Amount or value of the matter in controversy in the appeal" (Supreme Court Act, R.S.C., 1927, c. 35, s. 39).

Plaintiff sued to enforce rights claimed under an agreement made in 1934. In 1931 M. Co. had transferred to plaintiff 350,000 shares which it held in P. Co. It appeared that this transfer was made without the authority of the shareholders of M. Co. being given in accordance with the terms under which M. Co. held the shares. By the agreement now in question (of 1934) defendants, who were directors of M. Co., bought from plaintiff 240,000 shares of P. Co. at 7 cents a share and gave an option to plaintiff to repurchase 140,000 of said shares at 8 cents a share within nine months, but this option was "contingent upon the fact" that defendants were to call a meeting of the stockholders of M. Co. "within a reasonable time after the date of this agreement" and submit to that meeting the question of ratifying said transaction of 1931, and if at said meeting the holders of 51% of the shares of M. Co. did not vote for such ratification, "the option hereby given shall become and be deemed null and of no effect." It was also provided that when and as soon as defendants received proxies from stockholders holding 51% of the issued and outstanding shares of M. Co. for voting at the meeting, defendants would cause a meeting to be called to consider such ratification. No meeting was called nor was the option exercised within the nine months. The trial judge held that under the agreement the duty of obtaining proxies and calling the meeting fell primarily upon defendants and, as plaintiff could not exercise the option until the meeting was called and the requisite approval obtained, plaintiff was entitled to a declaration that the option was still in force and would remain so for a fixed period to enable the meeting to be held, and to that extent the agreement

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might be reformed. On appeal by defendants, the Court of Appeal for Ontario held against the relief granted at the trial, but held that under the agreement defendants were obliged to call the meeting within the option period of nine months, that their failure to do so was breach of the agreement in a matter vital to its whole operation, that by such breach plaintiff had lost the chance of an approval of the holders of 51% of the shares within said nine months, and had lost the option, and gave judgment for damages with a reference to ascertain the amount. Defendants appealed.

Held: There was an obligation on defendants to call the meeting, as held in the Court of Appeal, but the judgment should have been for nominal damages only. Plaintiff had not developed at the trial any claim for damages on the basis of a breach of contract in not calling the meeting; there was no evidence that there was any reasonable probability that if the meeting had been called within the nine months a favourable vote of the holders of 51% of the shares could have been obtained; the plain inference from the evidence was that a favourable vote could not have been obtained. Further (*per* the Chief Justice and Davis J.), even had the meeting been called and a favourable vote obtained, plaintiff's option, in view of the evidence as to the market value of the shares, was not of any real value to him. (*Per* Rinfret, Crocket and Kerwin JJ.: *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, and *Carson* v. *Willitts*, 65 Ont. L.R. 456, discussed; those cases afford no authority justifying the awarding of any more than nominal damages for the loss of a mere chance of possible benefit except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value. *Sapwell* v. *Bass*, [1910] 2 K.B. 486 also cited).

There had been a motion to quash the appeal for want of jurisdiction. The plaintiff had claimed in his pleadings (*inter alia*) "$50,000 as damages for breach of contract," and the record contained an affidavit on behalf of defendants on information and belief that plaintiff's counsel intended to produce evidence, on the reference, to establish damages much in excess of $2,000. The Court (in a judgment given prior to judgment on the merits) held (Crocket J. not concurring) that defendants had not established that "the amount or value of the matter in controversy in the appeal exceeds the sum of $2,000" (*Supreme Court Act*, R.S.C., 1927, c. 35, s. 39) and in the absence of leave to appeal the appeal could not be entertained. (Having regard to circumstances in the case, opportunity was given to ask the Court of Appeal for such leave, which was granted).

APPEAL by the defendants (other than the defendant company; the individual defendants are hereinafter called the defendants) from the judgment of the Court of Appeal for Ontario which, on appeal to that Court by the defendants from the judgment of Kingstone J. at trial in favour of the plaintiff, also gave judgment for the plaintiff but for relief different in its nature from that allowed by the trial judge.

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In 1931 March Gold Inc. had transferred to plaintiff 350,000 shares of stock in Porcupine United Gold Mines Inc. (the defendant company). Apparently, through inadvertence, this transfer was made without the authority of the shareholders of March Gold Inc. being given in accordance with the terms under which March Gold Inc. held the shares. Defendants were directors of March Gold Inc. and wished to be in a position to meet any objections that might be made by shareholders to said transfer. The agreement now in question, of October 4, 1934, was made between plaintiff and defendants. It provided for plaintiff transferring to defendants 240,000 shares of stock of Porcupine United Gold Mines, Inc., at 7 cents per share (this was done), and for an option to plaintiff to repurchase 140,000 of said shares at 8 cents per share within nine months from the date of the agreement, defendants not to be required to deliver said stock within six months if for certain reasons they deemed it inadvisable to do so.

By clause 5 of the agreement the option was "further contingent upon the fact" that defendants were to call a meeting of the stockholders of March Gold, Inc., "within a reasonable time after the date of this agreement" and submit to said meeting the question of ratifying said transfer of 350,000 shares to plaintiff in 1931, "and that if at said meeting the holders of 51% of the shares of stock of March Gold, Inc., do not vote" to ratify said transfer made in 1931, then "the option hereby given shall become and be deemed null and of no effect."

By clause 6 it was provided that when and as soon as defendants or their agents and representatives received proxies from stockholders of March Gold, Inc., holding 51% of the issued and outstanding stock of that corporation, authorizing the voting of said shares at the meeting, the defendants would cause the Chairman of the Board of Directors of March Gold, Inc., to call a meeting of the stockholders to consider the sale and/or disposition of said 350,000 shares and the ratification of the contract made in 1931.

The provisions of the agreement and the facts of the case are more fully set out in the judgments now reported.

The plaintiff sued for enforcement of said option and certain further and alternative relief (including an injunction against selling, etc., the shares, and "$50,000 as damages for breach of contract").

The trial judge, Kingstone J., found that plaintiff had not, prior to the expiry of the nine months option period, notified defendants in any formal manner that he was exercising the option; that no meeting of the stockholders of March Gold, Inc., was called or held pursuant to clauses 5 and 6 of the agreement; that plaintiff could not exercise the option or right to repurchase until the meeting was called and approval of the transaction of 1931 obtained; that the duty of obtaining proxies and calling the meeting fell primarily upon defendants. He held that plaintiff was entitled to a declaration that the option was still in full force and effect and would remain so for a period of four months from the date of judgment to enable the meeting to be held, and to that extent there might be a reformation of the agreement; that plaintiff was entitled to an injunction against disposing of or dealing with the 140,000 shares until after the holding of the meeting.

The (individual) defendants appealed to the Court of Appeal for Ontario. That Court held that there was an obligation under clause 5 on defendants to call the meeting within a reasonable time; that such reasonable time was necessarily within the option period of nine months, and consequently there was breach by defendants of the agreement in a matter vital to its whole operation; that the result of such breach was that the plaintiff had lost the chance of an approval by 51% of the shareholders of March Gold, Inc., within said period of nine months; that the Court could not override the express terms of the agreement that the option expired at the end of nine months or extend this period; that there was no basis on which to reform the agreement; that therefore the judgment of the trial judge should be varied by declaring that defendants had committed a breach of agreement as aforesaid, whereby plaintiff's option to purchase 140,000 shares of Porcupine United Gold Mines, Inc., had been lost; that there should be a reference to the Master to enquire and report the damages thereby suffered by the plaintiff, the plaintiff to be at liberty to enter judgment on confirmation of the Master's report for the amount found. The injunction granted at trial was vacated.

The defendants appealed to the Supreme Court of Canada.

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There was a motion to quash the appeal for want of jurisdiction, on which questions arose as to whether the appeal had been brought within the statutory time and as to whether there was an "amount or value of the matter in controversy in the appeal" sufficient to give jurisdiction.

A motion had been made by defendants to the Court of Appeal for Ontario to allow the appeal and security thereon, and alternatively, if the Court should consider that the time for bringing the appeal had expired, for an order extending the time, and also alternatively, if the Court should consider that the amount or value of the matters in controversy in the appeal did not exceed $2,000, for special leave to appeal to the Supreme Court of Canada. On that motion, the Court of Appeal, having regard to certain proceedings and determinations in settlement of the minutes of judgment, held that time had commenced to run in this case, for the purpose of an appeal, from the date when the judgment was finally settled and entered, and on this basis the appeal was brought in time, and the security was allowed (1). This order did not deal with the question of the amount or value involved. A clause in an affidavit in support of the motion before the Court of Appeal was that

> The amount claimed by the statement of claim herein for damages for breach of contract is $50,000 and I am informed by counsel for the plaintiff and verily believe that he intends to produce evidence on the proposed reference to establish damages substantially in excess of $2,000. * * * Exhibit D * * * is a true copy of a memorandum * * * delivered * * * by the solicitors for the plaintiff setting out the heads of damage proposed to be established by him.

The Supreme Court of Canada heard argument on the motion to quash and also argument on the merits.

E. Bristol K.C. and *N. E. Phipps* for the appellants.

A. C. Heighington K.C. and *H. G. Steen* for the respondent (plaintiff).

J. E. Corcoran K.C. for defendant company, respondent.

Judgment was reserved. On a subsequent day the Court delivered judgment on the motion as follows:

"In the opinion of the majority of the Court (Mr. Justice Crocket not concurring in this) the appellant has

(1) [1938] Ont. W.N. 135; [1938] 2 D.L.R. 751.

not established that the "amount or value of the matter in controversy in" this "appeal exceeds the sum of $2,000" and, in the absence of leave, therefore, the appeal, for want of jurisdiction, cannot be entertained.

"It appears that an application for leave to appeal was made by the appellant to the Court of Appeal and it seems that this application was not dealt with by that court. We are not satisfied that the Court of Appeal would not have granted the application for leave if they had thought that an appeal *de plano* was incompetent. In the circumstances, we think the appellant should have an opportunity of renewing his application for leave to the Court of Appeal and, in the meantime and for that purpose, further proceedings in the appeal should be stayed."

Special leave to appeal was subsequently granted by the Court of Appeal for Ontario. The Supreme Court of Canada on a subsequent day delivered judgment on the merits.

The judgment of the Chief Justice and Davis J. was delivered by

DAVIS J.—The plaintiff (respondent) sought in this action specific performance against the individual defendants (appellants) of an alleged contract for the sale of 140,000 shares of Porcupine United Gold Mines, Inc., at 8 cents a share. The plaintiff alleged tender of the purchase price before action and pleaded his willingness and readiness to perform on his part the alleged contract for the purchase of the said shares. That was the main claim of the plaintiff in the action. After an extended trial the plaintiff failed on this claim. Alternatively, the plaintiff claimed cancellation of the alleged contract and the return to him of 240,000 shares of the same stock which he had previously sold and delivered to the individual defendants, on repayment by him of the amount received by him for those shares. The plaintiff failed at the trial on this claim as well. No appeal was taken by the plaintiff from the judgment at the trial in respect of these two claims. The result is that the action came to an end, in so far as these two claims are concerned, with the judgment at the trial.

The plaintiff, however, had made a further alternative claim in his prayer: a declaration that his right to repurchase the 140,000 shares under the contract, dated October

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4th, 1934, notwithstanding that it contained a limitation of time of nine months, had not been determined (the writ was not issued until November 24th, 1936) and was still in full force and effect and would so remain until a meeting of the shareholders of another company, March Gold, Inc., had been held. The plaintiff succeeded at the trial on this claim. The trial judge ordered the reformation of the said contract; extended for a period of four months from the date of the judgment the time for the running of the plaintiff's right or option for the purchase of the 140,000 shares; declared that it was the duty of the individual defendants under the terms of the contract to cause a meeting of the shareholders of March Gold, Inc., to be held for the purpose of considering the question of ratifying, confirming and approving a prior sale and transfer of 350,000 shares of the Porcupine United Gold Mines Inc. to the plaintiff which had been made by the directors of March Gold, Inc. on or about the 12th of June, 1931; restrained the individual defendants from transferring, disposing of or otherwise dealing in Ontario with the said 140,000 shares of Porcupine United Gold Mines Inc. until after the holding of the meeting of the shareholders of March Gold Inc. and restrained Porcupine United Gold Mines Inc. (which was a party defendant in the action) from accepting or recording any transfer of the said 140,000 shares of Porcupine United Gold Mines Inc. until after the meeting of the shareholders of March Gold Inc. had been held.

From that judgment the individual defendants (appellants in this Court) appealed to the Court of Appeal for Ontario, which Court unanimously disagreed with the conclusion of the trial judge on the last mentioned branch of the case, holding that the contract plainly contemplated and provided a fixed period of nine months, from its date, for the holding of a meeting of the shareholders of March Gold Inc. and the exercise of the option, if such right became available as a result of the vote at such meeting.

But the Court of Appeal, while holding that the contract had expired nine months from its date and that there was no ground upon which the Court was justified in extending the time, held that the plaintiff was entitled to damages against the individual defendants for their breach of the contract in failing to call a meeting of March Gold

Inc., and accordingly varied the judgment at the trial as follows:

(1) This Court doth order and adjudge that the plaintiff do recover from the individual defendants the damages sustained by the plaintiff as a result of the breach by the individual defendants of their obligation under clause 5 of the Agreement in question in this action to call a meeting of the stockholders of March Gold Inc. within the period of nine months from the date of such agreement during which the option granted to the plaintiff by the said agreement to purchase 140,000 shares of Porcupine United Gold Mines Inc., existed.

(2) And this Court doth further order that it be referred to the Master of this Court to ascertain the amount of the said damages, the costs of such reference to be in the discretion of the said Master.

From that judgment the individual defendants have appealed to this Court. No cross-appeal was taken and therefore the sole issue in the appeal is whether or not the plaintiff is entitled, upon the particular facts and circumstances of the case, to a judgment for damages with a reference to ascertain their amount.

It is unnecessary to review the evidence in detail. The essential facts are few and are not really in dispute. The plaintiff had, on or about June 12th, 1931, acquired 350,000 shares of Porcupine United Gold Mines Inc. by a sale and transfer to him of the said shares from the directors of March Gold Inc. Both companies had been incorporated and organized under the laws of the State of Delaware in the United States, but the former named company, Porcupine United Gold Mines Inc. (made a party defendant in this action), has an office within the province of Ontario, where the stock transfer books of the company are kept. The individual defendants in the action were directors of March Gold Inc. at the time of the said sale and transfer of the 350,000 shares of the Porcupine Company, and had, inadvertently it would appear, failed to obtain the authority of the shareholders of March Gold Inc. to the said sale and transfer of the said Porcupine shares to the plaintiff. These shares had been held by March Gold Inc. under the terms of an agreement of February, 1929, which had provided that the shares should be held

in trust for the sole, exclusive and continuing benefit of the shareholders of March Gold, Inc.

and could

not be sold or otherwise disposed of until and unless not less than 51% of the entire issued and outstanding stock of March Gold, Inc. vote its approval at a meeting of shareholders called by the Chairman of the Board of March Gold, Inc.

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It seems to have been agreed by the parties that this omission had the effect of leaving the directors open to an action by the shareholders of March Gold, Inc. for breach of trust in disposing of the shares in contravention of the terms of the said arrangement, and perhaps of leaving the plaintiff's title to the shares doubtful.

In order to avoid the risk of liability to their shareholders for the unauthorized sale of these shares, and to put themselves in a position where they could satisfy the demands of any shareholders of March Gold, Inc. who might attack the transaction, the directors in October, 1934, repurchased from the plaintiff 240,000 of these shares at the price of 7 cents a share. This number of shares was calculated to be sufficient to meet any demands of any shareholders of March Gold, Inc. who might complain of the earlier transaction. The purchase and sale of the 240,000 shares between the plaintiff and the individual defendants was in writing, dated October 4th, 1934, and was carried out. The contract, however, contained a provision whereby the plaintiff was given the right or option to repurchase 140,000 of the 240,000 shares of the Porcupine United Gold Mines Inc. at 8 cents per share,

provided that said stock is purchased within nine (9) months of the date hereof, and upon the further understanding and agrement that the purchasers (i.e., the individual defendants) shall not be required to deliver said stock to Hyman (the plaintiff) within six (6) months of the date hereof, if, in their discretion, they deem it inadvisable to sell or transfer said stock by reason of any possible claims that may exist in relation thereto in favour of March Gold, Inc. and/or in favour of its stockholders.

Whenever called upon after said six (6) months and within nine (9) months, the purchasers proportionally shall re-transfer and deliver to Hyman at Fort Erie, Province of Ontario, said shares of stock of Porcupine United Gold Mines, Inc., as aforesaid, in blocks of ten thousand (10,000) shares or more, as Hyman may require.

The contract contained the further express condition as to the right or option for the repurchase of the 140,000 shares:

This option is further contingent upon the fact that the purchasers (i.e., the individual defendants) are to call a meeting of the stockholders of March Gold, Inc., within a reasonable time after the date of this agreement and submit to said meeting of stockholders the question of ratifying, confirming and approving the delivery of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., to Hyman, and that if at said meeting the holders of fifty-one (51%) per cent. of the shares of stock of March Gold, Inc., do not vote to approve, ratify and confirm the delivery of said Porcupine United

Gold Mines, Inc., stock to Hyman as aforesaid, that then and in that event the option hereby given shall become and be deemed null and of no effect; * * *

The contract continues (it is unnecessary for the purpose of this appeal to quote intervening provisions which have no application now):

When and as soon as the purchasers (i.e., the individual defendants), or their agents and representatives, receive proxies from stockholders of March Gold, Inc. holding fifty-one (51%) per cent. of the issued and outstanding stock of such corporation, authorizing the respective attorneys therein named to vote said shares at a meeting of the stockholders of March Gold, Inc., called by the Chairman of the Board of Directors of the company, to consider the sale or disposition of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., the purchasers will cause the Chairman of the Board of Directors of March Gold, Inc., to call a meeting of the stockholders of March Gold, Inc., at a fixed time and place, pursuant to the by-laws of such corporation, to consider the sale and/or disposition of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., and the confirmation and ratification of the said contract between Hyman and others, on the one part, and March Gold, Inc., and others, on the other, dated on or about June 12th, 1931, and all amendments and supplements thereto.

It is admitted that the individual defendants were in a position, had they so desired, at any time during the nine months period to call a meeting of March Gold, Inc.

It is plain that the plaintiff's right to repurchase the 140,000 shares could not arise until a meeting was called of the shareholders of March Gold, Inc. and until fifty-one per cent. of the shares of the said company had been voted in favour of the approval, ratification and confirmation of the original sale of the 350,000 Porcupine shares by March Gold, Inc. to the plaintiff.

It is not disputed that no meeting of the shareholders of March Gold, Inc. was called.

We agree with the view taken in the Court of Appeal that upon the true construction of the contract the individual defendants were under an obligation to the plaintiff to call a meeting of the shareholders of March Gold, Inc. within the period of nine months fixed by the contract and sooner if they received sufficient proxies from the shareholders to vote in favour of the ratification of the original transaction. It is not disputed that the individual defendants did not receive such proxies, but it was none the less their duty to call the meeting. To that extent there was a breach of the contract.

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Was this a case for merely nominal damages or can it be properly said that it is a case for substantial damages? The Court of Appeal undoubtedly treated the case as one for substantial damages. The reasons for judgment of Masten J.A. were concurred in by the other members of the Court. That learned Judge of Appeal said:

> I would therefore vary the judgment of the learned trial judge by declaring that the defendants have committed a breach of the provisions of the agrement in the pleadings mentioned whereby the option of the plaintiff to purchase 140,000 shares of Porcupine United Gold Mines Inc. has been lost, and would direct a reference to the Master to inquire and report the damages thereby suffered by the plaintiff, the plaintiff to be at liberty to enter judgment on confirmation of the Master's report for the amount so found and the costs of the reference to be in the discretion of the Master.

The plaintiff in his prayer for relief in his statement of claim did claim, under paragraph (*f*), "$50,000 as damages for breach of contract," but did not in any way develop at the trial any claim for damages on the basis of a breach of the contract in not calling the meeting. His two main claims were specific performance or, in the alternative, an extension of time for the holding of the meeting. The whole action was developed and fought out at the trial on those two principal issues. There was no evidence that there was any reasonable probability that if a meeting had been called within the nine months, a favourable vote of fifty-one per cent. of the shareholders of March Gold, Inc. could have been obtained. No demand was made by the plaintiff within the nine months period for the calling of the meeting and it cannot be said to have been a deliberate and intentional disregard of the plaintiff's right. The plain inference from the evidence is that a favourable vote could not have been obtained.

Assuming in the plaintiff's favour that the meeting had been called within the nine months period and that fifty-one per cent. of the shares had voted in favour of the ratification of the transaction, and thereby the option had become open to the plaintiff, would he have exercised it? Was the right of any real value to him? If he could have bought the same shares on the market at the stipulated price, or at a lower price, the right would have been of no money value and the breach of the contract would not have involved any loss. This disregards the suggestion

that a favourable vote in ratification of the original transaction would have made the title to the plaintiff's remaining shares unquestionable, but nothing was made of that point either in the pleadings or in the evidence. The whole action in its several branches was based upon the refusal or failure of the individual defendants to resell to the plaintiff the 140,000 shares at the option price of 8 cents a share. Where there is a market in the shares, the proper measure of damages in general is the difference between the contract price and the market price of such shares at the time when the contract was broken, because if the purchaser has the money in his hands he may go into the market and buy. The evidence as to the prevailing market price of the shares in question during the nine months period is not as explicit as it might be but it is sufficient, I think, to indicate that if the plaintiff really wanted 140,000 shares at the time he could have bought them on the market at a price equal to, and perhaps considerably less than, the stipulated price. The agreement, to repeat, was October 4th, 1934, and the nine months would expire on July 4th, 1935. Moore, an attorney who had been practising in Buffalo since 1899, testified that

> When the option expired, Porcupine stock was selling around 5 cents a share.

Kinkel testified that on January 1st, 1935, or thereabouts, he sold 5,000 shares at 6 cents a share and that he bought 5,000 shares on November 17th, 1934, at 4½ cents a share, on June 5th, 1935, 4,000 shares at about 5 and 9/10 cents a share, and on June 7th, 1935, he bought 1,000 shares at 5 and 3/10 cents per share. He testified further that on December 28th, 1935 (nearly six months after the expiration of the nine months period) he bought a 1,000-share block at 3 cents a share. During 1936 the market appears to have improved. Kinkel says that the group of individual defendants bought 200,000 shares, paying 8 cents a share for 140,000 and 10 cents a share for 60,000 shares. The exact date is not made plain but I take it from his evidence it was somewhere around June, 1936.

Kinkel further testified that

> During the period of the nine months I naturally assumed that Mr. Hyman, making no effort to bring in proxies or give me his proxy, was not interested in acquiring the stock under those circumstances at 8 cents a share, and therefore made no effort to force him to get proxies.

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If the plaintiff had intended to establish a claim for substantial damages for the breach of the contract in not calling the meeting (which is the claim that the Court of Appeal allowed), he should have developed, if it were possible, that branch of the case at the trial by giving at least some evidence upon which it would appear likely that a favourable vote could have been obtained within the period of nine months, had a meeting been called, and that the option would have been of some real monetary value to him. But the plaintiff made no such case at the trial and under the circumstances I think, with the greatest respect, that the Court of Appeal should have given judgment for nominal damages only. The courts should insist upon as much certainty and particularity, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the breach complained of.

The question of jurisdiction to hear and determine this appeal was raised by counsel for the plaintiff (respondent) upon the ground that the "amount or value of the matter in controversy" in the appeal did not exceed the sum of $2,000 and that, in the absence of leave, the appeal should fail for want of jurisdiction. Since the issue of a memorandum by the Court on June 27th last, the Court of Appeal for Ontario has granted leave to appeal (September 15th) and we are therefore now in a position to dispose of the appeal.

In my opinion the appeal should be allowed and the judgment appealed from set aside and judgment should be entered in favour of the plaintiff (respondent) against the individual defendants (appellants) in the sum of $1.00 with costs of the action on the High Court scale without a set-off. The appellants (the individual defendants) should be allowed their costs in the Court of Appeal and in this Court against the plaintiff (respondent).

The appellants made the Porcupine United Gold Mines Inc. a party respondent to this appeal but made no claim for relief against it and at the conclusion of the argument we dismissed the appeal as against this respondent with costs.

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

CROCKET, J.—This case having previously been fully argued both on the jurisdictional ground and on the merits, the court pronounced its judgment on the jurisdictional question on June 27th, holding that there was no jurisdiction to hear the appeal without a special order of the Court of Appeal and staying further proceedings in order to give the appellant an opportunity of renewing an application to the Court of Appeal for such special leave. Special leave to appeal having been granted in the meantime, we are now in a position without further argument to deal with the merits of the appeal.

The controversy involved in this appeal arises out of an agreement entered into between the respondent (Hyman) and the appellants (Kinkel et al.) on October 4th, 1934. This agreement was made to adjust some difficulties, which had resulted from the previous sale to Hyman by the appellants, acting as directors of March Gold Inc., of 350,000 shares of the stock of Porcupine United Gold Mines Inc., held by the former corporation and which sale had not been ratified by the stockholders of that corporation as required by its by-laws. By it Hyman agreed to sell to the appellants 240,000 shares of the stock of Porcupine United Gold Mines Inc., at 7 cents per share, with an option to him to repurchase 140,000 of them at 8 cents per share within nine months of the date of the agreement, and upon the further understanding and agreement that the appellants should not be required

> to deliver said stock to Hyman within six months of the date hereof, if in their discretion they deem it unadvisable to sell or transfer said stock by reason of any possible claims that may exist in relation thereto in favour of March Gold, Inc., and/or in favour of its stockholders,

and the appellants agreed whenever called upon after the said six months and within nine months to retransfer and deliver to Hyman said shares of stock in blocks of 10,000 shares or more as Hyman might require. This option was further conditioned upon the appellants calling a meeting of the stockholders of March Gold Inc. within a reasonable time after the date of the agreement for the purpose of ratifying the previous 350,000 shares

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sale to Hyman. The latter condition is fully set out in paragraph 5, the material portion of which reads as follows:

This option is further contingent upon the fact that the Purchasers are to call a meeting of the stockholders of March Gold, Inc., within a reasonable time after the date of this agreement and submit to said meeting of stockholders the question of ratifying, confirming and approving the delivery of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., to Hyman, and that if at said meeting the holders of fifty-one (51%) per cent. of the shares of stock of March Gold, Inc., do not vote to approve, ratify and confirm the delivery of said Porcupine United Gold Mines, Inc. stock to Hyman as aforesaid, that then and in that event the option hereby given shall become and be deemed null and of no effect; and in the event that the holders of fifty-one (51%) per cent. of the shares of stock of March Gold, Inc., shall vote for the approval of the transfer and assignment of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc. by March Gold, Inc., to Hyman, then the Purchasers shall deliver the said one hundred forty thousand (140,000) shares of stock of Porcupine United Gold Mines, Inc. to Hyman as and when he exercises his option, as hereinabove provided, unless prior to the expiration date of said option there shall be pending in any Court an action by any person or corporation to determine the existing rights of March Gold, Inc. stockholders in and to said stock, or any part thereof, in which event the time of exercising said option shall be extended until the final determination favourable to the defendant or defendants therein, of any action in respect thereto.

Paragraph 6, which is the only other part of the agreement with which we are concerned, reads as follows:

When and as soon as the Purchasers, or their agents and representatives, receive proxies from stockholders of March Gold, Inc. holding fifty-one (51%) per cent. of the issued and outstanding stock of such Corporation, authorizing the respective attorneys therein named to vote said shares at a meeting of the stockholders of March Gold, Inc., called by the Chairman of the Board of Directors of the Company, to consider the sale or disposition of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., the Purchasers will cause the Chairman of the Board of Directors of March Gold, Inc., to call a meeting of the stockholders of March Gold, Inc., at a fixed time and place, pursuant to the by-laws of such Corporation, to consider the sale and/or disposition of said three hundred fifty thousand (350,000) shares of stock of Porcupine United Gold Mines, Inc., and the confirmation and ratification of the said contract between Hyman and others, on the one part and March Gold, Inc., and others, on the other, dated on or about June 12th, 1931, and all amendments and supplements thereto.

The Appeal Court was of opinion that the two paragraphs were independent and consistent with each other and that effect must be given to both. It therefore decided that paragraph 5 imposed upon the appellants an obligation to call a meeting of March Gold, Inc., with-

in a reasonable time, that such reasonable time was necessarily within the period of nine months during which the option granted to the plaintiff existed and that there was a breach of the agreement on the part of the appellants in a matter vital to its whole operation, whereby Hyman had lost the chance of an approval of 51% of the shareholders of March Gold, Inc., within the period of nine months during which his option was in existence, and directed a reference to the Master to enquire and report the damages thereby suffered by the respondent Hyman.

While I agree with the Court of Appeal that there was a breach of the agreement on the part of the appellants in not calling a meeting of the shareholders of March Gold, Inc. within a reasonable time, whereby the respondent lost the chance of the 51% approval of the original sale, I am of opinion that the clear inference from the undisputed facts disclosed by the evidence is that if a meeting had been called within the nine months, the chance of ratification of the original sale, which was necessary to save the option, was practically nil and therefore of no real value to the respondent. Certainly the respondent produced no evidence to shew that there was any reasonable probability of his obtaining the desired ratification had such a meeting been called and made no attempt to develop on the trial this branch of his case, upon which the judgment now appealed against wholly turned. For this reason I am of opinion that the Court of Appeal should have entered a judgment for nominal damages only.

It is quite evident from the reasons of Masten, J.A., concurred in by Fisher and Henderson, JJ.A., that these learned Appeal Judges would not have ordered a reference had they not been of opinion that the chance of obtaining ratification of the original sale might possibly be found to be of substantial value and that this opinion was founded upon the decision of the Court of Appeal in England in *Chaplin* v. *Hicks* (1), which was followed by the Appeal Court in *Carson* v. *Willitts* (2).

With all respect, the present case, I think, is distinguishable from *Chaplin* v. *Hicks* (1). There the jury had actually found, in answer to the question put to them by the trial judge, that the defendant did not take reason-

(1) [1911] 2 K.B. 786. (2) (1930) 65 Ont. L.R. 456.

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able means to give the plaintiff an opportunity of presenting herself for selection as one of a class of fifty ladies desirous of securing engagements as actresses, from whom twelve winners were to be chosen, to whom the defendant undertook to give three-year engagements (to the first four at £5 per week, to the second four at £4 per week and to the third four at £3 per week) and assessed the damages at £100. As Vaughan Williams, L.J., points out, the average chance of each competitor was one in four.

The judgment in that case really proceeded on the ground that difficulty or impossibility of ascertaining damages with certainty does not render damages unassessable and that in any such case it is for the jury to do the best they can in determining the amount, which they think will justly compensate the plaintiff for a breach of contract.

Vaughan Williams, L.J., in the course of his reported reasons, said:

> There are cases, no doubt, where the loss is so dependent on the mere unrestricted volition of another that it is impossible to say that there is any assessable loss resulting from the breach. In the present case there is no such difficulty.

He concluded:

> The jury came to the conclusion that the taking away from the plaintiff of the opportunity of competition, as one of a body of fifty, when twelve prizes were to be distributed, deprived the plaintiff of something which had a monetary value. I think that they were right and that this appeal fails.

The opinion of Fletcher Moulton, L.J., proceeded upon the same ground, though in the course of his reasons he said he could find no authority for the proposition that where the volition of another comes between the competitor and what he hopes to get under the contract, no damages could as a matter of law be given. I reproduce the following illuminating passages from His Lordship's reported reasons:

> Is expulsion from a limited class of competitors an injury? To my mind there can be only one answer to that question: it is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallengeable case of injury, and the damages given in respect of it should be equivalent to the loss. But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of *the reasonable probability* of the plaintiff's being a prize-winner. I think

that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case.

* * *

I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury. They must of course give effect to the consideration that the plaintiff's chance is only one out of four and that they cannot tell whether she would have ultimately proved to be the winner. But having considered all this they may well think that it is of considerable pecuniary value to have got into so small a class, and they must assess the damages accordingly.

Farwell, L.J., after pointing out that in an action for unliquidated damages the assessment of the amount is ordinarily for the jury, and that the words "chance" and "probability" may be treated as being practically interchangeable, said:

The necessary ingredients of such an action are all present; the defendant has committed a breach of his contract, the damages claimed *are a reasonable and probable consequence* of that breach, and loss has accrued to the plaintiff at the time of action. It is obvious, of course, that the chance or probability may in a given case be so slender that a jury could not properly give more than nominal damages, say one shilling; if they had done so in the present case, it would have been entirely a question for them, and this Court could not have interfered. But in the present competition we find chance upon chance, two of which the plaintiff had succeeded in passing; from being one of six thousand she had become a member of a class of fifty, and, as I understand it, was first in her particular division by the votes of readers of the paper; out of those fifty there were to be selected twelve prize-winners; it is obvious that her chances were then far greater and more easily assessable than when she was only one of the original six thousand. If the plaintiff had never been selected at all, the case would have been very different; but that was not the case.

I may add that at the conclusion of his reasons Fletcher Moulton, L.J., referred to the decision of Jelf, J., in *Sapwell* v. *Bass* (1). In that case the plaintiff was a breeder of race horses and the defendant the owner of a renowned stallion and it had been agreed between them that the defendant's stallion should serve one of the plaintiff's brood mares in consideration of a sum of 315 guineas to be paid by the plaintiff at the time of such service. The defendant afterwards sold the stallion to a purchaser in South Africa and thus precluded himself from carrying out the contract. In an action for breach of contract,

(1) [1910] 2 K.B. 486.

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Jelf, J., who tried the case without a jury, held that the plaintiff was only entitled to nominal damages. Fletcher Moulton stated that in his opinion that decision was right on the facts of the particular case for the reason that there was *no evidence to shew* that the right was worth more to the plaintiff than the 315 guineas, which he would have had to pay for the service of the stallion, and that there was therefore *no evidence that the damages were more than nominal.*

In the Ontario case of *Carson* v. *Willitts* (1), which was an action for the breach by the defendant of a contract to bore three oil wells in a specified territory, it was adjudged at the trial "that the plaintiff do recover from the defendant damages," the ascertainment of which was referred to a Master. The Master reported that the plaintiff was entitled to $2,162, estimating the damages on the footing of what it would cost the plaintiff to put down two of the three wells he had refused to bore. On appeal from the Master's report to a judge in Weekly Court the latter held that the Master had proceeded on a wrong principle in assessing the damages. The order made on this appeal merely allowed the appeal and set aside the Master's finding and report. On appeal from this latter order it was held by Masten, Orde and Fisher, JJ.A. (Riddell, J.A., dissenting), that the order was erroneous because the judgment at the trial had awarded the plaintiff damages, which meant something more than nominal damages; that, no appeal having been taken from that judgment, the effect of the order was to reverse the trial judgment, and that the order allowing the appeal from the report should stand, but that there should be added to it a declaration as to the basis upon which the damages should be assessed. A declaration was accordingly added to the effect that what the plaintiff lost by the refusal of the defendant to bore the two additional wells was a sporting or gambling chance that valuable gas or oil would be found when the two wells were bored; that it might not be easy to compute what that chance was worth to the plaintiff but the difficulty in estimating the quantum was no reason for refusing to award any damages.

(1) (1930) 65 Ont. L.R. 456.

For my part, I can find no authority in either *Chaplin* v. *Hicks* (1) or *Carson* v. *Willitts* (2) justifying any court in awarding any more than a nominal sum as damages for the loss of a mere chance of possible benefit except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value. Indeed the above quotations from *Chaplin* v. *Hicks* (1) and the decision in *Carson* v. *Willitts* (2) seem to me to point to the contrary.

As already intimated, the respondent's only chance of realizing any advantage from the option granted him by the appellants rested wholly upon the extremely doubtful ratification by a majority vote of the shareholders of March Gold, Inc. of the original sale to him of the 350,000 shares, and, there being no evidence upon which any finding could be made that such a vote was reasonably probable during the nine months fixed for the life of the option, I have been forced to the conclusion that the learned judges of the Court of Appeal were not warranted in awarding the respondent substantial damages which, under the decision in *Carson* v. *Willitts* (2) they must be taken to have done, and sending the case to the Master for the assessment of these damages. With the highest possible respect, I am of opinion that the Appeal Court's only justifiable course upon the evidence before it was to direct a judgment for nominal damages.

I would allow the appeal with costs and remit the cause to the Court of Appeal to enter judgment for the plaintiff against the individual defendants for nominal damages only in lieu of the provisions of the first paragraph of the formal judgment with such alterations in paragraph 2 as will give the plaintiff his costs of the action down to and including the trial on the High Court scale without a set-off. Paragraphs 3 and 4 will, of course, stand.

(1) [1911] 2 K.B. 786. (2) (1930) 65 Ont. L.R. 456.

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The appeal was dismissed as against the respondent corporation with costs on the hearing, so that paragraph 5 of the existing order stands.

Appeal allowed with costs and case remitted to the Court of Appeal to enter judgment for the plaintiff against the individual defendants for nominal damages only. Appeal dismissed as against the respondent corporation with costs.

Solicitors for the appellants: *White, Ruel & Bristol.*

Solicitors for the respondent (plaintiff): *Symons, Heighington & Shaver.*

Solicitors for the respondent (defendant) corporation: *Godfrey & Corcoran.*

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* Feb. 27, 28.
* June 27.

CLARENCE E. SNYDER .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax—Proceeds from production of oil well charged with payment of costs of drilling paid to contractor—Income—Liability for tax.

The appellant, and a group of persons who were sub-lessees of Sterling Pacific Oil Company Limited, were granted a licence subject to certain conditions, to drill an oil well on certain land in the province of Alberta, and to operate the same. The appellant and his associates assigned this licence and their rights to Sterling Royalties, Ltd., which undertook to perform the conditions of the original lease and to drill the well, paying therefor by the sale of units of production to the public, and to transfer to appellant and associates the remaining units of production. The Sterling Royalties Ltd. then entered into an agreement with one, Head, to drill the well for a sum of $30,000, $15,000 payable in cash and $15,000 to be paid by the company out of the sale of production. The remaining units of production were

transferred to the appellant and associates, who agreed that those units, having been pooled for that purpose, should be charged with the payment of the balance of Head's contract price. The well was completed, and the sum of $16,333.50 was paid by Sterling Royalties Ltd. to Head, and the amount was deducted from the proceeds derived from the pooled units of production. The Commissioner of Income Tax assessed that amount for income tax purposes, the assessment being confirmed by the Minister of National Revenue. The appellant then appealed to the Exchequer Court of Canada, which held that the payment to Head by Sterling Royalties, Ltd., was a payment made at the request of appellant and associates out of income, and that the appellant was liable for income tax in respect of his portion of $16,333.50.

Held, reversing the judgment of the Exchequer Court of Canada ([1938] Ex. C.R. 235), Crocket and Hudson JJ. dissenting, that, in view of the deeds and written agreements filed at the trial and of the other circumstances of this case, the above sum of $16,333.50 was never, directly or indirectly, received by the appellant and his associates within the meaning of the *Income War Tax Act* and cannot properly be treated as taxable income.

APPEAL from the judgment of the Exchequer Court of Canada, Maclean J. (1), dismissing the appeal of the appellant against the assessment of the Honourable Minister of National Revenue of the sum of $16,333.50 as having been received by the appellant and his associates from Sterling Royalties Ltd., as income from the oil well operated by that company during the taxation year 1934.

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

H. S. Patterson K.C. for the appellant.

Clinton J. Ford K.C. and *J. R. Tolmie* for the respondent.

THE CHIEF JUSTICE.—The controversy on this appeal turns upon the provisions of certain agreements which I proceed to consider.

The appellant is one of a group, to whom I shall refer as the vendors, and who had a licence from the Sterling Pacific Oil Company (to which I shall refer as the licensors) who, in turn, were lessees, under a lease from the Calgary and Edmonton Corporation, of the petroleum and natural gas in a tract of land, a part of the Calgary and Edmonton

(1) [1938] Ex. C.R. 235.

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Railway Company's land grant. This last mentioned lease will be referred to as the Head lease and the lessors as the Head lessors.

This lease is dated the 30th of June, 1928, and the licence to the vendors the 1st of June, 1933. The royalty payable under the Head lease is one-eighth, or 12½%, of the gross production of petroleum and natural gas and, under the license, in the events that have occurred, the same.

On the 1st of June, 1933, the vendors assigned to the Sterling Royalties, Ltd. (which will be referred to as the Company), its licence and its rights under the agreement with the licensors and the Company agreed to assume all the liabilities of the vendors under their agreement with the licensors.

The vendors received, in part consideration of the transfer, 3,450 fully paid up shares of the capital stock of the Company. The agreement contains two important provisions which are in these words:

5. It is understood that the Party of the Second Part (that is to say, the Company) will proceed forthwith to sell sufficient royalties or units of production for such an amount and in such manner and on such terms and conditions as will secure the drilling of a well on the property hereinbefore mentioned, according to the terms of the said agreement. It being agreed between the parties hereto and the Parties of the First Part as between themselves hereby agreeing, that after the sale of sufficient royalties or units or production as aforesaid, the royalties or *percentages of production remaining shall be divided among the parties of the First Part and Fred Elves in the proportion to the shares held by each in the company as hereinbefore set out;* said royalties to be considered as part of the consideration for the sale, transfer and assignment of the said contract as hereinbefore set out. The Company holding the lease, drilling the well and operating the same for such consideration as may be agreed upon between the Company and a Trustee for the unit holders.

6. It is further understood and agreed that the remaining royalties above mentioned and hereby agreed to be transferred to the Parties of the First Part and Fred Elves, or the proceeds therefrom shall *bear certain costs and charges mutually agreed upon between the Parties of the First Part and Fred Elves* including the sum of Fifteen thousand ($15,000.00) dollars, part of the price of drilling the well which it is proposed to pay to Hilary H. Head, drilling contractor, from production in an agreement now being negotiated with him.

It is important to notice that the stipulation set forth in the last paragraph (paragraph 6) is that the units of production agreed to be transferred to the vendors and Fred Elves, which will hereafter be referred to as vendors'

units, or the proceeds therefrom, are to bear the costs and charges mentioned and that what these costs and charges are has been mutually agreed upon by the vendors and Fred Elves, and that they are to include the $15,000 mentioned. The important point is that there is no stipulation making the vendors personally responsible for the payment of any of these costs and charges.

Further, this may be a convenient place at which to observe that, nowhere in these instruments is there to be found any evidence of an obligation on the part of the vendors to pay moneys agreed to be paid by the Company to Head for the construction of the well. The vendors were under an obligation to the licensors to construct the well and work it. If they failed to perform that obligation they would expose themselves to an action for damages; but, on the other hand, the Company agreed with the vendors to perform that obligation and also, as we shall see, covenanted directly with the licensors to perform it.

Before proceeding further, it is, perhaps, well to call attention to the manner in which the terms "unit of production" is used by the parties. That appears from the agreement between the Company and the Trustee contemplated by the first of the paragraphs just quoted, which is dated the 24th of June, 1933, some three weeks after the transfer of the licence by the vendors. That agreement recites the lease from the Calgary and Edmonton Corporation to the licensors, the agreement between the licensors and the vendors of the 1st of June, 1933, the transfer of this agreement by the vendors to the Company, and a further agreement between the Company and the North West Company, Ltd., by which the Company had acquired certain necessary equipment of the value of $24,000 in return for a right to eight per cent of the gross production of petroleum and natural gas from the Company's land.

The royalties (12½%) due to the Calgary and Edmonton Corporation, and to the licensors respectively, and that due to the North West Company (8%), amounting in the aggregate to 33% of the gross production of petroleum and natural gas, the residue of such production amounted

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to 67%, and the agreement recites that the Company proposes to sell all or part of that "67% in the form of 67 units of production on a net basis (viz., after the payment of the costs of production) for the purpose of financing and drilling a well" on the property. This agreement also recites that "the Company has let the contract for the drilling of the said well and has actually commenced drilling operations."

The provisions of the agreement between the Company and the Trustee make it plain that the rights of the holders of the units of production are, as this recital declares, rights subject to the payment of operating expenses including the cost of drilling the well.

It is necessary to understand clearly what it is that the Trustee gets under this agreement. The Company agrees with the Trustee

> to pay or cause to be paid to the Trustee for the holders or purchasers of * * * units of production * * * a royalty in cash at the current market value at the time and place of production of all the petroleum and natural gas * * * recovered from the well now being drilled on the following land (a description of the land follows) during the unexpired residue of the term of years covered by the lease or licence hereinbefore referred to and every renewal thereof

which is to be paid to the Trustee. But this royalty in cash, ascertained as provided for, is subject to the payment, first, of the royalties as above mentioned, amounting in all to 33% of the gross production; and, second, "all costs and expenses necessary for taking care of the production obtained from the said well." Then follows this most important stipulation,

> Such payment to represent sixty-seven (67%) per cent of production after deducting expenses and costs of producing the well.

There are two further provisions of the agreement which it is necessary to notice. The first is sub-paragraph (*c*) of paragraph 1, by which the Company covenants with the Trustee

> that it will regularly and duly pay from production all expenses and costs of producing the well and . . . with the said well.

The second is sub-paragraph (*h*). In virtue of this paragraph, the Company covenants with the Trustee:

> (*h*) That the parties entitled to the Sixty-seven (67%) per cent or Sixty-seven (67) units of net production, as hereinbefore mentioned and after the payment of Twelve and one-half (12½%) per cent gross royalty to The Calgary and Edmonton Land Corporation Limited: Twelve and

one-half (12½%) per cent gross royalty to Sterling Pacific Oil Company Limited and Eight (8%) per cent gross royalty to the Northwest Company Limited, and all expenses and costs of producing the said well, and the percentage or amount of net production or units on a net production basis, to which they are entitled, are as follows:

Name	Address	Royalty or Unit of Production
Fred A. Elves	118 7th Ave. West, Calgary	½ Unit
Robert Wilkinson	118 7th Ave. West, Calgary	½ Unit
Clarence Snyder	118 7th Ave. West, Calgary	½ Unit
W. S. Applegate	118 7th Ave. West, Calgary	½ Unit
William Anderson	Calgary Power Co., Calgary	½ Unit
D. Chas. Jones	Druggist, Vulcan, Alta	½ Unit
Mary Stack	c/o L. H. Stack, Vulcan, Alta	1 Unit
Fred A. Elves	117 7th Ave. West, Calgary	2 Units
(Issue in 4 Certificates of ½ Unit or ½% of production each)		
Reuben L. Elves	Vulcan, Alberta	1 Unit
A. C. Hogarth	Stock Exchange, Calgary	1 Unit
Herbert Gillies	W. R. Hull Ltd., Calgary	1 Unit
Mrs. W. H. Cawston	616 Elbow Drive, Calgary	1 Unit
P. M. Spence	Stock Exchange, Calgary	1 Unit
Vulcan Oils Ltd	Vulcan, Alberta	13 Units
(Issue in 13 Certificates of 1 Unit or 1% production each)		
Sterling Royalties Ltd.	Calgary, Alberta	43 Units

It will be observed that the rights to which the holders of units of production are entitled are described as in sub-paragraph (*h*) as "units of net production as hereinbefore mentioned and after the payment of" the gross royalties to the Head lessor, to the licensors and to the North West Company "and all expenses and costs of producing the said well"; and as "net production or units on a net production basis."

There is still another provision to be noticed and that is sub-paragraph (*i*) of paragraph 1 by force of which the Company covenants that,

(*i*) *Costs and expenses to be deducted from the Sixty-seven (67%) per cent of production or Sixty-seven (67) units of production as herein set out shall be all costs, charges and disbursements in connection with the producing of the well and obtaining production therefrom, after the well has been brought into production,* and in particular shall include the cost or price of production equipment such as storage tanks, separators, pump lines, boilers, pumps, meters, gauges, and all other appliances incidental to profitable production of the said well and installing, setting up and equipping the same, also insurance, taxes, rates, assessments nor/or

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hereafter levied, labour, and a reasonable charge for management, also including the cost of marketing in the event of the Operator being unable to sell the production wholesale.

And now it is necessary to refer to the form of the Trust certificate. These certificates are provided for in paragraph 2 of the agreement and, by that paragraph, they are to be substantially in the form attached. That form is as follows:

This certifies that.....of..... in the Province of..... is registered on the records of The Trusts and Guarantee Company, Limited, as being entitled to a Royalty of.....per centum (.....%) of all petroleum, natural gas, gasoline gas, naphtha and/or other petroleum products produced and marketed from the first and present well being drilled by Sterling Royalties, Limited, a company incorporated under Companies Act, 1929, of the Province of Alberta, on the following lands, namely:

Legal Subdivision One (1), of Section Thirty-three (33), in Township Eighteen (18), Range Two (2), West of the Fifth (5th) Meridian, in the Province of Alberta,

held by Sterling Royalties, Limited, subject to all the provisions and conditions of the Trust Agreement dated the 24th day of June, A.D. 1933, made between Sterling Royalties, Limited, as Operator, of the First Part, and The Trusts and Guarantee Company, Limited, as the Trustee, of the Second Part, which said Agreement may be inspected during office hours at the office of the said The Trusts and Guarantee Company, Limited, at Calgary, Alberta.

* * *

It will be observed that the "royalty" is a percentage of the natural gas and petroleum produced and marketed from the first and present well being drilled by Sterling Royalties, Ltd., and the holder's right is declared to be subject to all the provisions and conditions of the Trust agreement.

There are still two other agreements at which we must look: first, that of the 2nd of June, 1933, to which the vendors, the licensors and the Company are all parties. The licensors consent to the assignment of the licence from the vendors to the Company, but the two stipulations which should be carefully noticed are contained in paragraphs 2 and 3 which are in these words:

2. The Licensees jointly and severally and the Assignee hereby agree that they, and each of them, will observe, carry out and perform all the obligations contained in the agreement made between the Licensor and the Licensees dated June 1st, 1933.

3. The Assignee hereby covenants and agrees with the Licensor that the Licensor shall have as against the Assignee all the rights and remedies granted by the original agreement dated June 1st, 1933.

As already mentioned, one of the undertakings for which the vendors made themselves responsible to the licensors under their agreement was that the vendors should, within five weeks from the date of the agreement, that is, the 1st of June, 1933, commence the work of drilling a well and carry on the operation of drilling continuously to a depth of 6,000 feet or a depth of 400 feet into the limestone (whichever should be the lesser depth) unless oil or gas should be found in the limestone in commercial quantities at a lesser depth.

By paragraph 5, the vendors agree to use and work the well in a skilful and proper manner.

Obviously, the effect of article 2 of the agreement between the Company and the licensors was to make the Company directly responsible to the licensors for the performance of these stipulations; that is to say, the Company agreed to observe, carry out and perform the obligation of the vendors, to commence the work of drilling a well within five weeks of the 1st of June, and to carry on such drilling operations continuously and diligently as just mentioned.

Pursuant to this obligation of the Company to the licensors and its obligation to the vendors, the Company entered into an agreement with one Head, the agreement referred to in article 6 of the agreement of the 1st of June, 1933, between the vendors and the Company and in the recitals of the Trust agreement of the 24th of June. Head's agreement is dated the 7th of June and he was to proceed to drill a well and the consideration he was to receive by article 21 of the agreement was $15,000 in cash and a further sum of $15,000 in respect of which the article provides as follows:

> The remaining balance, namely, Fifteen thousand ($15,000.00) Dollars is to be paid out of the sale of production at the rate of Two Thousand ($2,000.00) Dollars per month, but not to exceed forty per cent (40%) of the net production coming to the Owner after the payment of all royalties in connection with the said wells.

The situation then, after execution of the agreement of the 24th of June, which I shall refer to as the Trust agreement, was that the Company had entered into an agreement with the licensors to execute all the obligations of the vendors under the agreement between the vendors and the licensors by which the vendors had acquired the

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licence; that they had covenanted with the vendors to perform all the vendors' obligations under the last-mentioned agreement and, being, therefore, under contractual obligations with the licensors, as well as the vendors, to construct and to work the well, they had pursuant to these obligations entered into an agreement with Head by which Head had agreed to construct the well, and by which $15,000 of the $30,000 was to be paid by the Company out of production.

The Company had also agreed with the vendors to sell sufficient units of production as to secure the drilling of the well on the property. The Company was to hold the lease, drill the well and operate the same for such consideration as should be agreed upon between the Company and the Trustee for the unit holders; and, further, the units of production remaining after the drilling of the well had been provided for were to be the property of the vendors and one, Fred Elves.

The Company, by the Trust agreement, had agreed to pay the cost of constructing the well and all operating expenses, and to pay to the Trustee a royalty in cash amounting to the current market value of all petroleum and natural gas recovered from the well then being drilled, subject to deductions of overriding gross royalties amounting to 33% of all costs and necessary expenses for "taking care of the production including the cost of producing the well."

The Company in the Trust agreement declared its intention of selling this 67% of production in the form of units of production on a net basis for the purpose of financing and drilling the well. The agreement declared that the parties are entitled to these 67 units of production at the date of the agreement were those named, 43 of these units being the property of the Company, and 24 of them being held by others. The annual remuneration of the Trustee is provided for, as well as compensation to the Company for its services; and the Trustee agrees

> that in the event of production being obtained in commercial quantities, it will, upon receipt of the royalty from the Company, distribute among the persons, firms and corporations entitled at the time of such distribution, as appears from its records, and in proportion to the interest or interests of each, all moneys so received, less only its charges as herein provided.

It is evident from what has been said that the parties intended, as the Trust agreement and the agreement with Head in the most explicit way provide, that all the costs of drilling and operating the well were to be paid by the Company out of gross production. These costs stood in precisely the same position as all other charges which were to be deducted from the gross value of the petroleum and natural gas produced for the purpose of ascertaining the royalty to be paid to the Trustee, such, for example, as the Head royalties.

As between the Company and the vendors, the sum of $15,000 now in question was, by force of the original vendors' agreement with the Company, to be charged on the vendors' units. The right of the Company and the holders of other than vendors' units to have this charge deducted in such a maner that its incidence should fall exclusively upon the vendors' units might have been worked out in various ways. It is not mentioned in the Trust agreement for the reason, possibly, that at that date 43 units out of the 67 allotted, were in the hands of the Company who were, therefore, in control of the situation. One obvious method of working out this right of the Company and of the holders of units other than the vendors' would be by a declaration by the Company and the holders of vendors' units that this sum was a charge on these units and a direction by them to the Trustee to pay it out of the share of the royalty which otherwise the Trustee would pay in its entirety to the holders of these units.

This, in effect, was what was accomplished by the agreement of February. The agreement is not conspicuously characterized by precision and the Crown naturally relies on the 4th recital. That recital says nothing whatever of relevancy to the question before us. It declares that it was agreed between the party of the first part, that is among the vendors and Elves, that certain costs and charges should be borne by the parties of the first part. It says nothing as to an agreement between the parties of the first part and the Company, or an agreement between them and the holders of the units.

As I have already said, there is not a suggestion in the vendors' agreement with the Company of the 1st of June that the vendors are to be under any personal liability

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in respect of the moneys due to Head by the Company. The agreement of February is simply a mode of giving effect to the agreement between the vendors and the Company that this particular sum and the other charges amounting in all to $20,000 should, as between the units of production sold to the public and the units of production transferred to the vendors and Elves, fall upon and be paid out of the latter. This was a right declared in the fundamental agreement by which the Company acquired from the vendors the licence, agreed to sell units of production for the purpose of drilling and financing a well, agreed to perform the obligations of the vendors, to operate the well, and to do so pursuant to the terms of an agreement to be entered into with the Trustee for the unit holders. From the very beginning, the arrangement that this payment, as part of the costs of production was to be charged exclusively upon the vendors' units and not spread over the units as a whole was a settled part of the plan and at no time had the vendors either a legal or a moral right to receive or to control the disposition of this sum.

The Company into whose hands came the proceeds of the sale of products of the well received this sum under a duty created by its agreement with Head to pay $15,000 to Head out of these proceeds. It received it under a duty created by the Trust agreement to pay out of the gross proceeds all costs and expenses including the "cost of producing the well." It did not receive these moneys as trustee or agent for or in any manner on behalf of the vendors. As to the Trustee, the royalty distributable by the Trustee amongst unit holders was a royalty ascertained by deducting the cost of the well as well as other expenses and, apart altogether from the agreement of February, it was the duty of the Company to see to it that the charge upon the vendors' units was made effective. The purpose of the arrangement made between the vendors and the Company acting for the protection of the unit holders generally would have been defeated if these moneys devoted from the beginning for the payment of this particular obligation had been allowed to come into the possession or under the control of the vendors. The purpose and effect of the agreement of February was to pro-

tect the rights of the Company and the unit holders as everybody recognized them.

From all this it results, in my opinion, that the sum in question was never, directly or indirectly, received by the appellant and his associates within the meaning of the statute.

The appeal will be allowed with costs throughout.

The judgment of Rinfret and Davis JJ. was delivered by

DAVIS J.—This is a Dominion Income Tax case arising out of the somewhat peculiar method (adopted, we are told, from an American practice) of dealing with speculative oil or gas production ventures which have in recent years become somewhat common in the western provinces. The method adopted is for the promoters to acquire, by lease or sublease or otherwise, the right to drill for and to take the oil or gas from certain defined lands upon the basis of giving to the land owner, and to the sublessor in case of a sublease, a certain proportion of the oil or gas that may be produced or its money worth. The promoters then sell and transfer, as vendors, the rights so acquired to a joint stock company which they cause to be incorporated and organized, taking in part consideration for the transfer fully paid shares of the capital stock of the company. In this way the vendors become the shareholders of the company. But instead of the company acquiring whatever capital may be necessary for the drilling of wells and other incidental expenses to the point of production by the sale of further shares of its capital stock, the agreement with the new company provides, by way of further consideration for the transfer of the rights, that the company shall dispose of all its prospective profits (which, under the ordinary commercial practice of trading companies would ultimately be distributable among the shareholders pro rata) by the creation of fractions or interests (called "royalties" or "units of production") in the prospective profits of the company; sufficient of these to be sold to the public to raise the necessary money and the balance to become the property of the vendors to the company. It is plain then that when these "units of production" thus created are sold or disposed of to

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such an extent that they absorb one hundred per cent. of the profits of the company, the holders thereof will become entitled to all the profits of the company which may arise from the production of oil or gas from the company's properties. The rights of the shareholders of the company will in consequence be confined to the capital of the company and they will not as shareholders be entitled to any distribution of the profits of the company which may result from the production of the wells. That being so, the vendors of the new company not only arrange that they shall become shareholders of the company but that they shall become entitled to some of the units of production in order to participate in profits if the venture proves successful.

In the case before us the vendors received 3,450 shares of the capital stock of the company, Sterling Royalties, Limited. These were divided and are held as follows:

Robert Wilkinson	1,300 shares
Clarence E. Snyder (the appellant)	800 shares
William S. Applegate	800 shares
Fred Elves	550 shares

So far as appears, those are the only shares of the capital stock of the company issued and outstanding.

But the agreement between the vendors and Sterling Royalties, Limited, provided not only for the issue of these shares of the capital stock of the company to the vendors as part consideration for the transfer of their rights, but Sterling Royalties, Limited, undertook to

> proceed forthwith to sell sufficient royalties or units of production for such an amount and in such manner and on such terms and conditions as will secure the drilling of a well on the property hereinbefore mentioned, according to the terms of the said agreement. It being agreed between the parties hereto and the Parties of the First Part (the vendors) as between themselves hereby agreeing, that after the sale of sufficient royalties or units of production as aforesaid, the royalties or percentages of production remaining shall be divided among the Parties of the First Part and Fred Elves (a partner or associate of the three named parties of the first part) in the proportion to the shares held by each in the company as hereinbefore set out; said royalties to be considered as part of the consideration for the sale, transfer and assignment of the said contract as hereinbefore set out. The Company holding the lease, drilling the well and operating the same for such consideration as may be agreed upon between the Company and a Trustee for the unit holders.

By virtue of that clause of the agreement the promoters or "vendors," besides becoming the holders of the shares of the capital stock of the company, became entitled to all

the units of production which would remain after the company had sold sufficient units of production to secure the drilling of a well on the property. What actually happened was this: the vendors had become under obligation to the head lessor and to the sublessor of the property for a total of 25% of whatever petroleum or natural gas might be produced. These obligations were assumed by Sterling Royalties, Limited. Another 8% of production was accepted by the Northwest Company Limited from Sterling Royalties Limited for the supply of the drilling equipment. These were percentages of gross production and aggregated 33%. Then Sterling Royalties Limited created 67 units of production to cover the balance of production; 36½ were sold for cash to the public by the company and the remaining 30½ units, subject to payment thereout of certain charges and expenses of the company amounting to $16,333.50, became the property of the vendors, under their agreement with the company, in the proportions of the shareholdings of each of them in the company as hereinbefore set out.

The drilling of the well for Sterling Royalties, Limited, was given by contract to one Head, who undertook to drill the well for $30,000, payable as follows: $15,000 in cash by monthly instalments of $2,000 each, the first of these instalments to be due and payable within thirty days after the actual commencement of drilling operations, the second instalment within thirty days thereafter and so on from month to month until the well was completed. (There is an acceleration clause with which we are not concerned.) The balance of the contract price, that is, a further sum of $15,000, was to be paid "out of the sale of production" at the rate of $2,000 per month but not in excess of 40% of the net production coming to the company after the payment of all royalties in connection with the said well.

Sufficient cash appears to have been raised by the sale to the public of 36½ units of production to meet the first $15,000 cash instalments that were to be paid to the contractor Head, but the second $15,000 that was only to be paid to Head "out of the sale of production" (i.e., if the well came into production) was part of the charges and expenses of the company amounting to $16,333.50

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which, by the agreement between the vendors and Sterling Royalties, Limited, were to be borne by and charged against the 30½ units of production to which the vendors were entitled as part of the consideration for the transfer of their rights to the company.

A trust agreement was made between Sterling Royalties, Limited, and The Trusts and Guarantee Company Limited for delivery to the trust company of the net proceeds of production of the well in question (i.e., after providing for the 33% of the gross production to the head lessor, the sublessor and the Northwest Company Limited which supplied the drilling equipment) and for the distribution of the same, after payment thereout of operating expenses, among the holders of the units of production. A form of trust certificate was adopted to evidence the title of the holders of the units of production.

The well came into production and the last-mentioned $15,000 paid to Head under his contract and the other costs and charges amounting to $1,333.50, all of which had been agreed upon between the vendors and the company to be charged against the "remaining" units of production (i.e., the vendors' 30½ units) were paid.

The Minister of National Revenue sought to charge the appellant Snyder, who was one of the vendors, with his portion of $16,333.50 and Snyder challenged this claim upon the ground that no part of the $16,333.50 was income or profits to the individual holders of the 30½ units. The Minister took the position that the vendors had acquired a 30½% interest in the production of the well and that they had in effect paid $16,333.50 to acquire that interest; that instead of paying that sum direct to the company as a capital expenditure on their part in order to acquire the 30½ units, they adopted this method of dealing with the sum in question whereby they charged their 30½ units of production with the payment of the $16,333.50, taking their profits to the extent of $16,333.50 to acquire as many as 30½ units for themselves.

But no part of this total sum of $16,333.50 ever reached the vendors; in fact they were not entitled to any of it. The agreement was that they were to get whatever units of production were not sold to the public but that these "remaining" units were to be charged with the payment of this $16,333.50. The share or interest of the vendors

in the profits of the company from the production of the well was in fact 30½% less $16,333.50. If the speculation had not proved the success it apparently did, and 30½% of the sales of the production of its well had never amounted to more than $16,333.50, these vendors would never have become entitled to any profits at all. This statement is not exactly accurate, in that the 33 units set aside for the head lessor and the sublessor and the equipment company were gross production units, but that is not for our present purpose of any real consequence.

Suppose Snyder and his associates had never transferred their rights to Sterling Royalties Limited but had proceeded with the venture themselves as a partnership undertaking and had made the same arrangement with the drilling equipment company to take 8% of the production instead of cash and had made the same arrangement with Head to drill the well as Sterling Royalties Limited made—what would have been the result? Snyder and his associates in that event would have been entitled to 67% of the production; that is, the total production less 25% to which the head lessor and the sublessor were entitled and less 8% to which the equipment company was entitled. But Snyder and his associates would have had to pay the $30,000 to Head. The result of their transaction with Sterling Royalties Limited, however, was that they turned over, for better or for worse, their rights to that company, in consideration of certain shares and units of production, and that company by the sale to the public of certain units of production raised sufficient money to pay Head the first $15,000 on his contract and whatever other or incidental outlay was involved in the company bringing its well to the point of production. Snyder and his associates, in consequence of their arrangement wisely or unwisely made by them with Sterling Royalties Limited, have now only 30½% of the profits of the venture less the sum of $16,333.50 agreed between them and the company to be paid out of and charged against the first proceeds of this 30½%.

We are dealing with income tax and it is perfectly plain that the appellant Snyder never received any part of the $16,333.50 nor was he ever entitled to receive any part of it.

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Lord Macmillan in the Privy Council in the *Tata Hydro-Electric* case (Bombay) (1), said at p. 694:

Before their Lordships counsel for the Crown did not seek to support the judgment of the High Court in the present case on the ground that it was ruled by the decision in the *Pondicherry* case (1931) L.R. 58 I.A. 239, and in their Lordships' view he was well advised in recognizing the clear distinction between that case and the present case. In the *Pondicherry* case the assessees were under obligation to make over a share of their profits to the French Government. Profits had first to be earned and ascertained before any sharing took place. Here the obligation of the appellants to pay a quarter of the commission which they receive from the Tata Power Co., Ld., to F. E. Dinshaw, Ld. and Richard Tilden Smith's administrator is quite independent of whether the appellant made any profit or not. Indeed, if on their year's operations as a whole they were to make a loss and incur no liability to income-tax they would nevertheless have to pay away a quarter of the commission in question to the parties named. The commission in truth is not profit or gain; it is only an item or factor in the computation of the appellants' profits or gains. Their Lordships regard this as a fundamental distinction.

I would refer to the language of Sir Wilfrid Greene, the Master of the Rolls, in the recent case of *British Sugar Manufacturers, Limited,* v. *Harris* (*Inspector of Taxes* (2):

Various authorities have been referred to. Speaking for myself, I find the greatest assistance from two passages, one of them is a passage in the judgment of Romer L.J. in this Court in the case of *Union Cold Storage Co.* v. *Adamson* (3). What Romer L.J. says there (at p. 328) is that in order to succeed in that case the Crown would have had to establish the following proposition: "That where a company, for the "purpose of enabling it to carry on its trade and earn profits in the "trade, places itself under an obligation to make money payments, the "amount of which is dependent upon the profits earned, or the payment "of which is contingent upon certain profits being earned, payments made "in discharge of that obligation are payments made out of the profits or "gains of the company, within the meaning of Rule 3 (*l*). In my opinion, "for that proposition there is no foundation at all in principle or on "authority." The case that was being dealt with there was a case where the obligation to make the payment was dependent upon the profits earned, but it seems to me that the reasoning and the expressions of Romer L.J. equally apply to the case where the payment to be made is a commission or a percentage of profits earned.

The other passage is a passage in the judgment of the Privy Council delivered by Lord Maugham in the case of *Indian Radio and Cable Communications Co.* v. *Income-tax Commissioner, Bombay Presidency and Aden* (4). That was a case into the facts of which I need not go, but it is important as containing a reference to the particular phrase in an earlier case which affected the mind of Finlay J. in the present case. That case having been brought to the attention of the Board in the

(1) [1937] A.C. 685.
(2) [1938] 2 K.B. 220, at 235, 236, 237.
(3) (1930) 16 Tax Cas., 293.
(4) [1937] 3 All E.R. 709.

Indian Radio case, Lord Maugham said this (at p. 713): "It may be "admitted that, as Mr. Latter contended, it is not universally true to "say that a payment, the making of which is conditional on profits being "earned, cannot properly be described as an expenditure incurred for the "purpose of earning such profits. The typical exception is that of a "payment to a director or a manager of a commission on the profits of "a company. It may, however, be worth pointing out that an apparent "difficulty here is really caused by using the word 'profits' in more "than one sense. If a company, having made an apparent net profit "of £10,000, has then to pay £1,000 to directors or managers as the con-"tractual recompense for their services during the year, it is plain that "the real net profit is only £9,000. A contract to pay a commission at ten "per cent on the net profits of the year must necessarily be held to mean "on the net profits before the deduction of the commission, that is, in the "case supposed, a commission on the £10,000." That passage, in my opinion, contains sufficient to dispose of this case, and if I may link it up, as I understand it, with what I said a moment ago about the two accounts, the two accounts are I think what may be called the account-ancy aspect of the two different senses in which the word "profits" is used in these cases, as explained by Lord Maugham. Once you realize that as a matter of construction the word "profits" may be used in one sense for one purpose and in another sense for another purpose, I think you have the real solution of the difficulties that have arisen in this case.

The learned President of the Exchequer Court held that Snyder was liable to pay income tax in respect of his portion of the $16,333.50 charged against the 30½ units, but with great respect I do not think for the reasons above given it can properly be treated as taxable income. I would therefore allow the appeal and set aside the judgment appealed from, and the assessment and decision of the Minister in so far as the item of $16,333.50 is concerned. The appellant is entitled to his costs throughout. As a result of this conclusion it becomes unnecessary to consider the cross-appeal of the Minister on the question of costs. The cross-appeal should be dismissed, but without costs.

CROCKET J. (dissenting)—I agree with my brother Hudson and the President of the Exchequer Court that the appellant and his associates were not entitled to deduct from the income of their royalty trust certificates for the year 1934 the $16,333.50, which Sterling Royalties Limited (of which they were the sole directors and shareholders) applied at their request to the payment of the indebtedness then outstanding for the drilling of the oil well. That amount admittedly represented 30½% of the net proceeds of the oil produced from the well and sold,

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(see Snyder's evidence, p. 40), to which they had become entitled by the transfer to them by Sterling Royalties Limited, after the completion of the drilling operations and the oil well had been brought into production, of the 30½ remaining so-called units of production that had been previously held by Sterling Royalties for sale to the public for that purpose, upon the appellant and his associates undertaking to liquidate the outstanding indebtedness of Sterling Royalties for completion of the drilling operations. The arrangement, under which the four partners acquired these 30½ units, is formally set out in the pooling agreement entered into between them and Sterling Royalties Limited under date of February 6th, 1934. Its practical effect was to charge the income payable on the royalties certificates they acquired with a capital outlay of $16,333.50, and to make this amount the purchase price of the 30½ units of production. The fact that instead of having Sterling Royalties Limited hand over the net income of their royalties certificates to their trustees for distribution among them, as they were bound to do under the trust agreement, they chose to direct the operating company to apply the whole amount to the liquidation of the capital indebtedness they had assumed, does not in my opinion entitle them to deduct the amount from their income of that year as a current disbursement.

I agree with my brother Hudson that the appeal should be dismissed with costs.

HUDSON J. (dissenting)—The facts have been set forth at length by the learned President in the court below and I shall refer only to those which I think sufficient to dispose of the matter.

Snyder and his associates were the licensees of oil and gas rights and, under agreement granting them the licence, they covenanted to drill a well and their obligation to do this remained throughout until the well had been drilled and completed.

The next step was the agreement made with Sterling Royalties Limited and it must be borne in mind that Snyder and his associates were the sole shareholders and directors of this company. The plan adopted for financing the operation was to sell what were called units of production or percentages, and under clause 5 of this agree-

ment it was contemplated that sufficient units should be sold to pay for the cost of drilling the well and that Snyder and his associates should get the remaining units up to the total number to be issued, but the agreement also contemplated the possibility of sufficient units not being sold to provide for the total cost of drilling, and to cover this, provision was made and incorporated in clause 6 as follows:

> 6. It is further understood and agreed that the remaining royalties above mentioned and hereby agreed to be transferred to the Parties of the First Part and Fred Elves, or the proceeds therefrom shall bear certain costs and charges mutually agreed upon between the Parties of the First Part and Fred Elves, including the sum of Fifteen thousand ($15,000.00) Dollars, part of the price of drilling the well which it is proposed to pay to Hillary H. Head, drilling contractor, from production in an agreement now being negotiated with him.

It should be observed here that the effect of this agreement was to provide for the disposal of the company's entire net income from the production of the well under consideration not to the shareholders as such but to the holders of units of production or royalties, whichever term is appropriate.

When the well was drilled and came into production the pooling agreement dated 6th February was made. Prior to that date the unsold units under the agreement with Sterling Royalties Limited had already been divided between Snyder and his associates. There was, of course, attached to these units the obligation provided for in clause 6 of the agreement with Sterling Royalties. It may be that the recitals in the pooling agreement do not correspond exactly with the obligations under clause 6 above mentioned, but the pooling agreement provides specifically that Snyder and his associates agree to pool their royalties or percentages of production for the purpose of paying all costs, charges and expenses including the payment to Head which is the matter of controversy in this litigation. It is there further provided that the proceeds derived from the said royalties be paid to Sterling Royalties for the purpose of paying the costs and charges including the amount payable to Head, and there is a further provision authorizing the trustees of the money to pay these moneys over for that purpose. This pooling agreement clearly recognizes the realities of the situation.

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The appellant was examined on this point and gave his evidence as follows:

Q. That agreement was signed by the four of you?—A. Yes.
Q. You were the four shareholders of the company?—A. Yes.
Q. Are you a Director?—A. Yes.
Q. Was Mr. Wilkinson a Director?—A. Yes.
Q. And Mr. Elves?—A. Yes.
Q. And Mr. Applegate said he was?—A. Yes.
Q. Now, I call your attention to clause 1 of that Agreement Exhibit No. 6. That clause reads:

"(1) The Parties of the First Part hereby agree to pool their royalties or percentages of production for the purpose of paying all costs, charges and expenses agreed to be paid by them and amounting to approximately Twenty thousand ($20,000.00) Dollars, the details and items of which said amount are well known to each of the Parties of the First Part, and include the bonus of Fifteen thousand ($15,000.00) Dollars"

(which really became $16,333.50)

"payable to Hilary H. Head under a drilling agreement with him dated 7th June, 1933."

Now how do you explain those words "agreed to be paid by them"?—A. That clause means exactly what it says. We agreed to pay it out of royalties that we owned.

Q. This agreement goes on further to say in clause 2 that the parties of the First Part further agree to pool the proceeds of the said royalties or percentages; now when you speak of the proceeds of said royalties or percentages, what do you mean?—A. What was received for the oil that was sold.

Q. Under your Royalty Trust Agreement you had the right to take oil from the well or take money, have the oil sold by the Trustee or take money?—A. Yes.

Q. So that it is really the income from the well; is that right?—A. It is the income from the royalties that were unsold that came to us; what I mean is this, that it was the money paid to us from the oil sold that was credited to royalties that belonged to that pool.

Q. And your share of that was what per cent?—A. 30½% of the net production.

Q. And by that you mean after the Head royalty was taken off?—A. Yes.

Q. After the costs of operation?—A. Yes.

Q. And out of whatever was left you got 30½%?—A. That is right.

Q. And that proportion of the net amount in each year the well produced came to the four of you?—A. Yes.

Q. And you pooled that amount and gave instructions to the Trustee to pay that sum to Sterling Royalties?—A. That is right.

The auditors' statement of Sterling Royalties attached to the appellant's income tax return shows the money in question as "applied against liability of" Snyder. This confirms the view that Sterling Royalties were simply taking care of a recognized obligation of Snyder out of the proceeds of production, and under section 1, chapter 55, of the Statutes of Canada, 1934, all royalties or other

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periodical receipts dependent upon the production or use of real property, notwithstanding that the same were payable on account of the use of such property, are taxable.

It seems to me that Sterling Royalties in receiving the proceeds of production allocated to the units of Snyder and the others were receiving it as agents for them, and in paying Head they were likewise paying it as agents for them. If this be so, then it is simply a case of paying a capital expenditure out of the earnings of the business.

I think that in all respects material to this litigation Sterling Royalties should be regarded simply as agents for Snyder and his associates from the making of the first agreement entered into with that company. For these reasons, I think the appeal should be dismissed with costs.

There was a cross-appeal by the respondent in respect of costs in the court below. I think, however, that this was a matter within the discretion of the learned trial judge and would not disturb his judgment in this respect.

Appeal allowed with costs.

Solicitors for the appellant: *Patterson, Hoff & Patterson.*
Solicitor for the respondent: *W. S. Fisher.*

MONTREAL TRAMWAYS COMPANY (DEFENDANT) ..... APPELLANT;

v.

DAME HANNA LINDNER (PLAINTIFF) .. RESPONDENT.

1939

* May 8, 9.
* June 27.

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

Practice and procedure—Accident—Husband killed by tramway—Action for damages brought by wife and children—Whether such action susceptible of being tried by a jury—Article 1056 C.C.—Article 421 C.C.P.

An action for damages, brought under article 1056 C.C. by dependents of a person whose death was caused by the commission of an offence or a quasi-offence, is an action "resulting from personal wrongs" within the meaning of article 421 C.C.P., and therefore susceptible of being tried by a jury.

Montreal Tramways Co. v. *Séguin,* (1915) 42 S.C.R. 644, foll.

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

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MONTREAL TRAMWAYS CO. v. LINDNER.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment rendered by Rhéaume J., upon the verdict of the jury at the trial in favour of the respondent.

The respondent brought this action claiming damages on behalf of herself and as tutrix of her minor children, in consequence of the death of her husband, the father of the children, caused as alleged by the negligence of the appellant.

Jean Letourneau for the appellant.

John L. O'Brien for the respondent.

The judgment of the Chief Justice and of Rinfret, Davis and Kerwin JJ. was delivered by

RINFRET J.—The grounds of appeal submitted to the Court were as follows:

1. The plaintiff offered no evidence upon which the jury could find a verdict; and the motion for non-suit presented at the conclusion of the plaintiff's enquête should have been granted by the trial judge;

2. The respondent had lost her right, if any, to a jury trial on account of the expiration of the delays provided for in article 442 of the Code of Civil Procedure;

3. The overruling of the challenge to the array was erroneous;

4. The finding against the appellant did not constitute a fault duly alleged and proved.

5. The amount awarded was so excessive as to warrant interference by the Court.

6. The case was not susceptible of being tried by a jury.

We will now discuss each of these points in order.

On the first ground: The motion for non-suit having been disallowed, the appellant proceeded with the case and produced evidence on its own behalf. Under the circumstances, in dealing with this point, an appellate court may not be restricted to a consideration of the evidence as it stood when the motion was presented, but the court must have regard to the whole of the evidence submitted to the jury.

In that view of the matter, it cannot be said that there was no evidence to go to the jury. It is sufficient for the present purpose to refer to the many extracts of the testimony quoted in the judgment of the trial judge and to the careful review of the facts made in the Court of King's Bench by Mr. Justice Hall, with whom the other judges either concurred or agreed in a separate judgment.

We would not feel warranted in reversing and setting aside the verdict on that first ground.

It is unnecessary to expose in detail the somewhat complicated incidents upon which the appellant based his second and third grounds of appeal, for we indicated at the hearing that, in our view, these were strictly questions of practice and procedure in respect to which we would not interfere with the unanimous decision of the Court of King's Bench; and counsel for the respondent was told that he need not present any argument on these points.

As to the fourth ground: The rule invariably followed in this Court is that the findings of a jury must be read in the light of the pleadings, the evidence and the charge of the trial judge; it must receive a fair interpretation and must not be submitted to a "rigorous critical method." So construed, the verdict in this case undoubtedly constitutes a fault in law and it is a proper finding of negligence.

The fault found by the jury was sufficiently alleged, and we have already stated in discussing the first ground of appeal, that there was evidence upon which the jury could find as it did.

There is no inconsistency in the findings against each of the parties, since the verdict is to the effect that each of them directly contributed to the accident.

Coming to the fifth ground of appeal, it may be stated that a court of appeal, more particularly this Court sitting as a second court of appeal should be slow in interfering with the amount of damages awarded.

The rule as laid down by the Code of Civil Procedure (art. 502) is that

> a new trial is granted whenever the amount is so grossly excessive or insufficient that it is evident that the jurors have been influenced by improper motives or led into error.

On this point, the Court of King's Bench was unanimous in refusing a new trial. In the premises, it is not easy to see how we could declare that it was "evident that the jurors have been influenced by improper motives." But the appellant says that they were "led into error" by the learned trial judge, in his charge, when he referred to a passage in the judgment of Mr. Justice

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Anglin, as he then was, in the case of *Canadian Pacific Ry. Co.* v. *Lachance* (1), as a result of which the jury was induced to include in its award items of damages not contemplated by article 1056 of the Civil Code.

This, however, is the equivalent of a complaint of misdirection and under the Code of Civil Procedure, it could be given effect to, only if "the party complaining duly excepted to the misdirection" (Art. 498, subp. 3, C.C.P.).

In the Court of King's Bench, Mr. Justice Barclay was of opinion that no exception was taken. The other judges did not express any opinion on this point. We would be inclined to think that the exception was not insisted upon in the course of the discussion which followed the learned judge's charge.

But the main difficulty in which the appellant finds itself is that *Canadian Pacific Ry Co.* v. *Lachance* (1) is a case in this Court. The citation referred to by the trial judge and to which the appellant objects is taken from a judgment delivered in this Court. On the pertinent point, the judgments of the other members of the Court were along the same lines, and we would not see our way clear to differ from what was said in those judgments.

The remaining ground of appeal is that this case was not susceptible of being tried by a jury.

So far as this Court is concerned, we consider that the matter is concluded by the decision in *Montreal Tramways Co.* v. *Séguin* (1). No doubt one of the reasons in that case was that the point had been taken too late by the appellant, but the majority of the Court also decided that a jury was competent to try an action brought under art. 1056 of the Civil Code.

This disposes of all the grounds of the appellant; and, as a result, the appeal fails and should be dismissed with costs.

CROCKET J.—While I doubt very much whether the jury's answer to question 4 is a sufficient specification of the particular fault on the part of the motorman, which contributed to the accident, to enable the Court to determine with any degree of certainty whether it was his antecedent negligence in failing to keep a proper look-

(1) (1909) 42 S.C.R. 205. (1) (1915) 52 S.C.R. 644.

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out, or some other antecedent fault, it is quite as definite as their specification in the same answer of the deceased's own contributory negligence, which has not been questioned on this appeal. For this reason I am not disposed to rely upon this point as a sufficient ground for dissenting from the conclusion of my brother Rinfret that the appeal should be dismissed, particularly as I am fully in accord with his view that there was evidence, which the jury apparently believed, and which would warrant a finding that there was some negligence on the part of the motorman, which caused or materially contributed to cause the unfortunate accident.

Appeal dismissed with costs.

Solicitors for the appellant: *Vallée, Letourneau & Tansey.*
Solicitors for the respondent: *Audette & O'Brien.*

LINTON HOSSIE BALLANTYNE (DEFENDANT) ..... APPELLANT;

AND

DAME CATHERINE SOPHIE EDWARDS (PLAINTIFF) ..... RESPONDENT.

1938

* Dec. 8.

1939

* June 17.

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

Husband and wife—Separated from bed—Action for damages by wife against husband—Prescription—Inscription in law—Applicability of article 2233 C.C. enacting no prescription between husband and wife—Doctrine of "déchéances"—Articles 2183, 2233, 2261, 2262 and 2267 C.C.

Article 2233 of the Civil Code, which enacts that "husband and wife cannot prescribe against each other," applies to all cases of prescriptions, both to the short and to the long prescriptions.

The limitations provided by articles 2261 and 2262 C.C., which are called therein "prescriptions" and are dealt with as prescriptions, are real prescriptions; they are not merely "déchéances," as, in that case, according to the doctrine generally adopted in France, the exception as regards husband and wife contained in article 2233 C.C. would not operate.

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

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BALLANTYNE v. EDWARDS.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Surveyer J. and dismissing the appellant's inscription in law.

L. H. Ballantyne in person for the appellant.

V. M. Lynch-Staunton and *John F. Stairs* for the respondent.

The judgment of the Court was delivered by

RINFRET J.—This is an action in damages instituted by the wife, who is the respondent, against her husband, who is the appellant.

By means of an inscription in law the appellant prayed for the dismissal of the action on the ground that it was prescribed under the provisions either of article 2261 or of article 2262 of the Civil Code. The material provisions of those articles relied on by the appellant are as follows:

2261. The following actions are prescribed by two years:

* * *

2. For damages resulting from offences or quasi-offences, whenever other provisions do not apply;

2262. The following actions are prescribed by one year:

1. For slander or libel reckoning from the day that it came to the knowledge of the party aggrieved.

* * *

By force of article 2267 C.C. in those cases

the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired.

The Court of King's Bench, however, decided that the appellant's plea of prescription could not succeed because the parties were husband and wife, and they could not "prescribe against each other," as enacted in article 2233 of the Civil Code.

The ground upon which the appellant maintains that the judgment appealed from is wrong may be expressed as follows: he says that the limitations provided for by articles 2261 and 2262 C.C. are really not prescriptions, but properly speaking "déchéances"; and that, according to the doctrine generally adopted in France, the exception as regards husband and wife contained in article 2233 C.C. does not operate in the case of "déchéances."

(1) (1938) Q.R. 64 K.B. 27.

But the difficulty for the appellant is that, in the Code itself, these limitations are called prescriptions and they are dealt with as prescriptions.

They are to be found under the sub-title "Of Certain Short Prescriptions" and under the general title "Of Prescription"; and they come within the definition of prescription given in article 2183 C.C.

Prescription is the word used in article 2233 C.C. as well as in articles 2261, 2262 and 2267 C.C. According to the accepted rule of interpretation, the same word used throughout the same legislation should be construed as having the same meaning.

No distinction is made in article 2233 C.C. In terms it is of general application. We should not introduce an exception where the Code itself makes none; and we think article 2233 must be held to apply to all cases of prescription—both to the short and to the long prescriptions.

Such is also the view of Mr. Mignault. (Droit Civil Canadien, Volume 9, page 545). He says:

mais il faut remarquer que la prescription même courte n'a pas lieu entre époux. (Article 2233).

Now, article 2267 C.C. enacts that the right of action is denied only "after the delay for prescription has expired"; and article 2233 C.C. provides that prescription does not run between husband and wife. It follows that, in this case, as prescription did not run, the right of action still exists; and we agree with the majority of the Court of King's Bench that the appellant's contention cannot prevail.

In this Court the appellant wished to raise the further point that, quite apart from any question of prescription, the respondent had no right of action in the present case, on the principle that no husband or wife is entitled to sue the other for an offence or a quasi-offence.

But, we do not think the point is open to the appellant.

The parties are before the Court on an inscription in law.

Under the Code of Procedure (art. 192), the inscription in law "must contain all the grounds relied upon," and "no ground which is not therein alleged can be urged at the hearing."

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A general allegation, which moreover is merely introductory, is not sufficient; there must be a specific allegation. The only ground specifically alleged in the inscription in law is that of prescription.

RINFRET J.

Admittedly, the point was not raised in the courts below. But Mr. Justice St. Jacques who delivered the main judgment for the majority in the Court of King's Bench, more than once expressed a doubt as to whether the right of action existed. He stated however:

La Cour doit rester dans le cadre de l'inscription en droit, telle qu'elle est libellée.

We therefore express no opinion upon the question whether the respondent was entitled to sue in damages; and it may be that the appellant is still at liberty to raise his objection in the future course of the case.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *L. H. Ballantyne* in person.

Solicitor for the respondent: *V. M. Lynch-Staunton.*

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*Mar. 22, 23
*Oct. 30.

THE BOARD OF EDUCATION FOR THE CITY OF WINDSOR..... APPELLANT;

AND

FORD MOTOR COMPANY OF CANADA LIMITED AND THE BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF WINDSOR ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Schools—Companies—Company designating portion of its assessment in municipality for separate school purposes—Separate Schools Act, R.S.O., 1937, c. 362, s. 66—Notice by company in form B to city clerk—Apportionment of assessment attacked on ground that portion so designated not ascertained to comply with s. 66 (3) as to proportionate limit—Prima facie validity of notice—Onus of proof.

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

The secretary of respondent company, in accordance with a resolution of its directors, forwarded to the clerk of the City of Windsor a notice in form B, provided for by *The Separate Schools Act,* now R.S.O., 1937, c. 362, s. 66, requiring that 18% of its assessment be entered, rated and assessed for separate school purposes, and the assessor made his assessment accordingly. An appeal by appellant board against the assessment for separate school purposes was allowed by the court of revision, and its decision was sustained by Mahon Co. C.J., who, in a stated case made for purposes of appeal, found that the apportionment for separate school purposes made by the directors of the company (the shares of which company are numerous, widely distributed and extensively traded), though made in good faith, was not based on actual knowledge and was "only a guess or an estimate"; and held that the notice (form B) given by the company should be set aside and declared of no effect, and that all the company's assessments in said city should be assessed, enrolled and rated for public school purposes, as it had not been proved affirmatively that there was compliance with s. 66 (3) of said Act, namely, that the portion (18%) designated for separate school purposes was no greater proportion of the whole of the assessment than the amount of the shares held by Roman Catholics bore to the whole amount of the shares of the company. His judgment was reversed by the Court of Appeal for Ontario, [1938] O.R. 301, on the grounds that the statute ought, if possible, to be interpreted and applied so as to effectuate its manifest intention, viz., to provide for an equitable apportionment; on receiving the notice the assessor is bound to assess and return his roll apportioning the assessment; his roll is *prima facie* valid; the onus of displacing that situation rests on the attacking party and this onus was not discharged. Appeal was brought to this Court.

Held (The Chief Justice and Davis J. dissenting): The appeal should be dismissed.

Per Rinfret, Crocket and Kerwin JJ.: Having regard to the history of the Act and the change made in 1913 (c. 71) to the present form of s. 66 (3), the legislative intention was to free a company desirous of having part of its assessment apportioned to separate school purposes from the difficulty of ascertaining the precise ratio of the holdings of Roman Catholics. To give effect to that intention it must be held, on proper construction of the statute, that the company's notice stands and is to be followed unless displaced by evidence that the prohibition in s. 66 (3) has been violated. (*Regina Public School District* v. *Gratton Separate School District,* 50 Can. S.C.R. 589, discussed; it forms no authority on the point now in question) (Crocket J. further expressly concurred in the reasons given in the Court of Appeal).

Per the Chief Justice (dissenting): Sec. 66 imposes a strict limit upon the proportion which can be designated by the company in its notice, and a prohibition to the company against exceeding that limit. In giving the notice, the company, though not a public body, is exercising a statutory authority bestowed upon it in the public interest and for a public purpose, and is affected by certain obligations which govern a public body invested with powers the execution of which may prejudicially affect the rights and interests of others; it is bound to act within the limits of the power conferred, and conformably

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to the procedure laid down by the statute; it is bound to exercise the power in good faith for the purposes (those contemplated by the statute) for which the power is given; and in putting the power into effect (following the procedure laid down) it is bound to act reasonably (*Westminster* v. *London & N.W. Ry. Co.*, [1905] A.C. 426, at 430). The statute contemplates a notice given, and only given, after the company has ascertained as a fact that the proportion is not greater than that defined by s. 66 (3); unless that condition be fulfilled, the company cannot be said to be exercising the statutory power in conformity with the directions of the statute. Though there was no suggestion of any conscious dereliction from duty or any motive but an honest desire to conform to the directions of the statute, yet the material (as disclosed by the findings in the stated case) on which the notice was given formed no substantial foundation for the conclusion of fact which was the essential condition of a valid notice; therefore in giving the notice the company was not acting reasonably in exercise of the power conferred, and therefore the notice was not a valid exercise of the power. The above view would not preclude the establishment before the court of revision that the conditions under which the notice could validly be given did in fact exist; but there was no such evidence in this case.

Per Davis J. (dissenting): The portion of its school rates which a company has a right under the Act to divert from public schools to separate schools is limited to the proportion named in s. 66 (3). Though it may not know all its Roman Catholic shareholders, it can, to the extent that it does ascertain them, exercise that right. But, in the absence of actual knowledge of any amount of shares held by Roman Catholics, an estimate of shares so held does not satisfy the plain conditions imposed by the Act. (*Regina Public School District* v. *Gratton Separate School District,* 50 Can. S.C.R. 589, at 606, cited; also the history of the legislation discussed, in regard to the construction of the statutory provisions now in question). In view of the facts as found according to the stated case, the question of onus of proof was not important; but, in a case where it became of importance, the onus should rest upon the party seeking the benefit of the special statutory provision—on the person claiming exemption as a separatist from the general liability for the support of public schools, to prove those exceptional matters that took him out of the general rule (*Re Ridsdale and Brush,* 22 U.C.Q.B. 122, at 124; *Harling* v. *Mayville,* 21 U.C.C.P. 499, at 511; *Free* v. *McHugh,* 24 U.C.C.P. 13, at 21; also Parts I and II, generally, of the Act now in question and s. 5 of *The Public Schools Act,* R.S.O., 1937, c. 357, referred to; also principles as to onus of proof discussed).

APPEAL by the Board of Education for the City of Windsor from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of His Honour G. F. Mahon, a Judge of the County Court of the County of Essex. The judgment of Mahon Co. C.J. sustained the

(1) [1938] O.R. 301; [1938] 3 D.L.R. 298.

decision of the Court of Revision of the City of Windsor (which had allowed the present appellant's appeal against the apportionment of assessment made in accordance with the notice in Form B hereinafter mentioned) and held that the notice in Form B (provided for by *The Separate Schools Act,* now R.S.O., 1937, c. 362, s. 66) forwarded by the secretary of the Ford Motor Company of Canada Ltd. (in accordance with a resolution of the directors of the company) to the clerk of the City of Windsor, directing that 18% of the assessment of said company within the city of Windsor be entered, rated and assessed for separate school purposes, should be set aside, vacated and declared null and void and of no effect and that all the assessments of said company in said city should be assessed, enrolled and rated for public school purposes.

Sec. 66 (3) of said Act provides:

> Unless all the stock or shares are held by Roman Catholics the share or portion of such land and business or other assessments to be so rated and assessed shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares.

Mahon Co. C.J. found that the apportionment made by the directors of the company (though they "acted in good faith and with every desire to be fair") "was not based on actual knowledge and was only a guess or an estimate." He held that the onus was upon the company to establish that the portion of its assessment set out in its requisition (Form B) did not bear a greater proportion to the whole of its assessment than the amount of its stock or shares held by Roman Catholics bore to the whole amount of the stock or shares; and that this onus was not discharged.

The Court of Appeal for Ontario (1), on a special case stated by Mahon Co. C.J. for purposes of appeal (pursuant to s. 85 of *The Assessment Act,* R.S.O., 1937, c. 272), answered the questions submitted therein adversely to his holdings, on the grounds that the statute ought, if possible, to be interpreted and applied so as to effectuate its manifest intention, viz., to provide for an equitable apportionment of public and separate school taxes payable by companies having Roman Catholic shareholders who are supporters of separate schools; the assessor is bound to assess and return his roll apportioning the company's assessment

(1) [1938] O.R. 301; [1938] 3 D.L.R. 298.

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on receiving the notice; his roll is *prima facie* valid; the onus of displacing the *prima facie* situation rests on the attacking party and this onus was not discharged in the present case, though practical means of undertaking to do so existed by summoning and cross-examining the company's directors or officers on the hearing before the Court of Revision or before the County Court Judge.

The material facts as found by the County Court Judge are set out in the judgments given in this Court now reported. The appeal to this Court was dismissed with costs, the Chief Justice and Davis J. dissenting.

I. F. Hellmuth K.C. and *N. L. Spencer* for the appellant.

J. B. Aylesworth K.C. for the respondent Ford Motor Company of Canada Ltd.

A. Racine K.C. for the respondent Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor.

THE CHIEF JUSTICE (dissenting)—Mr. Justice Masten states in his judgment:

> The appellants admit that *prima facie* every corporation shall be rated and assessed for the support of public schools and that this is the general or basic rule subject, however, to the provisions of section 65 of the Separate Schools Act.

Section 65 (now s. 66) is in these words:

> 66. (1) A corporation by notice (Form B) to the clerk of any municipality wherein a separate school exists may require the whole or any part of the land of which such corporation is either the owner and occupant, or not being the owner is the tenant, occupant or actual possessor, and the whole or any proportion of the business assessment or other assessments of such corporation made under *The Assessment Act*, to be entered, rated and assessed for the purposes of such separate school.
>
> (2) The assessor shall thereupon enter the corporation as a separate school supporter in the assessment roll in respect of the land and business or other assessments designated in the notice, and the proper entries shall be made in the prescribed column for separate school rates, and so much of the land and business or other assessments so designated shall be assessed accordingly for the purposes of the separate school and not for public school purposes, but all other land and the remainder, if any, of the business or other assessments of the corporation shall be separately entered and assessed for public school purposes.
>
> (3) Unless all the stock or shares are held by Roman Catholics the share or portion of such land and business or other assessments to be so rated and assessed shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares.

(4) A notice given in pursuance of a resolution of the directors shall be sufficient and shall continue in force and be acted upon until it is withdrawn, varied or cancelled by a notice subsequently given pursuant to any resolution of the corporation or of its directors.

(5) Every notice so given shall be kept by the clerk on file in his office and shall at all convenient hours be open to inspection and examination by any person entitled to examine or inspect an assessment roll.

(6) The assessor shall in each year, before the return of the assessment roll, search for and examine all notices which may be so on file and shall follow and conform thereto and to the provisions of this Act.

The appeal came before the Ontario Court of Appeal by way of a stated case and it is convenient to set forth the material facts in the words of the case:

The appeal was heard by the Court of Revision and on the 25th day of November, 1937, the decision of that Court, along with its reasons, was handed down in writing and a certified copy was produced and filed as Exhibit 6. That Court allowed the appeal with the effect that the whole of the assessment of the Ford Company goes to the support of the Public Schools.

The decision of that Court was not unanimous. The minority member, who would have disallowed the appeal, stated "that in his opinion the basis of the appeal should have been established by subsection 4 of section 65 of the Separate Schools Act"; the section 65 mentioned being now section 66 of the Revised Statutes of Ontario, 1937, chapter 362.

It was the opinion of the majority members of the Court, according to the certificate filed (exhibit 6): "That subsection 4 does not invalidate subsection 3 and providing that the letter of the law and the spirit therein is adhered to in accordance with subsection 3, then subsection 4 would have been grounds for confirmation of the assessment. Such was not established by evidence under oath as previously recorded, not only was no effort made by the Corporation to ascertain the number of shares held by Roman Catholics but the Corporation had no knowledge of the proportion of shares held by Roman Catholics."

Against this decision Ford Motor Company of Canada Limited and the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor appealed.

In addition to the aforementioned exhibits filed was exhibit 5, being a certified copy of notice, form 15, under section 33*b* of the then Assessment Act, Revised Statutes, 1927, chapter 238, of the Ford Motor Company, filed in 1936 attached to which was the statutory declaration of the secretary stating that the Ford Company was unable to ascertain which of its shareholders are Roman Catholic and Separate School supporters or the ratio which the number of shares or memberships held by Roman Catholics who are Separate School supporters bore to all the shares issued by the Corporation.

At the commencement of the hearing of the appeal, after the production of the exhibits and their identification by Mrs. Helen Weller of the City Clerk's Department of the City of Windsor, Mr. Aylesworth, counsel for the Ford Motor Company, pointed out that one of the main questions between the parties was as to where the burden rests as to the compliance or non-compliance of the Company with the provisions of the then section 65 (now 66) of the Separate Schools

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Act and that without waiving his position that that onus was on the respondent here to prove affirmatively that less than 18% of the shares were held by Roman Catholics and that that onus was not on the appellant company to prove that there were as many as 18% of its shares held by Roman Catholics, he was willing to bring out the facts on the point. To this Mr. Spencer assented.

Mr. Douglas B. Greig, Secretary of Ford Motor Company of Canada Limited, was then called and gave his evidence, some of the material parts of which were:

The Company was incorporated under the Dominion Companies Act; has 1,658,960 shares of common stock and no preferred shares; that there were shares held by companies; that as of November 28th, 1936, the shares were held in 32 countries; that as of November 27th, 1937, the shares were held in 34 countries; that in Canada and the United States 1,500,000 shares are held; that the company cannot get the shareholders to reply to communications as to religion and school taxes; that the company has difficulty in getting many of its dividend cheques into the hands of those entitled; that they lately had about 100 letters containing dividend cheques returned to them; that there is, on the average, about 20,000 different shareholders; that all the company's shares of stock are not voting shares; that voting shares are not as widely distributed; that, on the average, about 19% of the proxies are returned; that voting shares are held in 16 different countries; that a number of outstanding shares are held in names of brokers; that between September, 1936, and November, 1937, the company's records indicate that the average number of shares held by brokers was 195,000; that the company has transfer agencies in Montreal, Toronto, Detroit and New York; that the number of shares changing ownership, according to records of stock exchanges, exceed by 9,500 monthly the number of shares presented for transfer on the books of the company; that in the year 1937 there were 665,874 shares of stock transferred on the books of the company; that the directors knew that all the stock of the company was not held by shareholders of the Roman Catholic faith and that shares were held by both Roman Catholics and others but did not know and could not ascertain what total percentage of the stock was held by Roman Catholics; that it was a practical impossibility to ascertain definitely what percentage of the shares were held by Roman Catholics and in fact the directors did not inquire from the shareholders as to their religious faith; that the Board consisted of five directors of whom one was a Roman Catholic which director was absent from the meeting adopting the resolution.

There were other facts brought out from Mr. Greig's evidence; but, I think the material facts are above recited. His evidence did show that directors in making the apportionment they did, acted in good faith and with every desire to be fair; they reasoned from a number of angles and made assessment comparisons and population comparisons, it is true many, if not most of them, after the notice, Form B, had been filed with the City Clerk; and that the directors, in adopting the resolution believed, from such information as was available to them, that the apportionment made to Separate Schools by the resolution was a percentage of the Company's local assessment no greater than the percentage of its shares held by Roman Catholics. However, I found that the division they made was not based on actual knowledge and was only a guess or an estimate.

None of the parties proved what proportion of the stock or shares of the Company was held by Roman Catholics.

With the greatest respect, I find myself unable to concur in the application that has been made of this statute by the Court of Appeal for Ontario. My views can be stated very briefly.

I am unable to escape the conclusion that section 66 imposes a strict limit upon the proportion of its land and business or other assessments which can be designated by the ratepayer-corporation in its notice for assessment for the purposes of the separate school in the municipality. Subsection 3 appears to me to impose a prohibition directed to the corporation against designating for such purposes a proportion of its land, business or other assessments greater than the proportion which the stock or shares held by Roman Catholics bears to the whole amount of its stock or shares.

The ratepayer corporation is not a public body, but in giving the notice authorized by section 66, it is exercising a statutory authority bestowed upon it in the public interest and for a public purpose. In exercising such authority it is affected by certain obligations which govern a public body invested with powers the execution of which may prejudicially affect the rights and interests of others. It is bound to act within the limits of the power conferred, and conformably to the procedure laid down by the statute. It is bound to exercise the power in good faith for the purposes for which the power is given, that is to say, for the purposes contemplated by the statute; and, in putting the power into effect (following the procedure laid down), it is bound to act reasonably. (*Westminster* v. *London & N.W. Ry. Co.* (1)).

With great respect, I think this statute contemplates a notice given, and only given, after the ratepayer corporation has ascertained as a fact that the proportion of its assessment directed to be applied for separate school purposes is not greater than the proportion defined by subsection 3. Unless that condition be fulfilled, the corporation cannot, in my opinion, be said to be exercising the statutory power in conformity with the directions of the statute.

Now, nobody suggests that in this case there has been on the part of those acting for the ratepayer corporation

(1) [1905] A.C. 426, at 430.

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any conscious dereliction from duty, or any motive but an honest desire to conform to the directions of the statute; but, having considered with the greatest care the material before them as disclosed by the findings of the learned judge, I am constrained to the view that they had not before them any substantial foundation for the conclusion of fact which was the essential condition of a valid notice —in the absence of which, that is to say, the notice could not be given conformably to the tenor of the statute.

It follows, I think, that in giving the notice the corporation was not acting reasonably in exercise of the power conferred; and that the notice was, therefore, not a valid exercise of their power. The learned judge considered that the persons acting for the Ford Company proceeded upon a guess or an estimate. There is much elasticity in the employment of the word "estimate," but it is very clear to me that, as I have already implied, they had not before them anything that could lead them beyond the region of supposition.

No abstract criterion can be laid down for weighing the probative force of facts. It is sufficient that in this case there was no solid basis for a conclusion that the statutory condition of a valid notice was, in fact, fulfilled.

The view I have expressed would not preclude the Corporation ratepayer, or, I think, the Separate School Board, from establishing before the Court of Revision that the conditions under which the notice could validly be given did in fact exist; but there was no such evidence in this case.

Question No. 3 ought, therefore, to be answered in the affirmative and that answer disposes of the controversy.

The appeal should be allowed and the judgment of Judge Mahon restored.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—On July 27th, 1937, the directors of the respondent company, Ford Motor Company of Canada, Limited, passed a resolution instructing its secretary to forward to the Clerk of the City of Windsor a notice requiring that eighteen per centum of the Company's land and business or other assessments in Windsor be entered,

rated and assessed for Roman Catholic Separate School purposes. A notice to that effect, in the prescribed form, was sent to and received by the City Clerk, and the assessor entered the Company as a separate school supporter in the municipal assessment roll with respect to the designated percentage of the Company's assessments and as a public school supporter with respect to eighty-two per centum of its assessments.

It is common ground that in the absence of such notice the Company would have been properly entered as a public school supporter only. The notice was given and the entries made in accordance with section 65 of *The Separate Schools Act,* R.S.O., 1927, chapter 328, as enacted by section 57 of *The Statute Law Amendment Act, 1937.* As the determination of this appeal depends primarily upon the construction of section 65, its provisions are reproduced forthwith:—

65. (1) A corporation by notice, Form B, to the clerk of any municipality wherein a separate school exists may require the whole or any part of the land of which such corporation is either the owner and occupant, or not being the owner is the tenant, occupant or actual possessor, and the whole or any proportion of the business assessment or other assessments of such corporation made under *The Assessment Act,* to be entered, rated and assessed for the purposes of such separate school.

(2) The assessor shall thereupon enter the corporation as a separate school supporter in the assessment roll in respect of the land and business or other assessments designated in the notice, and the proper entries shall be made in the prescribed column for separate school rates, and so much of the land and business or other assessments so designated shall be assessed accordingly for the purposes of the separate school and not for public school purposes, but all other land and the remainder, if any, of the business or other assessments of the corporation shall be separately entered and assessed for public school purposes.

(3) Unless all the stock or shares are held by Roman Catholics the share or portion of such land and business or other assessments to be so rated and assessed shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares.

(4) A notice given in pursuance of a resolution of the directors shall be sufficient and shall continue in force and be acted upon until it is withdrawn, varied or cancelled by a notice subsequently given pursuant to any resolution of the corporation or of its directors.

(5) Every notice so given shall be kept by the clerk on file in his office and shall at all convenient hours be open to inspection and examination by any person entitled to examine or inspect an assessment roll.

(6) The assessor shall in each year, before the return of the assessment roll, search for and examine all notices which may be so on file and shall follow and conform thereto and to the provisions of this Act.

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FORM B

(*Section 65*)

Notice by Corporation as to Application of School Tax.

To the Clerk of (describing the municipality).

Take notice that (*here insert the name of the corporation so as to sufficiently and reasonably designate it*) pursuant to a resolution in that behalf of the directors requires that hereafter and until this notice is either withdrawn or varied the whole or so much of the assessment for land and business or other assessments of the corporation within (*giving the name of the municipality*) as is hereinafter designated, shall be entered, rated and assessed for separate school purposes, namely, one-fifth (*or as the case may be*) of the land and business or other assessments.

Given on behalf of the said company this (*here insert date*).

R.S., Secretary of the Company.

In accordance with section 32 of *The Assessment Act* then in force (R.S.O., 1927, chapter 238), the Board of Education for the City of Windsor complained to the Court of Revision that the Company was wrongfully placed upon the roll as a Roman Catholic School supporter. By a majority, the Court of Revision considered that it was not established by evidence under oath that eighteen per centum was not a greater proportion of the whole of the Company's assessments than the proportion of stock or shares in the Company held by Roman Catholics bore to the whole amount of such stock or shares; and

not only was no effort made by the corporation to ascertain the number of shares held by Roman Catholics but the corporation has no knowledge of the proportion of shares held by Roman Catholics.

They therefore held that the whole of the Company's assessments should be entered and assessed for public school purposes.

The Company and the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor appealed to the County Judge and upon the latter's affirmance of the decision of the Court of Revision took a further appeal to the Court of Appeal for Ontario on a stated case. The Court of Appeal reversed the order of the County Judge and the Board of Education now appeals to this Court.

The County Judge reported and found as follows:—

At the commencement of the hearing of the appeal, after the production of the exhibits and their identification by Mrs. Helen Weller of the City Clerk's Department of the City of Windsor, Mr. Aylesworth, counsel for the Ford Motor Company, pointed out that one of the main questions between the parties was as to where the burden rests

as to the compliance or non-compliance of the company with the provisions of the then section 65 (now 66) of the Separate Schools Act and that without waiving his position that that onus was on the respondent here to prove affirmatively that less than 18 per cent. of the shareholders were Roman Catholics and that that onus was not on the appellant company to prove that there were as many as 18 per cent. of its shareholders Roman Catholic, he was willing to bring out the facts on the point. To this Mr. Spencer assented.

Mr. Douglas B. Grieg, secretary of the Ford Motor Company of Canada, Limited, was then called and gave his evidence, some of the material parts of which were:

The Company was incorporated under the Dominion Companies Act; has 1,658,960 shares of common stock and no preferred shares; that there were shares held by companies; that as of November 28th, 1936, the shares were held in 32 countries; that as of November 27th, 1937, the shares were held in 34 countries; that in Canada and the United States, 1,500,000 shares are held; that the company cannot get the shareholders to comply with requests as to school taxes; that the company has difficulty in getting many of its dividend cheques into the hands of those entitled; that they lately had about 100 letters containing dividend cheques returned to them; that there is, on the average, about 20,000 different shareholders; that all the company's shares of stock are not voting shares; that voting shares are not as widely distributed; that, on the average, about 19 per cent. of proxies are returned; that voting shares are held in 16 different countries; that a number of outstanding shares are held in names of brokers; that between September, 1936, and November, 1936, the company's records indicate that the average number of shares held by brokers was 195,000; that the company has transfer agencies in Montreal, Toronto, Detroit and New York; that the number of shares changing ownership, according to records of stock exchanges, exceed by 9,500 to 10,000 monthly the number of shares presented for transfer on the books of the company; that in the year 1937 there were 665,874 shares of stock transferred on the books of the company; that the directors knew that all the stock of the company was not held by shareholders of the Roman Catholic faith and that shares were held by both Roman Catholics and others but did not know and could not know what percentage of the stock was held by Roman Catholics.

There were other facts brought out from Mr. Greig's evidence, but, I think the material facts are above recited. His evidence did show the directors, in making the apportionment they did, acted in good faith and with every desire to be fair. They reasoned from a number of angles and made assessment comparisons and population comparisons, it is true many, if not most of them, after the notice, Form B, had been filed with the city clerk. However, I must find and do find that the division they made was not based on actual knowledge and was only a guess or an estimate.

The questions asked in the stated case are as follows:—

1. Upon the facts above set out and upon the true construction of the Statutes as applied to the facts, was I right in holding that upon an appeal by a ratepayer affected by the Notice "B" given by the Corporation and the assessment, rating and enrolment made thereunder, the onus is upon the Corporation to establish the fact that the share or proportion of its land, business or other assessments as set out in its

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requisition (Form B) does not bear a greater proportion to the whole of its assessments than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares.

2. Upon the facts above set out and upon the true construction of the Statutes as applied to the facts, was I right in holding that upon an appeal by a ratepayer affected by the Notice "B" given by the Corporation and the assessment, rating and enrolment made thereunder, the onus is not upon the ratepayer attacking the assessment to establish affirmatively the fact that the share or proportion of the Corporation's land, business or other assessments as set out in its requisition (Form B) bears a greater proportion to the whole of its assessments than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares.

3. Upon the facts above set out and upon the true construction of the Statutes as applied to the facts so stated, was I right in holding that the appeals of Ford Motor Company of Canada, Limited, and of the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor, should be dismissed, the decision of the Court of Revision sustained and the Notice, Form B, delivered by Ford Motor Company of Canada, Limited, set aside, vacated and declared null and void and of no effect and that all the assessments of the Company in the City of Windsor be assessed, enrolled and rated for Public School purposes, unless it was affirmatively proved before me that the share or proportion of the Corporation's land, business or other assessment as set out in its requisition (Form B) did not bear a greater proportion to the whole of its assessment than the amount of the stock or shares held by Roman Catholics bore to the whole amount of the stock or shares.

Two points should, I think, be here emphasized. The first is that, while in the present instance the assessor fulfilled the obligation cast upon him by subsection 2 of section 65 of *The Separate Schools Act,* the problem would be the same if he had disregarded his plain duty and had failed to assess in accordance with the notice sent by the Company. In either case the question of substance must be whether a party objecting to the notice is obliged to show affirmatively that the proportion of the holdings of Roman Catholics in shares or stock of the Company was less than eighteen per centum. The second point is that the hearing of the appeal from the Court of Revision by the County Judge is in the nature of a new trial, as subsection 2 of section 78 of the present *Assessment Act,* R.S.O., 1937, chapter 272, provides:—

> The hearing of the said appeal by the county judge shall, where questions of fact are involved, be in the nature of a new trial, and either party may adduce further evidence in addition to that heard before the court of revision subject to any order as to costs or adjournment which the judge may consider just.

The proper construction of section 65 of *The Separate Schools Act* cannot be reached without an investigation

of its history. For many years the *Separate Schools Act* in force from time to time in Ontario contained a section empowering a company to give notice to the clerk of the municipality wherein a separate school existed, requiring any part of its assessable property to be rated and assessed for the purposes of the separate school. In this section was included a proviso (as, for instance, in section 54 of *The Separate Schools Act* as enacted by 4 Edward VII, chapter 24, section 6) that the share so rated "shall bear the same ratio and proportion to the whole of the assessment" as the amount or proportion of the shares or stock of the Company as are held and possessed by persons who are Roman Catholics bears to the whole amount of such shares or stock. In 1913, however, by 3-4 George V, chapter 71, section 66, the statutory provision was recast. What was formerly the proviso appeared (as it now does), as subsection 3,—but with this important difference: Instead of the requirement that the share of the assessment should bear the *same* ratio and proportion to the whole of the assessment as the amount or proportion of the shares held by Roman Catholics bore to the whole amount of such shares, it was provided that it *shall not bear a greater proportion.*

Mr. Hellmuth, for the appellant, argued that prior to 1913 it would have been incumbent upon the Company to ascertain the exact proportion, and that as soon as it was shown before the Court of Revision or County Judge that that had not been done, the Company would be assessed for public school purposes; the new Act, he submitted, merely authorized the Company to find the limits of the ratio but gave it no further or greater power. That is, he contended, the Company must be able to show that, in selecting the proportion to be assessed for separate school purposes, it has not adopted a greater proportion than the holdings of Roman Catholics bear to the whole amount of the Company's stock or shares. As an aid towards the establishment of these propositions he relied upon *Regina Public School District* v. *Gratton Separate School District* (1).

In connection with that case, it should be noted at the outset that two members of this Court were in favour of allowing the appeal because of their views as to the

(1) (1915) 50 Can. S.C.R. 589

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proper construction of sections 93 and 93 (*a*) of the Saskatchewan *School Assessment Act,* while two others adopted a directly contrary construction. In the result, the appeal was allowed, but that was because the fifth member, Mr. Justice Idington, without expressing any opinion upon the question of construction, concluded that the legislation was *ultra vires* the Saskatchewan legislature. In any event, the statutory provisions and the facts before the Court in that case were so different from what we have to consider on this appeal that no assistance may be gained from a review of the opinions expressed as to the construction of the statute. There, a number of companies had not given, under the permissive section 93 of the Saskatchewan *School Assessment Act,* notices requiring a portion of their school taxes to be applied for separate school purposes. Section 93 contained a proviso that the share to be assessed for separate school purposes should bear the same proportion to the whole property of the company assessable within the school district as the proportion of the shares of the company held by Protestants or Roman Catholics respectively bore to the whole amount of the shares of the company,— in effect the same as the proviso in the earlier Ontario statutes. Under section 93 (*a*), which had been enacted later than section 93, the separate school trustees notified these companies that unless and until they gave notice under section 93 the school taxes payable by them would be divided according to a set formula. The mooted question was as to the efficacy of the separate school trustees' notices upon the proper construction of the two sections.

In the case at bar, although no obligation was imposed upon the respondent company, it did give a notice. As found by the County Judge, the directors acted in good faith, knowing "that shares were held by both Roman Catholics and others" although "not what percentage of the stock was held by Roman Catholics." Under these circumstances, if the question had arisen under the statute as it stood prior to the 1913 amendment, no effect could have been given to the notice because it was shown that the share of the Company's assessments to be rated for separate school purposes did not bear the same ratio to the whole of the assessments as the proportion of the shares held by Roman Catholics bore to the whole amount

of such shares. I attach no importance to the fact that the new legislation appears, not as a proviso, but as a separate subsection, but the enactment was altered and it is only from a consideration of the language used that we are justified in gauging the intention of the legislature. That intention was to free a company desirous of having part of its assessment apportioned to separate school purposes from the difficulty of ascertaining the precise ratio of the holdings of Roman Catholics in its capital stock. To adopt the construction of the statute suggested on behalf of the appellant would be to require the Company to do the very same thing, although, it is true, it might then direct that a less proportion of its assessments be rated for such purposes. To give effect to the legislative intention, the proper construction of the statute requires us to hold that the Company's notice stands and is to be followed unless displaced by evidence that the prohibition in subsection 3 has been violated. As pointed out by Masten, J.A., if the fact be as the appellant contends, the means existed whereby it might be proved.

The appeal should be dismissed with costs.

CROCKET J.—As I fully concur in the reasons for the unanimous judgment of the Ontario Court of Appeal (Middleton, Masten and Fisher, JJ.A.), as given by Masten, J.A., as well as in those of my brother Kerwin here, I would dismiss this appeal with costs.

DAVIS J. (dissenting)—I am of the same opinion as my Lord, the Chief Justice. The fact that the case is one of general importance leads me to state fully the reasons which move me to the same conclusion.

The appeal raises nothing but a question of law. The facts found by the County Judge are not subject to any right of appeal; we are entirely bound by those facts. The only question open for determination upon the stated case under *The Assessment Act* is the question of pure law: whether the County Judge as a matter of law upon the facts as he found them, reached a proper conclusion.

The point in issue in the case is a very simple one, turning on the interpretation and application of the words of sec. 66 of *The Separate Schools Act,* R.S.O., 1937, ch. 362. For convenience I shall refer throughout to the pro-

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visions in the present revised statutes of Ontario (1937) because there has been no change in the relevant provisions in force at the dates material in this case. Under said sec. 66 a corporation may require the whole or any part of its land, business or other assessments in any municipality in which a separate school exists, to be rated and assessed for the purposes of separate schools rather than for the purposes of public schools, but "unless all the stock or shares" in the corporation "are held by Roman Catholics," the share or portion of said land, business or other assessments to be so rated and assessed "shall not bear a greater proportion" to the whole of such assessments than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares of the corporation.

The respondent Ford Motor Company of Canada Limited, in July, 1937, sought to have 18 per cent. of its land, business and other assessments in the City of Windsor rated and assessed for separate school purposes under and by virtue of the statutory provision above mentioned, by delivering to the clerk of the municipality a notice (Form B) as provided by subsection (1); the assessor thereupon, in accordance with subsection (2), entered the company as a separate school supporter in the assessment roll in respect of 18 per cent. of its land, business and other assessments designated in the notice. The Board of Education for the City of Windsor complained of this assessment (by virtue of sec. 31 of *The Assessment Act,* R.S.O., 1937, ch. 272) and raised the question by way of appeal to the Court of Revision, of the right of the company to divert this portion of its school rates from the public schools to the separate schools. The Court of Revision by a majority agreed with the Board of Education's contention that the company had not brought itself within the statute, and accordingly set aside the assessment in respect of separate schools. On an appeal being taken by the company and by the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor (by separate notices of appeal, to which I shall later refer) to the County Judge, he, by force of subsec. (2) of sec. 78 of *The Assessment Act,* was entitled to deal and did deal with the appeals as "in the nature of a new trial" and all parties were entitled

to adduce further evidence in addition to that heard before the Court of Revision. Sec. 83 of *The Assessment Act* provides that the decision and judgment of the County Judge "shall be final and conclusive in every case adjudicated upon," except that in the case of the assessment of a telephone company an appeal shall lie from such decision and judgment to the Ontario Municipal Board. Sec. 85, however, gives a right of appeal to the Court of Appeal from the judgment of the County Judge "on a question of law or the construction of a statute." Subsection (2) of sec. 85 provides that any party desiring so to appeal to the Court of Appeal shall, on the hearing of the appeal by the Judge, request the Judge to make a note of any such question of law or construction and to state the same in the form of a special case for the Court of Appeal. That was the procedure adopted in this case.

The County Judge found, as was in fact admitted, that all the shares of the company were not held by Roman Catholics. That being so, the question of fact then was whether or not 18 per cent. was a greater proportion of the whole of the company's assessments than the amount of the shares of the company held by Roman Catholics bore to the whole amount of the shares of the company. The right of a company under the statute to divert a portion of its school rates from public schools to separate schools (where all the shares are not held by Roman Catholics) is limited, as I have said, to a proportion "not greater than" the amount of the shares of the company held by Roman Catholics bears to the whole amount of the shares of the company. Prior to the amendment made in 1913 (3-4 Geo. V, 1913, ch. 71, sec. 66 (3)) the words were "shall bear the same ratio and proportion" (see 4 Edw. VII, 1904, ch. 24, sec. 6). The amendment permitted any part of a company's taxes to be diverted to separate schools so long as it "shall not bear a greater proportion." It is a simple mathematical calculation to determine the maximum statutory percentage once two amounts are ascertained—the amount of the shares in the company held by Roman Catholics and the total amount of the shares of the company. It became unnecessary however, under the amendment, that the exact ratio and proportion be ascertained, or if ascertained be diverted. To whatever extent the company ascertained the amount

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of shares held by Roman Catholics, to that extent the amendment gave the power to divert. The taxes that may be diverted must not bear "a greater proportion"; they may be less, but they cannot be greater. But one cannot determine any proportion at all until he ascertains, first, the total amount of the shares of the company, and second, some amount of those shares that is held by Roman Catholics.

In this case the parties gave all the evidence they could to the County Judge and he found as a fact that no one knew what amount of shares was held by Roman Catholics. The evidence of the Secretary of the Company, accepted by the County Judge, was that the directors "did not enquire from the shareholders as to their religious faith." The County Judge expressly found as a fact "that the division they (i.e., the directors) made was not based on actual knowledge and was only a guess or an estimate" and he sustained the decision of the Court of Revision.

The Company and the Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor, by way of a stated case on a question of law or construction of statute, appealed to the Court of Appeal. The two appeals are said to have been heard together in the Court of Appeal, as they had been before the County Judge. I cannot see any reason for both the company and the Separate School Board appealing separately, but that only goes to the question of costs. The Court of Appeal took a different view of the matter from that taken by the Court of Revision and by the County Judge, and allowed the appeals. From that judgment, to which I shall presently refer, the Board of Education appealed to this Court.

Upon the facts as found by the County Judge (and there was not a suggestion that if an appeal had lain on matters of fact as well as on matters of law the findings of fact could have been in any way impeached), I confess that I cannot see any really arguable point of law. If the company does not ascertain any number of shares held by Roman Catholics, how can the Court say that 18% is "not greater than" the maximum proportion allowed by the statute?

Much of the argument was directed to the question of onus and the first two questions in the case stated by the

County Judge at the request of the respondents are directed to the question of onus. But all the available facts were frankly given to the tribunal of fact (i.e., the County Judge), and the facts have been found and there is no right of appeal thereon. If no evidence had been tendered to the County Judge on the hearing before him, or if the evidence had been so evenly balanced that the County Judge could come to no conclusion on the facts, the onus or burden of proof might have operated as a determining factor of the whole case; *Robins* v. *National Trust Co.* (1). But that was not the case here. The learned County Judge was not upon the whole evidence judicially satisfied that 18 per cent. was not a greater proportion than that permitted by the statute. It is quite unnecessary for the Court to answer the first two questions submitted in the stated case. The third question is the substance of the matter, i.e., Was the County Judge right in holding that the appeals of the company and of the Roman Catholic Separate Schools Trustees should be dismissed, the decision of the Court of Revision sustained and the notice, form B, delivered by the company, set aside, unless it was affirmatively proved that the percentage of the company's assessments (i.e., 18 per cent.) set out in the requisition (Form B) did not bear a greater proportion to the whole of its assessments than the amount of the shares held by Roman Catholics bears to the whole amount of the shares of the company? Agreeing as I do with the conclusion of the learned County Judge upon the facts as he found them, I would answer the third question in the affirmative.

But there was so much said during the argument on the question of onus that it may be desirable to say that in any case where onus becomes of importance the problem of deciding upon whom the onus rests depends upon the nature and circumstances of the particular question involved. There is no single principle or rule which will afford a test in all cases for ascertaining the incidence of the burden. A statement of general application appears to be that the burden of proof lies upon the party who substantially asserts the affirmative; but even this statement as a working rule presents its own difficulties in

(1) [1927] A.C. 515, at 520.

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particular cases because, when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment may be taken as true unless disproved by that party. And yet this statement again cannot be said to furnish a satisfactory general working rule. The article on Evidence in the Hailsham edition of Halsbury's Laws of England (Vol. XIII) which was under the editorship of Lord Roche, has left untouched the carefully guarded statement in the article on Evidence, in the first edition, which was under the joint editorship of Mr. Hume-Williams and Mr. Phipson. The law was there stated as at October, 1910, and the unchanged statement to which I have reference, in the edition of 1934, is paragraph 615 (2) at page 545, as follows:

> (2) Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it lies upon the latter.
>
> The principle of this exception has frequently been recognized, both by the Legislature and in decided cases. On the other hand, its validity has been several times challenged by high authorities, and having regard to this conflict of opinion, the following statement of the point is, perhaps, the one which is the least open to objection:—"In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively."

I cannot appreciate the argument that when a company has been given a statutory right to divert taxes from one purpose to another provided the division "shall not bear a greater proportion" than that stipulated in the statute, and the company puts in an arbitrary figure without any actual knowledge of the facts, it falls upon those adversely affected to establish the two essential facts that are necessary in order that the simple mathematical calculation can be made to determine the maximum stipulated statutory proportion beyond which the taxes are not to be diverted, i.e., first, the total amount of the stock or shares of the company, and secondly, the amount of the stock or shares held by Roman Catholics. If that is so, it would only be necessary for any company to put in any arbitrary figure it liked and then to say to any person prejudicially affected and complaining that the division of taxes occasioned by such arbitrary figure must stand until the person who complains is able to prove affirmatively against the company (which itself has the information in its own

keeping, if any one has) that the arbitrary percentage is in fact greater than the proportion fixed and permitted by the statute.

While in my opinion, as already expressed, the question of onus does not arise in this case, if you had a case where onus became of importance it would, in my view, rest upon the party seeking the benefit of the special statutory provision. Even before the days of Confederation, the same sort of problem with which we have to deal here arose in Upper Canada with respect to school assessments of individuals. The principal school legislation of the province of Ontario may be traced from the form in which it appeared in the Consolidated Statutes of Upper Canada, 1859, ch. 64, through various consolidations. In 1862, in the case of *Ridsdale and Brush* (1), the Court of Queen's Bench, composed of McLean, C.J., Burns and Hagarty, JJ., delivered judgment in which Burns, J., speaking for the Court, at p. 124 said:

> We take it to be perfectly plain, from reading the Common School Act, chapter 64 of the Consol. Stats. of U.C., chapter 65, providing for separate schools, and chapter 55, the Assessment Act, that the Legislature intended the provisions creating the common school system, and for working and carrying that out, were to be the rule, and that all the provisions for the separate schools were only exceptions to the rule, and carved out of it for the convenience of such separatists as availed themselves of the provisions in their favour.

Gwynne, J., in *Harling* v. *Mayville* (2), approved the language of Burns, J., in the *Ridsdale* case (1) and said, at p. 511:

> I think that the party claiming exemption from the general rule of *prima facie* liability to common school rates should show that the trustees of his separate school have taken the steps pointed out by the law to procure for the separatists the desired exemption.

The language of Burns, J., in the *Ridsdale* case (1) was again referred to by Chief Justice Hagarty (he had been a member of the Court in that case) in *Free* v. *McHugh* (3). The effect of the judgments in those cases is that it lies on the person claiming exemption as a separatist from the general liability for the support of public schools to prove those exceptional matters that take him out of the general rule. I can see nothing inconsistent with that long established view of exemption from public school

(1) (1862) 22 U.C. Q.B. 122. (2) (1871) 21 U.C. C.P. 499.
(3) (1874) 24 U.C. C.P. 13, at 21.

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rates in the statement of Lord Haldane in the *Tiny* case (1), that "the separate school was only a special form of common school."

School legislation in Ontario has from earliest times, and continues so down to this date, provided under certain circumstances for Protestant as well as for Roman Catholic separate schools. Part I, being the first fifteen sections of *The Separate Schools Act,* R.S.O., 1937, ch. 362, provides the conditions on which one or more separate schools for Protestants and one or more separate schools for coloured people may be established in any township, city, town or village in the province. Part II provides for separate schools for Roman Catholics. The public schools are governed by *The Public Schools Act,* R.S.O., 1937, ch. 357. By sec. 5,

> All schools established under this Act shall be free public schools, and every person between the ages of five and twenty-one years, except persons whose parents or guardians are separate school supporters, and except persons who, by reason of mental or physical defect, are unable to profit by instruction in the public schools, shall have the right to attend some such school in the urban municipality or rural school section in which he resides.

Counsel for the respondents pressed upon us another argument, quite independent of the question of onus. They said that the proportion or percentage in this case was "a reasonable probability" made in good faith by the directors as a fair estimate, and that the statute should be so interpreted by the Court, as in fact it was by the Court of Appeal, to allow any such reasonable probability to stand as a satisfactory compliance with the statute, upon the ground that the manifest intention of the statute was to provide for an equitable apportionment of public and separate school taxes payable by companies having Roman Catholic shareholders. But the language of the statute itself is perfectly plain and the Court cannot relieve itself of its duty to apply it. There is nothing in the language that suggests a place for either an estimate or a guess. Sir Louis Davies (then Davies, J.) in this Court in *Regina Public School District* v. *Gratton Separate School District* (2), in discussing a Saskatchewan

(1) *Roman Catholic Separate School Trustees for Tiny et al.* v. *The King,* [1928] A.C. 363, at 387.
(2) (1915) 50 Can. S.C.R. 589.

statute allowing an apportionment between public and separate schools somewhat similar to the statute before us (except that the share to be assessed for separate school purposes should bear "the same ratio and proportion" to the whole property of the company as the proportion of the shares of the company held by the Protestants and Roman Catholics respectively bore to the whole of the shares of the company) said, at p. 606:

> Now it is manifest that a company desirous of exercising the permission given by section 93 must before exercising it have ascertained with certainty the religious persuasions or beliefs or connections of its various shareholders. In no other way could the statutory division the company was authorized to require of its assessable taxes be made and the grossest injustice might be done to one or other of the respective schools, public or separate, if in the absence of such knowledge any company should attempt to exercise its privilege.

The statutory provision with which we have to deal was first enacted in its present language in 1913 (3-4 Geo. V, ch. 71, sec. 66), when the words "not greater than" were substituted for the words "the same ratio and proportion," which had appeared in the enactment as first introduced in Ontario in 1886 by 49 Vict., ch. 46, sec. 53. It is not without significance, I think, that in 1936, then sec. 65 of *The Separate Schools Act,* R.S.O., 1927, ch. 328 (the same as present sec. 66), was repealed by the Ontario Legislature by *The School Law Amendment Act, 1936,* being 1 Edw. VIII, ch. 55, sec. 42, and there was passed by the Legislature *An Act to amend The Assessment Act,* being 1 Edw. VIII, ch. 4, which added to *The Assessment Act* entirely new sections, 33*a,* 33*b,* 33*c,* 33*d,* 33*e* and 33*f,* relating to the distribution of assessments of corporations for public and separate school purposes. These statutory changes—that is, the repeal of old sec. 65 of *The Separate Schools Act* and the enactment of the new provisions—were both assented to on April 9th, 1936. The new provisions expressly dealt with the case, such as the one before us in this appeal, of

> * * * a corporation, which, by reason of the large number of its shareholders or members and the wide distribution in point of residence of such shareholders or members, is unable to ascertain which of its shareholders or members are Roman Catholics and separate school supporters or the ratio which the number of the shares or memberships held by Roman Catholics who are separate school supporters bears to all the shares issued by or memberships of the corporation, * * * [sec. 33*b* (1)].

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> Provision was made for the division of school taxes between the public schools and separate schools in the same ratio as the total assessments of all the rateable property in such municipality or school section assessed according to the last revised assessment roll to persons who being individuals are public school supporters bear to the total assessments of all the rateable property in such municipality or school section assessed according to the said assessment roll to persons who being individuals are Roman Catholics and separate school supporters; and taxation for public school purposes and separate school purposes against the said lands, business and income of the corporation shall be imposed and levied accordingly; * * * [sec. 33*b* (3)].

These new provisions were obviously intended to meet just such a case as that now before us where, by reason of the large number of shareholders and the wide distribution in point of residence, a company is unable to ascertain, or cannot conveniently ascertain, which of its shareholders are Roman Catholics. But all these new statutory provisions were entirely repealed, on March 25th, 1937, at the next session of the Legislature by *The Assessment Amendment Repeal Act, 1937,* being 1 Geo. VI, ch. 9, and on the same day there was re-enacted, by *The Statute Law Amendment Act, 1937,* 1 Geo. VI, ch. 72, sec. 57, old sec. 65 of *The Separate Schools Act* (the same as sec. 66 in the Revised Statutes of 1937) which had been repealed the year before and which section specifically provides that

> 65. (3) Unless all the stock or shares are held by Roman Catholics the share or portion of such land and business or other assessments to be so rated and assessed shall not bear a greater proportion to the whole of such assessments than the amount of the stock or shares so held bears to the whole amount of the stock or shares.

The fact that the Legislature obviously dealt with just such a difficulty as has occurred in this case, and then immediately repealed the new provisions and restored the old, leaves no room in my opinion for the construction put upon the section by the Court of Appeal that we will best effectuate the intention of the Legislature by construing the words so as to imply that in the absence of actual knowledge of any amount of shares held by Roman Catholics in the company, a fair estimate is sufficient.

The general rule undoubtedly is that where an Act of Parliament has been repealed it is, as to all matters completed and ended at the time of its repeal, as though it had never existed as a governing law with respect to these

subject-matters (*per* Bramwell, L.J., in *Attorney-General* v. *Lamplough* (1)). But if a present statute is doubtful or ambiguous, it is to be interpreted so as to fulfill the intention of the Legislature and to attain the object for which it was passed, and in that connection Lord Blackburn in *Bradlaugh* v. *Clarke* (2) said:

It is upon this principle that it is held, as I think it has always been held, that where a statute was passed for the purpose of repealing and, in part, re-enacting former statutes, all the statutes *in pari materiâ* are to be considered, in order to see what it was that the Legislature intended to enact in lieu of the repealed enactments. It may appear from the language used that the Legislature intended to enact something quite different from the previous law, and where that is the case effect must be given to the intention. But when the words used are such as may either mean that former enactments shall be re-enacted, or that they shall be altered, it is a question for the Court which was the intention.

In the *Lamplough* case (3), Bramwell, L.J., said at p. 227:

Then it is argued that you cannot look at the repealed portion of the Act of Parliament to see what is the meaning of what remains of the Act. I know that is not the argument of the Solicitor-General, but that opinion has been expressed. I, however, dissent from it.

Brett, L.J., in the same case, said at p. 231:

The judgments of the majority in the Exchequer Division lay down that the moment an Act of Parliament is partly repealed we cannot look at the repealed part for any purpose, but that the repealed part must be regarded as if it had never been enacted. I cannot help thinking that that part of the judgments is not sustainable, for what we have to consider is not what was the construction of the first statute, but what is the effect of the repealing statute? We cannot tell what is the effect of the latter without looking at the meaning of the statute which it has repealed. We must treat it as we treat all statutes for the purpose of construing them; we must look at the facts which were existing at the time the Act passed to see what was its meaning.

Lord Justice Knight Bruce said in *Ex parte Copeland* (4):

Although it has been repealed, still, upon a question of construction arising upon a subsequent statute on the same branch of the law, it may be legitimate to refer to the former Act. Lord Mansfield, in the case of *The King* v. *Loxdale* (5), thus lays down the rule: "Where there are different statutes *in pari materiâ*, 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) (1878) 3 Ex. D. 214, at 228.
(2) (1883) 8 App. Cas. (H.L.) 354, at 373.
(3) (1878) 3 Ex. D. 214.
(4) (1852) 2 De G. M. & G. 914. at 920.
(5) (1758) 1 Burr. 445, at 447.

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Fletcher Moulton, L.J., in *Macmillan & Co.* v. *Dent* (1), said:

> In interpreting an Act of Parliament you are entitled, and in many cases bound, to look at the state of the law at the date of the passing of the Act—not only the common law, but the law as it then stood under previous statutes—in order properly to interpret the statute in question. These may be considered to form part of the surrounding circumstances under which the Legislature passed it, and in the case of a statute, just as in the case of every other document, you are entitled to look at the surrounding circumstances at the date of its coming into existence, though the extent to which you are allowed to use them in the construction of the document is a wholly different question.

While regard may be had to a repealed statute *in pari materiâ* where difficulties of construction arise, I do not think it is necessary to invoke this rule or to rely on the repealed statute to construe the present section, which is neither doubtful nor ambiguous. The conditions which the Legislature has thought fit to impose are plainly set forth and it is not within the province of any tribunal to relax these conditions. It is not for those seeking to take advantage of the special privilege of a statute to say that they have given something just as satisfactory and reasonable as the exact conditions imposed by the statute; they must clearly satisfy the conditions.

Although the case was argued before us by the respondents as if an estimate had been carefully arrived at by the directors before the statutory notice (Form B) was given to the clerk of the municipality, it is to be noted that the County Judge does not put it that way in his findings. He says:

> They (i.e., the directors) reasoned from a number of angles and made assessment comparisons and population comparisons,

but

> it is true many, if not most of them, after the notice, Form B, had been filed with the City Clerk.

The Court of Appeal took the view that it is impossible in most cases for companies to state the exact percentage of their shareholders who are Roman Catholics and that if it is a *sine qua non* under the provisions of the statute that they should so state, then the present legislation is wholly ineffective to accomplish the purpose intended by the legislation, which purpose that Court took to be to provide for an equitable apportionment of the taxes pay-

(1) [1907] 1 Ch. 107, at 120.

able by companies where some of their shareholders are supporters of public schools and others of their shareholders are supporters of separate schools. The Court of Appeal therefore thought it was its duty to give such an interpretation of the statute as would render it effective to accomplish that purpose. But Mr. Hellmuth pointed out that there was not the injustice that had been suggested in an adherence to the language of the statute because any company that wished to could ascertain, so far as it was convenient to do so, who, if any, were Roman Catholic shareholders in the company and the amount of shares held by them. The company might not be able to exhaust the entire list of its shareholders if the company had a very large number of shareholders scattered all over the world, but supposing it ascertained that 20 per cent. or 30 per cent. of the amount of the shares of the company was held by Roman Catholics, the company could divert its school taxes to separate schools up to the ascertained percentage and it could not then be denied that that proportion was "not greater than" the percentage stipulated by the statute. As the statute has stood since 1913 (except for the one year it was repealed) the percentage is not required to bear "the same ratio and proportion" as in the earlier statutory provisions; the result is that a company, though it may not know all its Roman Catholic shareholders, can, to the extent that it ascertains them, take full advantage of the present statutory provision.

In my opinion, the County Judge was right in his conclusion and I would therefore answer the third question submitted in the stated case in the affirmative, and would allow the appeal, with costs against the respondents in this Court and in the Court of Appeal.

Appeal dismissed with costs.

Solicitor for the appellant: *Norman L. Spencer.*

Solicitors for the respondent Ford Motor Company of Canada Ltd.: *Bartlet, Aylesworth & Braid.*

Solicitor for the respondent The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor: *Armand Racine.*

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*April 25, 26
*June 27.

ROBERT MAXWELL (DEFENDANT).....APPELLANT;

AND

DAWSON CALLBECK (PLAINTIFF).....RESPONDENT.

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

Motor vehicle—Collision between motor cycle and automobile—Ultimate negligence—Contributory Negligence Act (Alberta), 1 Geo. VI, c. 18—Statute specifically pleaded—Statute coming into force after date of accident, but before date of commencement of suit—Whether statute applicable.

An action was brought on October 12th, 1937, by a motor cyclist for damages sustained in a head-on collision with an automobile, which collision occurred on October 30th, 1936. The trial judge dismissed the action on the ground that the accident was caused solely by the plaintiff's negligence, but that judgment was reversed by the appellate court. The respondent, alleging contributory or ultimate negligence of the defendant, pleaded specifically the application of the *Contributory Negligence Act,* which went into force on July 1st, 1937.

Held that the statute has no application to this case; and, also, that upon the facts, the judgment of the trial judge should be restored, as the plaintiff was, to some extent if not *in toto,* guilty of negligence which contributed to the collision.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of the trial judge, Howson J. (2) and maintaining the respondent's action.

The action was brought by the respondent against the appellant for damages sustained in a head-on collision with an automobile. The facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

T. N. Phelan K.C. for appellant.
I. F. Fitch K.C. for respondent.

The judgment of the Chief Justice and of Rinfret, Davis and Kerwin JJ. was delivered by

DAVIS J.—This case arises out of a collision between a motor cycle and a motor car on the Bowness road near the city of Calgary. The collision occurred shortly after

(1) [1938] 3 W.W.R. 691. (2) [1938] 1 W.W.R. 734.

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

midnight on October 30th, 1936. The date becomes important in view of subsequent legislation to which I shall later refer. The owner and driver of the motor cycle (respondent) commenced this action against the owner and driver of the motor car (appellant) for damages claiming $1,177.50 for special damages and $13,820 for general damages. The date of the commencement of the action was October 12th, 1937, and that date becomes of importance also in considering subsequent legislation. The statement of defence was a general denial of liability but at the trial in February, 1938, leave was given to make amendments and the amended statement of defence set up that the collision was caused by the sole negligence of the plaintiff and, alternatively, that the plaintiff was guilty of contributory negligence, or, was guilty of ultimate negligence. The plaintiff then filed an amended joinder of issue and reply, in which he denied that the accident was caused by his sole negligence or that he was guilty of contributory negligence or of ultimate negligence and pleaded further that, if he was guilty of any negligence which in any way contributed to the accident, the liability to make good the damage or loss should be in proportion to the degree in which each of the parties was at fault. He pleaded specifically the *Contributory Negligence Act* of Alberta, 1 Geo. VI, 1937, ch. 18, which did not go into force until the first day of July, 1937.

The case was tried without a jury by Mr. Justice Howson at Calgary on February 23rd, 24th and 25th, 1938, and judgment was reserved until March 22nd, 1938. The action was dismissed with costs.

The learned trial judge carefully analyzed and considered the evidence. He found that the plaintiff had purchased the motor cycle—a second-hand 1929 model—two days before the accident; that the electrical ignition system was not in good condition, the tail light was disconnected, the front wheel brake was not operating, the horn was dead, the battery was very low and, although equipped so that bright and dim lights could be installed, yet the bright light only was actually working; and that between the times of the purchase of the motor cycle and the collision no repair work had been done on the machine except that the plaintiff had wound tape round the electric wiring in two places.

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The learned trial judge found that the collision occurred at a point where the road in question, which is hard-surfaced, makes "a very long, gradual and level curve." The motor cycle and the motor car were travelling in opposite directions.

There was, as is not unusual in these collision cases, a good deal of conflicting evidence, but the trial judge concluded:

> After considering all of the evidence, I find that the defendant did keep a proper lookout, that he was not operating his motor vehicle at an excessive rate of speed and that he had his automobile under proper control. I am convinced that the plaintiff either drove his motor cycle without any light until he was close to the defendant, and then switched it on, or that his light, if on, while rounding the curve, was so ineffective that it not only failed to give the defendant warning of the plaintiff's approach, but actually deceived the defendant. The defendant had then no chance of turning to the right and thus avoiding the collision but upon realizing the imminent danger, he did all that could reasonably be expected of him, namely, he jammed on his brakes.
>
> While I have the greatest sympathy for the plaintiff, who was very badly injured, yet I find that the accident was caused solely by his own negligence, and his action must, therefore, be dismissed with costs.

The case was carried to the court of appeal for Alberta. That Court reversed the judgment at the trial and gave judgment in favour of the plaintiff for the sum of $4,802.50 (to include both general and special damages) together with the costs of the action and of the appeal. From that judgment the defendant appealed to this Court and the plaintiff cross-appealed, asking for an increase in the amount of damages awarded from the sum of $4,802.50 and costs to the sum of $14,997.50 and costs.

The court of appeal reviewed the evidence and, speaking broadly, took the view that the defendant was guilty of negligence in not having taken the right-hand side of the road when meeting the plaintiff who, the Court thought, had a better right than the defendant to be on the other side of the road. Mr. Justice Ford, in delivering the judgment of the Court, said that it was clear from the evidence that the motor cycle was proceeding on its right-hand side of the centre line of the highway, close to the ditch, and at the time of the collision was, according to the defendant's own evidence, not more than four or five and a half feet from the north side of the road. The paved surface of the road is 22 feet wide. As a matter of fact, the plaintiff said he would be "anywhere between the ditch

and possibly five or six feet to my left hand side of the ditch." The defendant admitted that at the time of the impact he swerved his car two or three feet to the left. Mr. Justice Ford said that there was ample room for the defendant to turn to his right of the centre line of the highway when he met the plaintiff on his motor cycle. But with great respect, in the circumstances of this case it is not a question of whether there was ample room—undoubtedly there was; the question is whether when suddenly confronted in the darkness by the motor cyclist there was time or opportunity to avoid a collision. But taking the view they did of the evidence, the court of appeal concluded that

> after the emergency was apparent he (the defendant) and not the appellant (plaintiff) had the last chance to avoid the consequences of whatever negligence of either or both was antecedent to it, and he (the defendant) failed to avail himself of it. This * * * was the real cause of the accident.

Mr. Justice Ford, speaking for the Court, took a view of the evidence quite contrary to that taken by the learned trial judge and concluded his written reasons by stating that the plaintiff did all he could to avoid the collision; that although he had the right to expect that the defendant would yield him the right of way, he kept his motor cycle as near to his right-hand side and as near to the ditch as he could reasonably be expected to do; and that it could not be said that the last clear chance to avoid the accident rested with him.

This case is no different from so many collision cases which present their own difficulties upon conflicting evidence, and it is not easy to determine exactly where the blame lies. The young man on his motor cycle was undoubtedly on what is commonly called his own side of the road and the motor car as it met him travelling in the opposite direction was undoubtedly over to a considerable extent on what is commonly called its wrong side of the road. But it was on a curve in the road, after midnight, and the trial judge has found, and there is abundant evidence to support the finding, that the motor cycle was being driven without any light until it came up close to the motor car and then the light was switched on, or, that the light, if it was on while rounding the curve, was so ineffective that it not only failed to give the defendant

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warning of the approach of the motor cycle but actually deceived the defendant in the sense that the faint light indicated a tail light of a car going in the same direction as the defendant was travelling.

Our view of the whole evidence would agree with that taken by the trial judge that the plaintiff was the author of his own injury but it is not necessary to determine the case on that basis because even if it can properly be said that the plaintiff on his motor cycle was not solely at fault, it cannot safely be said on the evidence that he himself was not, to some extent at least, guilty of negligence which contributed to the collision. While at the date of the accident there may have been a *casus omissus* in the amendments to the Alberta *Vehicles and Highway Traffic Act* (since cured by subsequent amendments) in the absence of any specific statutory provision requiring a motor cycle to be equipped with a lamp or lamps, we agree with the statement of the learned trial judge in this regard:

> This would not excuse any motor cycle driver from failing to have on the front of his machine a light not only sufficient for his driving purposes but ample to properly warn others of his approach—anything less would constitute negligence on his part.

This negligence contributed to the accident and would bar the plaintiff from any recovery under the Alberta law as it stood at the date of the accident.

Counsel for the plaintiff pressed upon us the contention that if it were found to be a case of contributory negligence, then the plaintiff was entitled to the benefit of the *Contributory Negligence Act* of Alberta, 1 Geo. VI, 1937, ch. 18, and that that statute having been specifically pleaded, the plaintiff would be entitled to have the damage apportioned in the degree in which each person was at fault. But that statute was not passed until April 14th, 1937, and did not go into force until July 1st, 1937. It was contended that it applied to this action commenced on October 12th, 1937; the collision had occurred on October 30th, 1936. We cannot accept that contention. The principle is too well established to require authority that a statute is *prima facie* prospective unless it contains express words or there is the plainest implication to the contrary effect.

The *Alberta Contributory Negligence Act* which was specifically pleaded by the plaintiff in his amended joinder

of issue and reply dated February 24th, 1938, as a result of the amendments made by the defendant at the trial, has no application to this case.

We would allow the appeal and restore the judgment at the trial with costs throughout. The cross-appeal necessarily fails and should be dismissed, but without costs.

HUDSON J.—This is an action for negligence in which the learned trial judge found that the accident was caused solely by the plaintiff's negligence. This decision was reversed by the court of appeal in Alberta. There the learned judges took the view that the defendant was guilty of negligence in two respects. In the first place, that he did not keep his vehicle to the right of the centre line of the road, and secondly, that when he became aware of the plaintiff's approach, instead of turning to the right he turned to the left, and that even assuming that there was negligence on the part of the plaintiff himself to act, once the emergency was apparent the defendant had the last chance to avoid the accident and failed to avail himself of it.

In considering the disposition of the appeal, the statements of Lord Shaw of Dunfermline and Lord Macmillan, which I have quoted at length in a judgment given to-day in the case of *Sershall* v. *Toronto Transportation Commission* (1), seem to me to be particularly applicable to the present case. Approaching the matter in the way indicated by these statements, I do not feel any difficulty in accepting the view of the learned trial judge to the extent that there was negligence contributing to the accident on the part of the plaintiff himself. That the defendant may have been guilty of some negligence is a question on which I feel less satisfied, but the mere fact of negligence on the part of the defendant, where there was negligence contributing to the accident, on the part of the plaintiff himself, would not impose liability at common law. A statute of Alberta covering this situation was passed after the accident, but for reasons pointed out by my brother Davis, I do not think that this statute affected this case.

On the application of the doctrine "last chance" it seems to me that the trial judge was best qualified to

(1) [1939] S.C.R. 287.

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decide whether or not the plaintiff was to blame for the situation as it was. With all respect to the court below, I would allow the appeal and restore the judgment of the trial judge, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty & McLaurin.*
Solicitors for the respondent: *Fitch & Arnold.*

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* Feb. 27, 28.
* Oct. 30.

SAMUEL GOODMAN .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

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

Criminal law—Champerty—Maintenance—Officious or improper interventions—Stirring up of strife—Elements necessary to constitute these crimes.

The appellant was convicted of maintenance and champerty and fined five hundred dollars; and the conviction was affirmed by a majority of the appellate court. The facts of the case are undisputed, the accused having called no evidence. One Lallemand was injured and incapacitated for a considerable period. He did not know the name of a single witness who could strengthen any claim he might make against the Montreal Tramways Company, the party he considered responsible for his injury; and for that reason, his attorneys could not advise action. Some time later, Lallemand's wife approached the appellant, who undertook to search for those who might have seen the accident. Lallemand and his wife having no money to pay the appellant for his services, it was agreed that the amount and settlement of his remuneration should await the conclusion of the litigation; but there was no bargain that he should receive a share of the proceeds. Then Lallemand himself chose and retained an attorney, who commenced and continued an action against the Montreal Tramways Company without any contribution from Lallemand or the appellant towards the expenses. In the meantime, however, the appellant had discovered certain witnesses whose testimony was made available to Lallemand's attorney. The action was finally settled upon payment of $6,000 by the company to the attorney. At Lallemand's direction, the expenses were paid out of that sum, including the amount at which the appellant's account was finally fixed.

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

Held, that, under these circumstances, the appellant was not guilty of the criminal offence of maintenance. In order to make a person liable as a maintainer, either civilly or criminally, that person must have intervened officiously or improperly. There must exist officious interference, introduction of parties to enforce rights which others are not disposed to enforce and stirring up of strife. In this case, Lallemand was disposed to enforce his claim, and in fact had already consulted attorneys before his wife approached the appellant; and the appellant did not intervene on his own initiative and took no action that may be in any way described as stirring up strife and litigation.

Held, also, that the appellant could not be convicted of the crime of champerty, as he did not carry on the litigation at his own expense nor did he bargain for a share of the proceeds.

Review of cases and text books on "maintenance."

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming by a majority the judgment of the Court of Sessions of the Peace by which the appellant had been convicted of maintenance and champerty and fined five hundred dollars.

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

Gustave Monette K.C. for the appellant.

Ivan Sabourin for the respondent.

The judgment of the Chief Justice and of Rinfret, Kerwin and Hudson JJ. was delivered by

KERWIN J.—The appellant Goodman was convicted of maintenance and champerty by the Court of Sessions of the Peace and fined five hundred dollars. Upon appeal to the Court of King's Bench, the conviction was affirmed but, as appears from the formal judgment of the Court

Mr. Justice Bernier and Mr. Justice Hall dissent on the ground that the appellant, having been approached by the victim's wife and commissioned by her to discover the names and addresses of the witnesses required for the successsful prosecution of the proposed litigation, his participation therein was neither officious nor unlawful, and the fact that he consented to allow the payment for his services to await the outcome of the action does not amount to maintenance.

Based upon that dissent Goodman now appeals.

While a considerable part of the factum for the respondent deals with the submission that no question of law is involved, it also appears from the factum and we understood from counsel at bar that the contention really

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is that the appeal must be confined to the question as to whether the facts adduced in evidence by the Crown (and the inferences to be drawn therefrom) did amount to maintenance or champerty. Such a question is clearly one of law.

There is no dispute about the facts, which are few and which were testified to by witnesses on behalf of the Crown,—the accused calling no evidence; and there is likewise no dispute about the inferences. It appears that one Lallemand was injured and incapacitated for a considerable period. He did not know the name of a single witness who could strengthen any claim he might make against the Montreal Tramways Company,—the party he considered responsible for his injury. He consulted attorneys who, because of the lack of evidence, could not advise action. Some time later Lallemand's wife approached the appellant, who undertook to search for those who might have seen the accident. It was perfectly well known that Lallemand and his wife had no money to pay the appellant for his services and it was agreed that the amount and settlement of his remuneration should await the conclusion of the litigation. There was no bargain that he should receive a share of the proceeds.

Lallemand chose and retained an attorney, who commenced and continued an action against Montreal Tramways Company without any contribution from Lallemand or the appellant towards the expenses. In the meantime, however, the appellant had discovered certain witnesses whose testimony was made available to the attorney. The action was finally settled upon payment of six thousand dollars by the Tramways Company to the attorney. At Lallemand's direction, the expenses were paid out of this sum, including the amount at which the appellant's account was finally fixed.

Under these circumstances it is needless to refer to the various definitions of champerty since it is clear that the appellant did not carry on the litigation at his own expense nor did he bargain for a share of the proceeds. Champerty, although of greater atrocity, is an offence similar to that of maintenance and it is, therefore, necessary to determine what constitutes that crime.

A convenient starting point for that investigation is the first edition of Chitty's Criminal Law, 1816, vol. 2,

p. 234, where in a note to a precedent of an indictment for maintenance, the author, quoting Blackstone and Hawkins, states that,—

> Maintenance signifies a malicious, or at least officious, interference in a pursuit in which the party has no interest to assist either with money or advice to prosecute or defend the action.

Blackstone's statement had been based upon Hawkins' Pleas of the Crown, the first edition of which appeared about 1716. In the eighth edition the principle upon which the law against maintenance is based is thus stated (Vol. 1, cap. 27, s. 38):—

> It seemeth, that all maintenance is strictly prohibited by the common law, as having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits, which perhaps they would not venture to go on in upon their own bottoms.

Shortly after the publication of the eighth edition of Hawkins appeared Chancellor Kent's Commentaries on American Law. Kent adopted Blackstone's definition (which, as we have seen, was founded upon Hawkins). At p. 447 of volume 4 of the 12th edition, it is stated that the statutes of Edward I and Edward III against champerty and maintenance

> were founded upon a principle common to the laws of all well governed countries, that no encouragement should be given to litigation, by the introduction of parties to enforce those rights which others are not disposed to enforce.

Story on Contract, the first edition of which appeared in 1844, is to the same effect:—

> Maintenance is the officious assistance, by money or otherwise, proposed by a third person to either party to a suit in which he himself has no legal interest to enable him to prosecute or defend it.

In *Prosser* v. *Edmonds* (1), Lord Abinger puts the matter in exactly the same way as it appears in Kent where he states:—

> All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce.

Lord Abinger's statement is significant because of the classical expression used by him in the later case of *Findon* v. *Parker* (2):—

> The law of maintenance as I understand it upon the modern constructions, is confined to cases where a man improperly and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defences which they have no right to make.

(1) (1835) 1 Y & C 481 at 497. (2) (1843) 11 M & W 675, at 682.

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This well-known passage assumes even greater importance in connection with the present appeal. In *Findon* v. *Parker* (1) action was brought by a solicitor for his costs, the defence being that the work was done pursuant to an agreement and in circumstances amounting to maintenance. In order to understand precisely the particular relevancy of the words quoted it is necessary to reproduce the whole of Lord Abinger's judgment in so far as it is pertinent. He said:—

> If any ground can be fairly suggested for making this contract legal, we ought to adopt it in favour of the party who makes the defence, in order to acquit him of the imputation that he casts upon himself. The contract does not necessarily imply anything that the law calls maintenance. The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make. I do not like to give an opinion upon an abstract case, and therefore am not desirous to consider it; but if a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnish him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance; I am not prepared to say, that, in modern times, Courts of Justice ought to come to that conclusion. However, I give no opinion upon that point.

From this it will be observed that Lord Abinger was discussing the crime of maintenance and while expressing no opinion, stated his view that one ingredient of the crime must be "a stirring up" of litigation and strife.

In *Bradlaugh* v. *Newdegate* (2), Lord Coleridge, while determining that the passage quoted above had no application to the case before him, stated that it was full of the strong sense characteristic of Lord Abinger and he was inclined to agree with and adopt every word of it. Lord Coleridge gives a number of definitions of maintenance, among which will be found those of Kent and Story:—

> There are many definitions of maintenance, all seeming to express the same idea. Blackstone calls it "an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it": Bl. Comm. book iv, c. 10, s. 12. "Maintenence," says Lord Coke, "signifieth in law a taking in hand, bearing up, or upholding of a quarrel, or side,

(1) (1843) 11 M & W 675 at 682. (2) (1883) 11 Q.B.D. 1.

to the disturbance or hindrance of common right": Co. Litt. 368 b. These definitions are repeated in substance in Bacon's abridgement, in Viner, and in Comyns, under the head of maintenance. To the same effect, though somewhat differing in words, is the language of Lord Coke in the 2nd Institute in his commentary on the Statute of Westminster the First, c. xxviii. There is, perhaps, the fullest and completest of all to be found in Termes de la Ley, "Maintenance is when any man gives or delivers to another that is plaintiff or defendant in any action any sum of money or other thing to maintain his plea, or takes great pains for him when he hath nothing therewith to do; then the party grieved shall have a writ against him called a writ of maintenance." Chancellor Kent, adopting Blackstone's definition, which definition itself is founded on a passage in Hawkins, says that it is "a principle common to the laws of all well governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce": part vi, lect. 67. I quote from the excellent edition of Kent's Commentaries, published by Mr. O. W. Holmes at Boston in 1873. To the same effect is another American authority, Mr. Story. "Maintenance is the officious assistance by money or otherwise, proferred by a third person to either party to a suit, in which he himself has no legal interest, to enable them to prosecute or defend it."

In 1894, the case of *Alabaster* v. *Harness* (1) was decided by Mr. Justice Hawkins. That was an action for damages for the maintenance of an action for libel, which latter action it was considered by the Court had not really been brought by the plaintiff or at any rate had been brought at the instigation of Harness and upon a promise of sustenance with respect to the costs of the action. Hawkins, J., at p. 899, quotes the statement of the principle upon which the law against maintenance is based, which appeared in Hawkins' Pleas of the Crown and which has already been set out, and also quotes Lord Abinger's statement of the principle in *Prosser* v. *Edmonds* (2). In the Court of Appeal (3), Lord Justice Lopes, at p. 344, expressed his entire agreement with the judgment of Mr. Justice Hawkins in the court below and repeated, with approval, Lord Abinger's definition in *Prosser* v. *Edmonds* (2).

In *British Cash and Parcel Conveyancors Limited* v. *Lamson Store Service Company Limited* (4), Cozens Hardy, Master of the Rolls, after agreeing that there had been a time when what the defendants in that action did would have been regarded as criminal, stated there was little use in citing ancient text-books on the law of main-

(1) (1894) 2 Q.B.D. 897.
(2) (1835) 1 Y & C 481.
(3) (1895) 1 Q.B.D. 339.
(4) (1908) 1 K.B. 1006.

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tenance. "The law," (he continues) "has been modified in accordance with modern ideas of propriety," and he then proceeds to quote the famous passage from *Findon* v. *Parker* (5). At page 1020, Lord Justice Buckley quotes the definitions of Kent and Story mentioned above and also extracts from the judgments of Lord Abinger in *Prosser* v. *Edmonds* (2) and *Findon* v. *Parker* (5).

In *Scott* v. *The National System for the Prevention of Cruelty to Children* (1), Mr. Justice Bray, in referring at page 791 to certain bastardy proceedings, considered the cases showed that it was immaterial what the result might be but that most careful judge expressed the grounds of his decision on the point in the following sentence: "It was the wanton intermeddling that was the cause of action."

In *Oram* v. *Hutt* (2), Lord Sumner at p. 107, in declining to agree with the contention that the prosecutor's defeat in a maintained action would be a defence to an indictment for the misdemeanour of maintenance, states that it may be as much against public interest to *stir up* an action which lies indeed but which never would have been brought if the tort sufferer had been left to himself as to maintain an action that does not lie at all.

Finally, the House of Lords considered the civil action for maintenance in several aspects in *Neville* v. *London Express Newspaper Limited* (3). It was there held by Lord Finlay, Lord Shaw of Dunfermline and Lord Phillimore that an action for damages for maintenance will not lie in the absence of proof of special damage, Viscount Haldane and Lord Atkinson dissenting. It was held by Lord Finlay, Viscount Haldane and Lord Atkinson that the success of the maintained litigation, whether an action or a defence, is not a bar to the right of action for maintenance, Lord Shaw of Dunfermlin eand Lord Phillimore dissenting. Lord Abinger's statement in *Findon* v. *Parker* (4) was expressly referred to by only two of the peers. Lord Atkinson set it out with the object of ascertaining the meaning to be ascribed to the words "they have no right to make." In his Lordship's opinion they applied

(1) [1909] 2 T.L.R. 789.
(2) (1914) 1 Ch. 98.
(3) [1919] A.C. 368.
(4) (1843) 11 M & W 675.
(5) (1843) 11 M & W 675.

not to the persons maintained but to the persons who maintained these latter. After quoting Lord Abinger's statement at page 419 (1), Lord Shaw of Dunfermline concludes: "In my opinion that is still the law of England"; although on the particular point with which he was then concerned, he was in disagreement with Lord Atkinson and in fact in the minority.

It is clear, however, from a perusal of all the speeches in that case that no doubt was cast upon the general proposition that to make a person liable as a maintainer, either civilly or criminally, he must have intervened officiously or improperly. Lord Finlay really puts the matter in that way by quoting the definition of maintenance in Hawkins' Pleas of the Crown. Viscount Haldane, at p. 390 (1), remarks:—

> For the broad rule remains unrepealed by any statute that it is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest for its prosecution or defence.

Before quoting Lord Abinger's statement, Lord Atkinson had, at p. 395 (1), stated:—

> If, however, the essence of the action of maintenance be the officious intermeddling in or supporting litigation in which the meddler has no legitimate interest * * * as I think it is.

Later (p. 397 (1) he quotes the extract from *Prosser* v. *Edmonds* (2) and also (p. 405) (1) the extract from the *Scott* case (3). There is really nothing inconsistent with this view in the speech of Lord Phillimore.

These references to the speeches in the House of Lords in the *Neville* case (1) indicate that the views previously expressed by various writers of standing and by a number of very able judges have not been departed from and that there must exist that officious interference, that introduction of parties to enforce rights which others are not disposed to enforce, that stirring up of strife, to constitute the crime of maintenance. In the present case Lallemand was disposed to enforce his claim, and in fact had already consulted attorneys before his wife approached

(1) [1919] A.C. 368. (2) (1855) 1 Y & C 481.
(3) [1909] 2 T.L.R. 789.

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the appellant. The appellant did not intervene on his own initiative and took no action that may be in any way described as stirring up strife and litigation.

The appeal must be allowed and the conviction quashed.

CANNON J.—I am of opinion that this appeal should be allowed and the conviction quashed.

Appeal allowed and conviction quashed.

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* May 9.
* Oct. 3.

MONTREAL TRAMWAYS COMPANY (DEFENDANT) ..... APPELLANT;

AND

ROSARIO GUÉRARD, ÈS-NOM AND ÈS-QUAL. (PLAINTIFF) ..... RESPONDENT.

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

Minority—Action for damages by minor represented by father as tutor—Minor attaining age of majority during proceedings—Petition en reprise d'instance not presented—Minor, then of age, declared interdicted—Father duly authorized to continue suit as curator—No notification of change of status—Nullity of proceedings, since date of majority, urged on appeal before this Court—Petition in revocation of judgment of this Court—Arts. 268, 269, 1177 (8) C.C.P.

An action for damages, brought by a father as tutor to his minor daughter, having been maintained upon a verdict by a jury, that judgment was affirmed by the appellate court and by this Court. Subsequently, a petition in revocation of judgment (*requête civile*) was presented by the appellant company. The daughter attained her age of majority before the date for proof and hearing on the merits of the petition; but the suit continued without any petition *en reprise d'instance* being presented, and judgment was rendered dismissing the *requête civile*. While the case was pending before the appellate court, the daughter having been interdicted, the father then presented a petition to continue the suit as curator, which petition was granted by the appellate court; and no appeal was taken. There has been no notification of the change of status of the daughter as to her age. As a preliminary ground of appeal before this Court, the appellant urged that all proceedings, subsequent to the date on which the daughter attained her majority, were null.

Held, that under the circumstances of this case, the proocedings should not be declared null and void. The judgment of the appellate court,

authorizing the father to continue the suit as curator, had the effect of covering any irregularity in anterior proceedings. Moreover, no notification has been given as to the change of status of the daughter, and all proceedings are held to be valid up to the date of such notice. And, even after such notification the nullity incurred would be merely relative, and could be invoked only by the person whose interests would not have been represented.

As to the merits of the *requête civile:*

Held that the judgment of the appellate court, affirming the judgment of the trial judge and holding that the new evidence offered by the appellant was not sufficient to justify an order for a new trial, should be affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge, Casgrain J. and dismissing a petition in revocation of judgment by the appellant company.

The facts of the appeal and the questions in issue are stated in the head-note and in the judgment now reported.

Arthur Vallée K.C. for the appellant.
J. P. Charbonneau for the respondent.

The judgment of the Court was delivered by

RINFRET J.—Cette cause est déjà venue devant cette Cour sur appel d'un verdict du jury (1). Elle se présente maintenant sur une requête civile qui a été rejetée au mérite par la Cour Supérieure, dont le jugement a été confirmé par la Cour du Banc du Roi.

Il nous faut disposer d'abord d'un moyen préliminaire soulevé par les appelants.

Au moment de l'institution de l'action, Pauline Guérard était mineure, et les procédures furent prises au nom de son tuteur. Elle est devenue majeure le 22 février 1937, c'est-à-dire avant l'inscription à l'enquête sur la requête civile. Personne ne semble y avoir prêté attention; et la cause continua sans reprise d'instance.

Le jugement de la Cour Supérieure en faveur de Mlle Guérard fut rendu dans ces conditions; et c'est également dans ces conditions que ce jugement fut subséquemment porté en appel devant la Cour du Banc du Roi.

(1) [1937] S.C.R. 76.

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Puis, alors que l'instance était pendante en appel, surgit un nouvel incident: Pauline Guérard fut interdite et son père, qui avait été son tuteur, lui fut nommé comme curateur.

Il présenta alors une requête pour qu'il lui fût permis de reprendre l'instance en sa qualité de curateur.

Cette requête fut contestée, mais la contestation fut rejetée par la Cour et la reprise d'instance fut autorisée.

Il n'y eut pas d'appel du jugement autorisant cette reprise d'instance; et aucune des pièces qui s'y rapportent ne fait partie du dossier conjoint, dont la composition a été arrêtée de consentement.

Les appelants veulent maintenant soutenir devant nous que toutes les procédures faites subséquemment au 22 février 1937, date où Pauline Guérard a atteint sa majorité, sont nulles, n'ont aucune valeur, et que, de ce chef, l'appel devrait être maintenu.

Disons tout d'abord qu'il est clair que ce moyen ne saurait affecter la réclamation personnelle de l'intimé Rosario Guérard; il ne pourrait l'intéresser qu'en sa qualité de curateur à sa fille Pauline.

Mais nous sommes d'avis que l'appel qui nous est soumis ne donne pas ouverture à ce moyen préliminaire.

La Cour du Banc du Roi a autorisé le curateur à reprendre l'instance; et il nous paraît que, au moins à dater de ce jugement dont il n'y a pas eu d'appel, le cours de la procédure a été régularisé. Nous ne voyons pas comment nous pourrions maintenant remonter au delà de ce jugement qui a permis à l'intimé ès-qualité de continuer les derniers errements. Il est admis que toute cette question fut alors débattue. En accordant la requête en reprise d'instance, la Cour s'est prononcée sur la situation qui nous est exposée par les appelants. L'effet nécessaire de l'autorisation ainsi donnée au curateur est qu'il pouvait validement continuer la cause; et, comme conséquence, que les procédures faites durant l'intervalle entre la date de la majorité et celle de l'interdiction devaient être tenues pour valables.

Il nous semble d'ailleurs que les appelants ont à faire face à plus d'une autre difficulté.

Le Code de procédure civile (art. 268 et 269) édicte que le procureur qui connaît le changement d'état de sa partie

est tenu de le signifier à l'autre. "Les poursuites sont valables jusqu'au jour de cette signification." C'est seulement après que la "notification" a été donnée que, dans les affaires qui ne sont pas en état, les procédures sont nulles jusqu'à ce que l'instance ait été reprise par les intéressés ou que ces derniers aient été appelés en cause.

Dans le cas actuel, il n'y a eu aucune notification du changement d'état de Pauline Guérard.

Même après notification, les commentateurs, en général, enseignent qu'il s'agit d'une nullité purement relative, qui ne peut être invoquée que par celui dont les intérêts n'auraient pas été représentés. Et la jurisprudence, en France, est à cet effet.

Après avoir atteint sa majorité, Pauline Guérard jouissait pleinement de ses droits et de ses facultés; et elle était présumée capable de conduire son affaire. Nous ignorons à quel moment son tuteur lui a rendu ses comptes, mais nous savons qu'elle connaissait l'existence de sa cause puisqu'elle a rendu témoignage à l'enquête. Elle a donné au moins son acquiescement tacite à la continuation des procédures; et, comme le jugement lui a été favorable, il est impossible de voir quel préjudice elle aurait pu subir.

A fortiori, en l'espèce, les appelants ne sauraient réussir à faire mettre de côté, à leur avantage, tout ce qui s'est fait dans la cause entre la majorité et l'interdiction de Mlle Guérard.

Au mérite de la requête civile, les appelants avaient la tâche difficile de convaincre la Cour que la nouvelle preuve qu'ils invoquaient était telle que, si elle avait été faite en temps, le verdict du jury eût probablement été différent (art. 505 C.P.C.). Et il fallait, d'après le code de procédure (art. 1177-parag. 8 C.P.C.), que cette preuve fût concluante.

La Cour Supérieure et la Cour du Banc du Roi ont été unanimement d'avis que la nouvelle preuve offerte par les appelants ne rencontrait pas les exigences du code de façon à les justifier de remettre la cause devant un nouveau jury.

Nous ne trouvons rien dans le dossier qui nous permette d'infirmer ces deux jugements concordants.

Il faut, bien entendu, se borner à considérer l'enquête sur la requête civile.

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Cette enquête ne dévoile pas de dol personnel de la part de l'intimé. Elle ne concerne pas non plus les faits qui, d'après le verdict rendu sur l'action principale, ont constitué la faute des appelants.

En dehors de quelques incidents sans influence possible sur le résultat, la nouvelle enquête s'est surtout attachée à prouver des manœuvres ou de la négligence de la part de Bastien, l'autre défendeur, qui fut exonéré par le jury et qui a cessé d'être partie dans la cause dès après le jugement sur l'instance principale.

Or, un verdict de négligence contre Bastien ne serait pas suffisant pour libérer les appelants. Il leur faudrait, en plus, faire disparaître le verdict qui les a déclarés eux-mêmes en faute. Autrement, ils ne pourraient échapper à leur condamnation, par suite de la responsabilité solidaire en matière de délits ou de quasi-délits.

Nous ne pouvons trouver dans la nouvelle enquête la preuve "concluante" qui entraînerait probablement un résultat différent pour les appelants, c'est-à-dire: un verdict par lequel l'accident serait déclaré uniquement dû à la faute de Bastien. Et c'est dans ce cas seulement que les appelants pouvaient réussir.

Pour ces raisons, l'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Vallée, Beaudry, Fortier, Létourneau & Macnaughton.*

Solicitors for the respondent: *Lamothe & Charbonneau.*

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* May 1.
* Oct. 30.

PHILIAS MANTHA (PLAINTIFF).....APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT) ..... } RESPONDENT.

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

Municipal law—By-law—Superannuation and pension—Employee applying for—Refusal by civic committee after report by medical officers—Employee not informed of such report before decision rendered—

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

Whether Superior Court has jurisdiction to reverse such decision—Art. 50 C.C.P.—Right of employee to pension.

The appellant, having served as a member of the fire brigade of the city of Montreal for a period of eighteen consecutive years, presented to the chief of the brigade, on the 23rd of July, 1931, his resignation on grounds of ill health and made a request for a medical examination, in order to obtain during his lifetime the pension provided by a by-law of that city. The examination was made by two medical officers on the 27th of July, 1931, who reported immediately to the city that the appellant was still fit to perform his duties. But the appellant was not informed, for months after, that his application had been rejected. In the meantime he had been required by his superior officers to return his fireman's equipment and thenceforward was in every way treated as not in the city's employment. The by-law, upon which the appellant based his claim, contains in section 2 the cases where an employee would be entitled to a pension; and section 11 provides that it "devolve upon the Board of Commissioners (later called Executive Committee) to decide, in each case, whether any civic employee is eligible for superannuation and pension." The appellant brought his action only in February, 1936, and in his statements of claim, did not allege such a decision in his favour, nor did he allege facts precluding the respondent city from relying upon section eleven; but he contented himself with alleging that the pension to which he had acquired a right had been unjustly and illegally refused by the city respondent and that he had fulfilled all the conditions entitling him to it. The respondent city denied such allegations, set up the report of the doctors and alleged generally that the appellant had not brought himself within the conditions giving him a right to superannuation and pension. It also raised, at the trial, the ground that the Superior Court had no authority under article 50 C.C.P. to review the decision of the Executive Committee. The trial judge, holding that he had such authority under the provisions of that article, proceeded to make himself an independent examination of the facts touching the state of the appellant's health in July, 1931, and finally granted the appellant's claim for pension. The appellate court reversed that judgment on the grounds that the Executive Committee, in the exercise of the discretion conferred upon it by section 11, had the right to find that the appellant was not eligible for pension, that the Court could not substitute its opinion for that of the Committee and that, on the evidence, the decision of the Committee could not be declared to be arbitrary, unjust and illegal.

Held, reversing the judgment of the appellate court and restoring the judgment of the trial judge, but in both cases on different grounds, that the appellant's claim for a pension and other benefit provided by the by-law should be maintained.

Held, also, reversing the judgment of the trial judge as to that ground, that article 50 C.C.P. has not the application given to it by him. Such article is primarily concerned with jurisdiction; but such jurisdiction must be exercised "in such manner and form as by law provided." Where parties have agreed, as in the present case, that their rights shall rest upon the condition that a given individual or body shall be satisfied that a certain state of facts exists, article 50 C.C.P. does not enable the Superior Court to make a new contract between the parties and to declare their rights without regard to the

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contract and by reference solely to the trial court's own view of the facts. In this case a decision by the Committee favourable or unfavourable to an applicant is not susceptible of review upon the merits by any court.

Held, also, reversing the judgment of the appellate court, that the city respondent should not be permitted to set up the decision of its Executive Committee in answer to the appellant's claim. The appellant, not having been informed of the nature of the report of the doctors until long after the decision of the Executive Committee, was given no opportunity of answering that report, before the Executive Committee had reached its decision; and, in these circumstances, it should be held that no inquiry of the character contemplated by section 11 of the by-law had taken place. Moreover, in the existing circumstances of the case, section 11 of the by-law would not afford, at the present time, appropriate machinery for working out the rights of the parties, mainly on the ground that evidence, to which the Committee might have resorted eight years ago, would probably be no longer available.

Held, further, that the finding of the trial judge, that the appellant had established the facts necessary to entitle him to superannuation and pension, under the by-law, should not be set aside.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, L. Cousineau J., and dismissing the appellant's action.

The appellant obtained judgment in the Superior Court against the city respondent, condemning it to pay him an annual pension equivalent to a fifth of his annual salary at the time of his resignation as a member of the fire brigade of that city, namely, $416, to pay him the arrears accruing up to the date of the action with interest amounting to $2,085.20 and ordering the city to deliver him a paid-up certificate or policy of $1,000, entitling his heirs to payment of that amount upon his death.

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

Gustave Monette K.C. for appellant.
Claude Choquette for respondent.

The judgment of the Chief Justice and of Rinfret, Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE—The appellant's claim is based upon the enactments of by-law 506 amended by by-law 625 and section 38, cap. 112 of statutes of 1921. In so far as pertinent they are these:

2. When a permanent employee of the city shall become unable to perform his duties by reason of a chronic or incurable disease or of permanent infirmity contracted as a result or on account of the discharge of his municipal duties, he shall be superannuated and he shall then be entitled during his lifetime to an annual pension equal to one-fifth of the annual salary he was receiving at the time of his superannuation, if he has been in the city's employ for less than 10 years. If he has been in the city's employ for 10 years or more, he shall be entitled to the pension provided for in section 1 of this by-law.

11. It shall devolve upon the Board of Commissioners to decide, in each case, whether any civic employee is eligible for superannuation and pension.

By the statute of 1921 the Executive Committee succeeded to the functions of the Commissioners.

I agree with the majority of the Court of King's Bench that primarily the appellant's right to superannuation and a pension must rest upon the decision of the Board of Commissioners under section 11. I think it is reasonable to treat the provisions of sections 2 and 11 as terms of the engagements between the respondent corporation and its employees so long as the by-law is in force. It was entirely within the powers of the corporation to require as one of those terms that the right to superannuation and pension should not arise until there had been a decision under section 11 and that, I think, is the proper interpretation of the by-law.

On the other hand, it was the duty of the Executive Committee upon application by the appellant for superannuation on the ground of ill health to entertain his application and, after due consideration, to decide whether eligibility was established.

With great respect for the dissenting judges in the Court of King's Bench I do not think a decision by the Committee favourable or unfavourable to an applicant in the execution of their duties, after a proper consideration of the applicant's claim, is susceptible of review upon the merits by any court. The right of the retired officer is a right resting upon the by-law and the by-law accords him a pension when and only when he has received a favourable decision from the Executive Committee.

That, however, does not necessarily conclude the matter. If the Executive Committee refuses to entertain the application, or if they give a decision without having afforded the applicant a fair opportunity of supporting his claim, then, since the Corporation is responsible for the acts of its

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Duff C.J.

administrative organ, it may by the fault of that body be precluded from setting up this condition and the court may be in a position to enter upon an examination of the merits of the claim.

The evidence in the present case is rather meagre. The appellant presented to the Chief of the Fire Brigade on the 23rd of July, 1931, his resignation on grounds of ill health and requested a medical examination. The examination having been made by the two medical officers of the Fire Brigade, Dr. Lafleur and Dr. Morrison, they reported that the appellant was still fit to perform his duties as fireman.

At the trial the appellant said that it was not until some time in the year 1932 that he received a communication by letter from the President of the Executive Committee advising him that his application had been refused on the report of the medical officers that he was still fit for service. It was not until February, 1936, that proceedings were taken.

The appellant did not in his declaration state facts constituting a right of action against the Corporation. He did not allege a decision by the Executive Committee in his favour, nor did he allege facts precluding the defendant Corporation from relying upon section 11 of the by-law. He contented himself with alleging that the pension to which he had acquired the right had been unjustly and illegally refused by the defendant corporation; and that he had fulfilled all the conditions entitling him to it.

The facts upon which in his declaration he bases his claim are that at the date of his application he was, by reason of various ailments contracted in the performance of his duties, incapable of performing them.

The defendant corporation denied the allegations of the declaration and set up the report of the doctors and alleged generally that the plaintiff had not brought himself within the conditions giving him a right to superannuation and pension.

Except for this general allegation in the defence and the general allegation in the declaration mentioned above, the pleadings contain no reference to the conditions embodied in section 11 of the by-law or to the proceedings of the Executive Committee.

I have no doubt that the declaration was demurrable since a decision by the Committee favourable to him (or facts precluding the defendant Corporation from relying upon the condition embodied in section 11) was one of the constitutive elements of his cause of action.

It is clear, however, that at the trial both parties departed from the pleadings. The appellant in examination in chief gave evidence which, with that of the medical officers and the Chief of the Fire Department, made it quite clear that all parties understood that the appellant was applying for superannuation and a pension under the by-law, and an examination and report by the medical officers on the state of his health. He said that in 1932, the year following his application, he received, after repeated enquiries on the subject, a letter from the chairman of the Committee notifying him that his application had been rejected because the medical officers had reported him fit for duty.

On this evidence counsel for the defendant corporation based an argument at the trial (as appears by the judgment of the trial judge) that the action should be dismissed because the Superior Court had no authority to review the decision of the Executive Committee.

The learned trial judge rejected this contention, but the Court of King's Bench gave effect to it and on that ground allowed the appeal and dismissed the action.

It is convenient here to transcribe the relative *considérants* in both judgments. The trial judge says:

Le troisième point soulevé par la défense, toujours à l'argument seulement, est le défaut d'autorité de la Cour Supérieure pour reviser une décision du Comité Exécutif.

Considérant que l'article 50 du Code de Procédure Civile donne à la Cour Supérieure cette autorité, surtout dans une cause comme celle-ci, où il nous est démontré, par toute la preuve entendue, qu'il y a eu abus de pouvoir, soit volontairement, soit involontairement par ignorance des faits, et qu'une injustice grave a été commise.

Car considérant que le fait pour deux médecins de la cité de Montréal, qui connaissaient les maladies du demandeur depuis plusieurs années, de n'avoir pas examiné le demandeur minutieusement, et pour ces différentes maladies surtout, constitue "a palpable and manifest wrong", et que le fait, pour la cité, d'avoir accepté la résignation du demandeur pour cause de santé, car elle ne pouvait l'accepter qu'avec les raisons données, et de lui avoir subséquemment refusé sa pension, constitute un abus de pouvoir.

D'ailleurs la défenderesse, par ses actions ou par celles de ses employés, a acquiescé dans l'acceptation, d'abord en requérant le demandeur de remettre aux quartiers chefs, ses uniformes et ses bottes, qu'il en avait reçus, et en ne l'avisant pas que sa résignation n'avait pas été acceptée.

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Si, en effet, la cité avait refusé la résignation du demandeur, elle aurait dû l'en avertir pour qu'il puisse, soit reprendre son travail ou donner sa résignation pour d'autres causes. Elle n'a rien fait;

Considérant donc que le demandeur a établi, hors de toute doute, qu'il souffre depuis au moins 1928, de rhumatisme, de lumbago, de troubles de gorge et d'oreilles, et de fistules, et qu'il est dans les conditions requises par le règlement, et partant "incapable de remplir ses fonctions à raison de maladies chronique ou incurable", maladies qui ont été causées par le fait ou à l'occasion de l'exercice de ses fonctions.

In the judgment of the Court of King's Bench the following appears:

Considering that by the terms of the by-laws in force at the time when the respondent tendered his resignation—*which was accepted subject to medical report*—it devolved upon the Executive Committee of the city of Montreal to determine whether the respondent was eligible or not for the said pension;

Considering that the respondent, by his action as brought, does not pretend that the said Executive Committee failed to exercise the discretion so conferred upon it, but on the contrary the respondent expressly alleges that the Executive Committee unjustly and illegally rejected his claim;

Considering that, in accordance with the requirements of the by-laws relating to the matter, the respondent was examined by the medical officers of the fire brigade shortly after the date of his resignation and found to be still fit for service;

Considering that in virtue of the said by-laws governing such pension, a claim only arises in the event of the employee claiming it becoming unfit for further service, and the decision thereon is vested in the Executive Committee;

Considering that there was ground upon which the Executive Committee, in the exercise of the discretion so conferred upon it (while not bound to do so under the then existing by-laws), could, however, find that the respondent was not eligible for such pension as not coming within the terms of the by-law; and this court cannot substitute any opinion that it might form for that of the said Executive Committee, nor, in the light of the evidence, can it declare the decision of the said Executive Committee to be arbitrary, unjust and illegal (*Harvey* v. *Montreal* (1); *Montreal* v. *Diamond* (2)).

Considering that there is error in the judgment of the Superior Court in granting the said pension;

Considering, further, that as to the insurance policy claimed by the respondent, while he is entitled to the same under the provisions of the resolution of the city council dated the eighteenth day of January, one thousand eight hundred and seventy-five (1875), he is not entitled, in the alternative, to the sum of one thousand dollars ($1,000) in cash, and that there is error in the judgment of the Superior Court in this respect.

The judgment of the learned trial judge shews plainly enough, I think, that he misdirected himself. He was under the impression that his duty was to enter upon an independent examination of the facts touching the state

(1) (1934) Q.R. 72 S.C. 12. (2) (1934) Q.R. 57 K.B. 430.

of the appellant's health in July, 1931, and that, having concluded he was in the state of health contemplated by section 2 of the by-law (that is to say, unfit to discharge his duties) he was entitled to disregard any decision of the Executive Committee under section 11 or the absence of any such decision. He finds there was an abuse of power " soit volontairement ou involontairement par ignorance des faits et qu'une injustice grave a été commise ". But this finding is based solely upon his conclusion respecting issues of fact which, by the terms of the by-law, the Executive Committee is to pass upon. He does not put his conclusion upon any illegality in the proceedings of the Committee or any refusal to consider the application or any want of judicial temper or any partiality in the conduct of the inquiry, although he does find unfairness and injustice in the conduct of the doctors.

Article 50 of the Code of Civil Procedure is primarily concerned with jurisdiction; the jurisdiction, however, is by the express words of the article to be exercised " in such manner and form as by law provided." Where parties have agreed that their rights shall rest upon the condition that a given individual or body shall be satisfied that a certain state of facts exists, article 50 does not enable the Superior Court to make a new contract between the parties and to declare their rights without regard to the contract and by reference solely to the court's own view of the facts. I am satisfied that the judgment of the trial judge cannot be sustained, therefore, on the grounds on which he bases it.

On the other hand, after some hesitation, I have come to the conclusion that the judgment of the Court of King's Bench cannot be maintained.

The respondent corporation having at the trial taken its stand upon the decision of the Executive Committee (disclosed in the evidence of the appellant) and the Court of King's Bench having treated it, as Mr. Justice Bond says, " as established " against the appellant

> that the Executive Committee did in fact act in the matter and rejected his claim basing themselves upon the medical report received from the medical officers of the brigade, to the effect that the respondent at the time of his resignation was still fit for service,

I think we must consider whether, on the evidence on which the Court of King's Bench proceeded, the decision of the Executive Committee can be accepted as final. The

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evidence bearing on this point is chiefly that of the appellant. And, as appears from the judgment of Bond J. it is upon this evidence that the Court of King's Bench acted. The statement in the formal judgment of the Court in the second paragraph quoted above must be founded on the appellant's evidence since the appellant in his declaration makes no reference to the action of the Executive Committee, but only to the "illegal and unjust" refusal of his pension by the defendant Corporation.

From the evidence of the appellant we are entitled to conclude (he was not contradicted or cross-examined on these points) that, after the medical examination (July 27th), he was not informed for months that his application had been rejected or that the doctors had found him fit for duty, although they appear to have reported immediately. In the meantime he was required by his superior officers to return his fireman's equipment and thenceforward he was in every way treated as not in the Corporation's employment.

It is clear, as already observed, that everybody understood he was applying for superannuation under the by-law on the ground of incapacity by reason of ill health and the officials of the Corporation must have realized, if they gave the matter the slightest attention, that it was their duty at once to inform him that his application for superannuation had been rejected. In giving effect to the application as a simple resignation and keeping him in ignorance of the report of the doctors that he was fit for duty and of the decision of the Executive Committee, they were either deceiving him deliberately or acting with gross inattention to their plain duty.

One thing is plain: the appellant not having been informed of the nature of the report of the doctors was given no opportunity of answering that report before the Executive Committee had reached their decision.

It is obvious, of course, that in these circumstances there was no inquiry of the character contemplated by section 11. The duty of an administrative body charged with an inquiry into facts the results of which is to affect the civil rights of parties has been stated many times. It will be sufficient

to refer to the language of Lord Loreburn in *Board of Education* v. *Rice* (1):

> I need not add that * * * they must act in good faith and fairly listen to both sides. * * * They can obtain information in any way they think best always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view.

These words seem to be apt for the present purpose. The Court of King's Bench has overlooked the significance of the fact, not as I understand it disputed, that the appellant had no knowledge of the report of the medical officers until long after the decision of the Committee had been given and no opportunity to answer it. I repeat, in these circumstances, the respondent Corporation cannot be permitted to set up that decision in answer to the appellant's claim.

Is the Corporation also precluded from relying on the condition embodied in section 11 itself?

Section 11 contemplates an examination by the Committee of the facts touching the state of the applicant's health at the time of the application for the purpose of determining whether or not the applicant is in such a state of health as to be unable to perform his duties. If the inquiry results in a negative answer, then, in the ordinary course, the employee will not be superannuated but will continue to exercise his functions. As pointed out above the appellant by reason of the manner in which his application was dealt with was, in effect, dismissed from his employment although, according to the medical report and the decision of the Executive, he was not unfit to perform his duties. He was forced to commence an action to establish his status.

Section 11 in the existing circumstances affords no appropriate machinery for working out the rights of the parties. It does not appear that the Committee has any power to examine witnesses upon oath; and evidence to which the Committee might have resorted eight years ago would, probably, be no longer available.

Section 11, having in this particular case and chiefly by reason of the conduct of the defendant Corporation, and its officials and its administrative body, the Executive Committee, become abortive, the case appears to be one for the application of the principle of *Cameron* v. *Cuddy*

(1) [1911] A.C. 179 at 182.

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(1) as stated by Lord Shaw at page 656. The rule is a practical one for effectuating justice where the machinery set up by the instrument defining the rights of the parties has become inoperative. The rule is well within the spirit of article 50 of the Code of Civil Procedure and the law of Quebec is not less efficacious for meting out justice in such a case than the law of England or Scotland.

There still remains the issue raised by the contention of the Corporation that the plaintiff has failed to establish the facts necessary to entitle him to superannuation under section 2 of the by-law. I think there was some evidence as to the fistula, and I am not prepared to say that the finding on that point should be set aside. Then, the learned trial judge had before him the appellant, of whose credibility he appears to have had no doubt, and whose credibility, indeed, does not appear to have been seriously impugned; and he was in a specially advantageous position to weigh the value of the appellant's statements with regard to his ailments and symptoms, and on the whole I should not feel justified in reversing his finding that the conditions of section 2 of the by-law obtained at the relevant time.

In the result, the appeal is allowed and the judgment of the trial judge restored. In view of all the circumstances the appellant should have his costs throughout.

CANNON J.—The appeal should be allowed and the judgment of the trial judge restored with costs throughout.

Appeal allowed with costs.

Solicitors for appellant: *Campbell, Kerry & Bruneau.*

Solicitors for respondent: *St.-Pierre, Parent, Damphousse, Ménard & Choquette.*

(1) [1914] A.C. 651.

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([1938] Ex. C.R. 18) affirmed. The Chief Justice and Davis J. dissenting. PIONEER LAUNDRY & DRY CLEANERS LTD. *v.* THE MINISTER OF NATIONAL REVENUE..... 1

2——*Income tax—Liability for assessment—Income War Tax Act (R.S.C., 1927, c. 97, as amended), ss. 11 (2), 4 (e), 55, 56—"Income accumulating in trust for the benefit of unascertained persons or persons with contingent interests"—"Charitable institution"—Liability for interest prior to date of assessment—Costs.*]—B. of London, Ontario, on May 27, 1918, made a deed of settlement of real and personal properties to a trust company in Ontario, for management, administration, etc. At the end of 21 years after B.'s death the trustee was to pay the whole fund with accumulations thereon to the Municipal Council of the Town of Colne in Lancashire, England, "to be used by the said Council for the benefit of the aged and deserving poor of the said Town of Colne in such manner and without restriction of any kind, as shall be deemed prudent to the said Council." B. died on April 19, 1927. The trust company made yearly income returns for each of the years 1919 to 1934 respectively to the Dominion Government on the form to be filed by trustees. No assessment was made until February 21, 1936, when assessments for income tax were made for all those years, interest being added. Liability to pay the tax was disputed. Sec. 11 (2) of the *Income War Tax Act* (R.S.C., 1927, c. 97, as amended) provides that "income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee * * *." *Held* (reversing judgment of Maclean J. [1938] Ex. C.R. 95) (Kerwin J. dissenting): The income in question was not within said s. 11 (2) and was not taxable. *Per* The Chief Justice, Crocket and Davis JJ.: The fund was created for a purpose—to be used "for the benefit of the aged and deserving poor," a class, in the town of Colne (a purpose not improbably to be satisfied by building and maintaining some institution)—not, either as to capital or income, for any particular person or persons. What the settlor established was an arrangement or undertaking for promoting a defined public or social object without reference to the property appropriated for the purpose becoming vested at any time in any particular person or persons. No particular person will ever acquire a right to demand and receive the beneficial interest in the income from the fund or in any part thereof. Therefore s. 11 (2) (the only section suggested as under which the accumulating income is taxable) does not apply. (*Holden* v. *Minister of National Revenue*, [1933] A.C. 526, distinguished). *Per* Hudson J.: The persons intended under s. 11 (2) are persons who might become entitled to specific portions of the fund, and not a general class who would ultimately get the benefits of the fund in the way of charitable assistance. *Per* Kerwin J. (dissenting): Under the arrangement between the settlor and the trustee the real beneficiaries of the trust are the aged and deserving poor of Colne. The members of the class who will benefit are unascertained persons within the meaning of s. 11 (2). As to further contentions against the assessments: The income is not exempt as being "income of a charitable institution" within s. 4 (*e*) of the Act. Interest prior to date of assessment is payable under the Act (s. 55); s. 66 of the Act (considered in conjunction with other sections) does not leave it to the court's discretion whether interest should be exacted; it is merely an enactment establishing the exclusive jurisdiction of the Exchequer Court to deal with the dispute. The question of costs stands in a different position; the appeal should be dismissed without costs. PETER BIRTWISTLE TRUST *v.* THE MINISTER OF NATIONAL REVENUE. **125**

3——*Income tax—Deduction in computing assessable income—Income War Tax Act, R.S.C., 1927, c. 97, s. 6—Expenses "wholly, exclusively and necessarily" laid out "for the purpose of earning the income"—Expenditures by brewery company for treating in hotels selling its product, to promote sales of product—Manner of payment—Provincial statutory prohibitions as affecting the question.*]—Appellant company brewed and sold beer in Manitoba. Nearly all its shares were owned by R., who also controlled other corporations, each of which owned a hotel in Manitoba licensed to sell beer. During the taxation period in question appellant spent $4,206.40 through its officers or employees treating to beer frequenters of said hotels and other licensed hotels and clubs, the beer so purchased being nearly always of appellant's manufacture, though other beer was bought when, occasionally, a person being treated expressed a preference for it. Such treating was practised generally by brewers in the province, as they found it maintained or increased their sales, whereas discontinuance of the practice decreased their sales. *Held* (reversing judgment of Maclean J., President of the Exchequer Court of Canada) (Rinfret and Davis JJ. dissenting): The said sum should be allowed to appellant as a deduction in estimating its profits

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The remaining units of production were transferred to the appellant and associates, who agreed that those units, having been pooled for that purpose, should be charged with the payment of the balance of Head's contract price. The well was completed, and the sum of $16,333.50 was paid by Sterling Royalties Ltd. to Head, and the amount was deducted from the proceeds derived from the pooled units of production. The Commissioner of Income Tax assessed that amount for income tax purposes, the assessment being confirmed by the Minister of National Revenue. The appellant then appealed to the Exchequer Court of Canada, which held that the payment to Head by Sterling Royalties, Ltd., was a payment made at the request of appellant and associates out of income, and that the appellant was liable for income tax in respect of his portion of $16,333.50. *Held*, reversing the judgment of the Exchequer Court of Canada ([1938] Ex. C.R. 235), Crocket and Hudson JJ. dissenting, that, in view of the deeds and written agreements filed at the trial and of the other circumstances of this case, the above sum of $16,333.50 was never, directly or indirectly, received by the appellant and his associates within the meaning of the *Income War Tax Act* and cannot properly be treated as taxable income. SNYDER *v.* THE MINISTER OF NATIONAL REVENUE. **384**

6—*Schools — Companies — Company designating portion of its assessment in municipality for separate school purposes —Separate Schools Act, R.S.O., 1937, c. 362, s. 66—Notice by company in form B to city clerk—Apportionment of assessment attacked on ground that portion so designated not ascertained to comply with s. 66 (3) as to proportionate limit—Prima facie validity of notice—Onus of proof.*]— The secretary of respondent company, in accordance with a resolution of its directors, forwarded to the clerk of the City of Windsor a notice in form B, provided for by *The Separate Schools Act*, now R.S.O., 1937, c. 362, s. 66, requiring that 18% of its assessment be entered, rated and assessed for separate school purposes, and the assessor made his assessment accordingly. An appeal by appellant board against the assessment for separate school purposes was allowed by the court of revision, and its decision was sustained by Mahon Co. C.J., who, in a stated case made for purposes of appeal, found that the apportionment for separate school purposes made by the directors of the company (the shares of which company are numerous, widely distributed and extensively traded), though made in good faith, was not based on actual knowledge and was "only a guess or an estimate";

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and held that the notice (form B) given by the company should be set aside and declared of no effect, and that all the company's assessments in said city should be assessed, enrolled and rated for public school purposes, as it had not been proved affirmatively that there was compliance with s. 66 (3) of said Act, namely, that the portion (18%) designated for separate school purposes was no greater proportion of the whole of the assessment than the amount of the shares held by Roman Catholics bore to the whole amount of the shares of the company. His judgment was reversed by the Court of Appeal for Ontario, [1938] O.R. 301, on the grounds that the statute ought, if possible, to be interpreted and applied so as to effectuate its manifest intention, viz., to provide for an equitable apportionment; on receiving the notice the assessor is bound to assess and return his roll apportioning the assessment; his roll is *prima facie* valid; the onus of displacing that situation rests on the attacking party and this onus was not discharged. Appeal was brought to this Court. *Held* (The Chief Justice and Davis J. dissenting): The appeal should be dismissed. *Per* Rinfret, Crocket and Kerwin, JJ.: Having regard to the history of the Act and the change made in 1913 (c. 71) to the present form of s. 66 (3), the legislative intention was to free a company desirous of having part of its assessment apportioned to separate school purposes from the difficulty of ascertaining the precise ratio of the holdings of Roman Catholics. To give effect to that intention it must be held, on proper construction of the statute, that the company's notice stands and is to be followed unless displaced by evidence that the prohibition in s. 66 (3) has been violated. (*Regina Public School District* v. *Gratton Separate School District*, 50 Can. S.C.R. 589, discussed; it forms no authority on the point now in question) (Crocket J. further expressly concurred in the reasons given in the Court of Appeal). *Per* the Chief Justice (dissenting): Sec. 66 imposes a strict limit upon the proportion which can be designated by the company in its notice, and a prohibition to the company against exceeding that limit. In giving the notice, the company, though not a public body, is exercising a statutory authority bestowed upon it in the public interest and for a public purpose, and is affected by certain obligations which govern a public body invested with powers the execution of which may prejudicially affect the rights and interests of others; it is bound to act within the limits of the power conferred, and conformably to the procedure laid down by the statute; it is bound to exercise the power in good faith for the

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knowledge of his real purpose, which was an illegal purpose, and aided and abetted him therein by purposely providing the money for margining his account from time to time as required, that under the combined effect of ss. 231 and 69 of the *Criminal Code* the parties were principals in the commission of the offence and plaintiff could not recover. His judgment was affirmed by the Court of Appeal for Saskatchewan (with variation as to costs), [1938] 1 W.W.R. 22. Plaintiff appealed. *Held:* Plaintiff was entitled to recover. The contracts entered into for defendant were binding, calling for delivery and payment, and were so intended and understood by the parties thereto; and hence were not gaming or wagering transactions within the law nor illegal within s. 231 of the *Cr. Code* (the construction and effect of s. 231 discussed), even though defendant may have intended, through the machinery of the Grain Exchange, to "close" his transactions by turning over the fulfilment of his obligations to others by buying or selling grain (by legally binding contracts) before his time for fulfilment. Plaintiff's advances were to enable defendant to carry out binding obligations undertaken on his behalf, and were not for an illegal purpose. *Ironmonger* v. *Dyne*, 44 T.L.R. 497; *Forget* v. *Ostigny*, [1895] A.C. 318; *Thacker* v. *Hardy*, 4 Q.B.D. 685; *Franklin* v. *Dawson*, 29 T.L.R. 479; and *Woodward* v. *Wolfe*, 155 T.L.R. 619, cited. *Held*, further, *per* The Chief Justice (Davis J. concurring): Even assuming that there was illegality in defendant's intention to "close" a transaction in manner aforesaid, and even assuming that the Winnipeg brokers (who financed the transactions, i.e., carried them on margin) were through knowledge thereof *particeps criminis* (which was not shown), yet the repayment of said brokers' loans (loans made to finance the transactions as aforesaid) was not in itself an illegal act within s. 69 or s. 231 of the *Cr. Code* (the illegal act, if any, consisted in the purchase or sale), and an advance for the purpose of such repayment (as the advances by plaintiff for the purpose of replenishing defendant's margin) may be recoverable and the debt thereby created may constitute good consideration for a promissory note. The burden of establishing illegality was on defendant. In order to charge plaintiff with aiding and abetting under s. 69, *Cr. Code*, it was for him to show that the advances in respect of which the notes were given were made in such circumstances as to constitute aiding and abetting a specific illegal purchase or sale, and this was not shown. *Per* The Chief Justice (Davis J. concurring): *Beamish* v. *Richardson*, 49 Can. S.C.R. 595, and

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Maloof v. *Bickell*, 59 Can. S.C.R. 429, discussed and explained. *Beamish* v. *Richardson* was not a decision (nor, indeed, was *Maloof* v. *Bickell*) upon the construction and effect of s. 231, *Cr. Code*, though opinions thereon were expressed. Misconceptions by provincial courts with regard to the effect of *Beamish* v. *Richardson* pointed out. Opinions expressed in that case touching the construction or effect of s. 231 formed no part of the *ratio decidendi*, and, however valuable and weighty as opinions, they are not of binding authority (*Davidson* v. *McRobb*, [1918] A.C. 304, at 322; *Cornelius* v. *Phillips*, [1918] A.C. 199, at 211; *Leeds Industrial* v. *Slack*, [1924] A.C. 851, at 864; *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee*, [1913] 1 K.B. 612, at 623-4). Further, the evidence in the present case (discussed) does not bring the facts of this case within the opinions expressed in *Beamish* v. *Richardson* (as touching the application of s. 231) with regard to the facts there in question. PRUDENTIAL EXCHANGE CO. LTD. *v.* EDWARDS..... **135**

3——*Covenant in restraint of trade—Whether binding—Principles applicable—Nature of covenant—Reasonableness—Circumstances—Onus.*]—Both respondents, Connors Bros. Ltd. and Lewis Connors & Sons Ltd., packed and sold sardines and other fish in the Bay of Fundy area in New Brunswick. By an agreement of June 9, 1925, Connors Bros. Ltd. agreed to purchase on demand within a certain time appellant's shares in Lewis Connors & Sons Ltd. Appellant was engaged as manager of the latter company. By an agreement of October 2, 1926, appellant sold his shares in Lewis Connors & Sons Ltd. to Connors Bros. Ltd., and his employment as manager was terminated. In this agreement, and in the earlier agreement in practically the same terms, appellant covenanted that he would not "directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada." In April, 1937, appellant claimed that said covenant was not binding, being such as should not be enforced in restraint of trade, and took proceedings, by way of originating summons, to have the question determined. *Held* (reversing judgment of the Supreme Court of New Brunswick, Appeal Division, 13 M.P.R. 68, and judgment of Baxter C.J., 12 M.P.R. 102) (Crocket and Kerwin JJ. dissenting): The said quoted covenant should be declared to be unenforceable. *Per* The Chief Justice, Davis and Hudson JJ.: A covenant in restraint of trade is *prima facie* invalid; the onus is on the person who seeks to enforce it to show that it is valid—one which was

answering the first question in the affirmative, to say, with an appreciation of the purport of the words, that the accident was due (i.e., caused by) the fault of the appellant, it is difficult to understand how the jury could have used the language they do employ in the second sentence. *Per* Cannon J.—The finding of the jury was unsatisfactory. The verdict seems to be based not on a fact of which the jurymen were convinced, but on a probability or a possibility. The verdict is not sufficient to create the certainty required to connect the injuries suffered by the respondent with the alleged negligence or omission of the officer to order life lines erected earlier. *Per* The Chief Justice and Crocket, Kerwin and Hudson JJ.—In an action brought in the province of Quebec for damages in respect of personal injuries due to a tortious act committed outside that province, it is essential, as a first condition, that the plaintiff prove an act or default actionable by the law of Quebec; and in order to fulfil the second condition necessary for his right to recover, i.e., to establish that the tort charged is non-justifiable by the *lex loci delicti,* the plaintiff is entitled to pray in aid a presumption which is a presumption of law, viz., that the general law of the place where the alleged wrongful act occurred is the same as the law of Quebec. Where a defendant relies upon some differences between the law of the locality and the law of the forum, the onus is upon him to prove it. The provisions of section 265 of the *Merchants' Shipping Act,* 1894, apply to this case. It was the duty of the trial judge to apply the law of Quebec unless that law or some law of the Imperial Parliament or competently enacted law of the Parliament of Canada prescribed another rule. But a conflict of law appeared within the meaning of that section when it became apparent that the trial judge had to determine whether it was his duty to follow the rules of the law of Quebec or rules derived from some other system of jurisprudence. Therefore the *lex loci delicti* was the law of the port of registry, i.e., the law of British Columbia; and the trial judge was entitled to assume that that law was the same as the law of Quebec. *Per* Cannon J.—The law applicable to this case is the law of Quebec. *Lex fori* was the law of Quebec; *lex loci contractus* was also the law of Quebec, because the respondent was engaged in Montreal. The *lex loci commissi delicti* would be either the law of England or that of the port of registration: the latter was not pleaded and the defence of common employment, under the law of England, was not established and was not put to the jury. CANADIAN NATIONAL STEAMSHIPS CO. LTD. *v.* WATSON..... 11

2——*Burns by permanent-wave machine—Onus of proof—Charge to jury—Trial judge laying burden on plaintiffs—No objection taken—Jury finding no negligence—Appellate court ordering new trial—Misdirection of jury—Res ipsa loquitur.*] —The female respondent claimed damages for injuries alleged to have been suffered by her as the result of burns she said she received while having a permanent wave in the beauty parlour operated and conducted by the appellant in its departmental store in Vancouver. The trial judge instructed the jury that the burden lay upon the respondent to prove negligence against the appellant. The jury found that the burns on the respondent's head were not "the result of negligence, but rather accidental." The trial judge dismissed respondent's action. On appeal, the Court of Appeal ordered a new trial, on the ground that the doctrine of *res ipsa loquitur* was applicable to the facts of this case and, therefore, the jury had been misdirected as to the onus of proof. *Held,* reversing the judgment of the Court of Appeal (52 B.C. Rep. 447), that the judgment of the trial judge dismissing respondents' action should be restored. *Per* The Chief Justice and Davis and Hudson JJ.—It is unnecessary to consider whether or not the doctrine of *res ipsa loquitur* has any application to this case. It is sufficient to observe that the case for the respondents was formulated in the pleadings and developed at the trial as an action for negligence against the appellant without any reference to that rule. The case went to the jury, without any objection, on the basis of an action for negligence in which the burden lay upon the respondents. That being so, the respondents are not entitled upon an appeal to recast their case and put it upon a basis which had not been suggested at the trial.—*Scott* v. *Fernie* (11 B.C.R. 91) approved.—Comments on section 60 of B.C. *Supreme Court Act,* R.S.B.C., 1936, c. 56.—*Sisters of St. Joseph* v. *Fleming* ([1938] S.C.R. 172) ref. *Per* Crocket and Kerwin JJ.—The rule of *"res ipsa loquitur"* was not relied upon at the trial and may not be put forth to assist the respondents before the Court of Appeal or this Court. This being so, there is no ground upon which the verdict of the jury should have been disturbed. DAVID SPENCER LTD. *v.* FIELD..... 36

3——*Master and servant—Principal and agent—Company manufacturing and selling wine in Ontario—Delivery of parcels*

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to its customers by an individual—Motorcycle used by latter striking pedestrian—Question as to liability of the company—Relationship between the company and the individual—Liquor Control Act, Ont., and regulations—Question whether judgment taken at trial against individual precluded plaintiff from proceeding further against company.]—Appellant was a company licensed to manufacture and sell wine throughout Ontario, and had a retail store on Yonge St., Toronto. Its deliveries up to 4 o'clock p.m. were made by a certain delivery service. In the evening one S. would telephone inquiring if there were parcels to deliver, and if so would call for them and make delivery (within the time prescribed by regulations under the *Liquor Control Act*), collecting payment and securing signatures to orders and receipts. He was paid a stipulated sum per parcel, payment being made weekly. While delivering parcels as aforesaid, the motorcycle which he was driving struck K. who died as the result. The question on this appeal was appellant's liability for damages by reason of the accident (in an action brought under the Ontario *Fatal Accidents Act*). At the trial, which was had with a jury, the trial judge, on motion at close of plaintiff's case, dismissed the action as against appellant. The Court of Appeal for Ontario (Middleton J.A. dissenting) ([1937] O.R. 205) set aside said dismissal and ordered a new trial between plaintiff and appellant, confined to the question of liability of appellant and assessment of damages. Appellant appealed to this Court. *Held:* Appeal allowed and judgment at trial restored. (Duff C.J. and Davis J. dissenting). *Per* Crocket J.: This was a clear case of casual or collateral negligence on the part of a private carrier for hire. In the operation of the motorcycle, S. was not appellant's servant within the meaning of the rule which makes a master liable for the acts of a servant in the performance of his duty as such—he was not subject to appellant's control or direction, he was entirely his own master; his negligence, therefore, cannot properly be attributed to appellant. Also, neither the agreement under which S. was entrusted with the custody of the wine for delivery, nor any of the regulations made under the *Liquor Control Act* imposed any responsibility upon appellant for the injury of third persons by the negligent operation of the motorcycle. It is only upon the basis of appellant's employment of S. to make this particular delivery by means of a motorcycle in itself involving such danger to third persons that the accident might reasonably have been foreseen that appellant could properly be fixed

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with responsibility for K.'s death. In that case appellant's responsibility would really rest upon its own direct negligence in employing S. to make the delivery by that means rather than upon the so-called doctrine of vicarious responsibility (*City of Saint John* v. *Donald,* [1926] S.C.R. 371, at 383-4); it cannot be said that the delivery of parcels on occasion by means of a hired motorcycle is inherently dangerous. *Per* Kerwin J.: A person employing another is not liable for the latter's collateral negligence unless the relation of master and servant exists between them. It may be assumed that appellant knew that the delivery would be made by motorcycle, and that it therefore authorized delivery by that means. But, while appellant had the right to take the work out of S.'s hands, it had not the right to say that he was to continue the work and direct him during the continuance of it. S. was the agent of appellant so as to make appellant liable for anything done by S. with its authority; but appellant was not liable for S.'s negligence in driving the motorcycle, as that was a casual or collateral matter which appellant did not authorize expressly or by implication. Not being subject to appellant's control as to the manner of driving, S. was not its servant. There was no evidence of any authority in S. to drive negligently and there was, therefore, nothing to leave to the jury. Hudson J. adopted the reasons of Middleton J.A. (dissenting) in the Court of Appeal ([1937] O.R. at 228-232). *Per* Duff C.J. and Davis J. (dissenting): There was evidence on which a jury might reasonably find that, in the management of his motorcycle while driving it at the place and time in question, S. was acting in appellant's business in execution of his duty as its agent; that being so, plaintiff's case should have been submitted to the jury. The jury might not unreasonably find that in the circumstances in which the wine was placed in S.'s custody for delivery, the only practicable means of carriage was by some kind of motor vehicle; and, having regard to the practice, that on the occasion in question the goods were entrusted to and received by him on the tacit understanding that carriage would be effected by motorcycle; and that it was well understood that he must drive through the public streets. By force of the regulations made under the *Liquor Control Act,* S., who was not a common carrier within their meaning, could only lawfully be in possession of the parcels as appellant's agent; and a jury would be entitled to find as a fact that appellant's store manager was familiar

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with the purport of the regulations governing the sale of wine at the store, and, moreover, as a consequence, that S. was entrusted with the wine in the only capacity in which (not being a purchaser or approved carrier) he could lawfully be entrusted with it, namely, as appellant's agent. (Inclination expressed to the opinion that, under the principle stated in *In re Hallett's Estate,* 13 Ch. D. 696, at 727, it was not competent either to appellant or S. in an action of this character to deny that the wine was in fact entrusted to S. for carriage and delivery as appellant's agent). The parcels having been placed in S.'s custody as agent, obviously it was his duty as agent to take reasonable care for the safe carriage and delivery, and it would be clearly open to the jury to find that, as incidental to that duty, he was under an obligation to his principal in respect of the management of the motorcycle; and it would be incumbent upon the trial judge to instruct them that if they thought S.'s duty as agent embraced the duty to manage his motorcycle in such a manner as not to risk the loss of the wine or any part of it, it was for them to say whether the management of the motorcycle generally was a matter incidental to the functions expressly entrusted to him. The rule *respondeat superior,* and its ground, discussed, and authorities referred to. The rule does not rest upon any notion of imputed guilt or fault. The principal having the power of choice has selected the agent to perform in his place a class or classes of acts, and it is not unjust that he who has selected him and will have the benefit of his services if efficiently performed should bear the risk of his negligence in matters incidental to the doing of the acts. The fact that the damages were assessed against S. (who did not appear and was not represented at the trial) and judgment taken against him did not preclude the plaintiff, in the special circumstances of this case [discussed by Rowell, C.J.O. below in [1937] O.R. at 223, 224], from proceeding further against appellant. T. G. BRIGHT & CO. LTD. *v.* KERR..... **63**

4—*Collision between street car and milk-wagon at street intersection—Responsibility for accident—Findings of jury—Interpretation of findings—Evidence—Negligence and responsibility in law—Proximate cause of accident—Duty of appellate court when asked to reverse decision, on the evidence, of trial tribunal.*]—The action was for damages for the death of the driver of a horse-driven milk-wagon through collision at a street intersection in the city of Toronto. Defendant's street car, proceeding easterly along D. street (a

NEGLIGENCE—*Continued*

"through" highway), struck the wagon as it was crossing the tracks. At the trial the street car motorman testified that when he saw the horse approaching the D. street line he shut off the power, "fanned his brakes" (braked car to check speed) and after slackening the car down sounded the gong; that the horse after entering D. street started to turn eastward but was jerked by the reins so that it crossed the tracks; that when he saw the horse was going to cross he applied the emergency brake. The case was tried with a special jury, who found that the motorman was guilty of negligence causing the collision, in that, as stated in their answer to question 2 submitted to them, "the evidence indicates that he was conscious of danger when he fanned his brakes and at that time did not bring his car under such control that it could have been stopped, if necessary, in time to have avoided the collision"; and that deceased was not guilty of any negligence that caused or contributed to the collision; and plaintiff recovered judgment. The judgment was reversed by the Court of Appeal for Ontario, [1938] O.R. 694, which held that there was no reasonable evidence to support the finding against defendant's motorman, and that it did not constitute a finding of negligence in law, and that all the evidence indicated clearly that the deceased was guilty of negligence which was the proximate and effective cause of the accident. Plaintiff appealed. *Held* (Crocket and Kerwin JJ. dissenting): Plaintiff's appeal should be allowed and the judgment at trial restored. *Per* the Chief Justice: The jury's answer to question 2 should not be read as referring solely to the motorman's evidence or as founding the inference that he was "conscious of danger when he fanned his brakes" upon the fact that he fanned his brakes alone, or upon the motorman's evidence alone; it was stating an inference from the whole of the evidence. Considering all the evidence, there was evidence from which the jury might or might not conclude, according to their view of it, that the motorman realized what the deceased was doing (that he was in the act of crossing the street) in time to avoid a collision if he acted with reasonable promptitude. The jury taking the view that the motorman became aware of what the deceased was doing in time to enable him to bring his car under sufficient control to let the horse and wagon pass, and that his failure to do so was unreasonable and negligent, it was for the jury to say, on the whole evidence, whether, notwithstanding deceased's conduct, the motorman's negligence was the sole cause of the accident and whether deceased should be acquitted

of contributory negligence in the legal sense. (*Calgary* v. *Harnovis,* 48 Can. S.C.R. 494; *Long* v. *Toronto Ry. Co.,* 50 Can. S.C.R. 224; *Loach's* case, [1916] 1 A.C. 719; *Columbia Bitulithic* v. *B.C. Elec. Ry.,* 55 Can. S.C.R. 1; *Leech* v. *Lethbridge,* 62 Can. S.C.R. 123; *Athonas* v. *Ottawa Elec. Ry. Co.,* [1931] S.C.R. 139; *Nixon* v. *Ottawa Elec. Ry. Co.,* [1933] S.C.R. 154). *Per* Davis J.: Though lack of care on the part of deceased was closely relevant to the enquiry for the jury, the vital question was: whose negligence was the direct cause of the collision? The jury were the tribunal of fact. Their verdict should not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it. The jury were entitled, upon all the evidence, to find, as they did, that defendant was solely to blame. (*The Eurymedon,* [1938] P. 41, at 49-50, cited). Comment with regard to the practice adopted in the case, in the jury visiting the *locus* and other places for inspections. *Seneviratne* v. *The King,* [1936] 3 All E.R. 36, at 51, referred to. *Per* Hudson J.: There was evidence on which, if taken together with what may well have been unspoken impressions properly influencing the minds of the jurors when seeing and hearing the witnesses, and taking into account the jurors' special qualifications in this case, they could reasonably come to the conclusion at which they arrived. (*Clarke* v. *Edinburgh & District Tramways Co.,* 1919 S.C. (H.L.) 35, at 36; *Powell* v. *Streatham,* [1935] A.C. 243, at 257, cited as to the duty of a court of appeal when asked to reverse the decision of a trial tribunal). *Per* Crocket J., dissenting: The evidence established indisputably that the emergency out of which the accident arose was created by negligence of deceased. Only a valid unequivocal finding that the motorman, notwithstanding deceased's negligence in creating the danger, could by the exercise of due care have avoided the collision would justify fixing responsibility upon defendant. Such a finding of ultimate negligence against the motorman could not in the light of the evidence be fairly and reasonably spelled out of the jury's answers. Their answer to question 2 involved acceptance of the motorman's evidence that he fanned his brakes when he saw the horse approaching the street line, and also implied that the mere fact that he did so established that he must have then become conscious of some danger which made it his immediate duty to bring his car under such control that it could be stopped in time to avoid a collision in

case he should find that deceased was actually going to take the risk of crossing in front of the street car. The assumption that under the circumstances there was such duty is not justifiable, and a finding of negligence based thereon is not valid. Also the jury's answer to question 2 cannot, having regard to the entire testimony, fairly be taken as involving a rejection of the motorman's statement as to the horse starting to turn eastward. The jury's finding exonerating deceased from all blame for the collision was perverse. The only verdict reasonably possible upon the evidence, including those portions of the motorman's evidence which the jury must, upon a fair interpretation of their answer to question 2, be taken to have accepted, was that the motorman could not by the exercise of reasonable care and skill have avoided the collision which followed deceased's unquestionable negligence in entering and blindly crossing a through highway without stopping, and that the collision was therefore caused solely by deceased's own fault. *Per* Kerwin J., dissenting: The evidence was such that no jury with a proper appreciation of their duties could make the finding they did. Further, the fact that the motorman, upon seeing the horse and wagon, took the precaution to "fan" his brakes is not evidence that he was negligent in not anticipating that deceased would cross the tracks in front of the oncoming street car. The jury's finding that deceased was not guilty of negligence was perverse. SERSHALL *v.* TORONTO TRANSPORTATION COMMISSION **287**

5——*Motor vehicles — Collision between motor cycle and automobile — Ultimate negligence — Contributory Negligence Act (Alberta), 1 Geo. VI, c. 18—Statute specifically pleaded—Statute coming into force after date of accident, but before date of commencement of suit—Whether statute applicable.*]—An action was brought on October 12th, 1937, by a motor cyclist for damages sustained in a head-on collision with an automobile, which collision occurred on October 30th, 1936. The trial judge dismissed the action on the ground that the accident was caused solely by the plaintiff's negligence, but that judgment was reversed by the appellate court. The respondent, alleging contributory or ultimate negligence of the defendant, pleaded specifically the application of the *Contributory Negligence Act,* which went into force on July 1st, 1937. *Held* that the statute has no application to this case; and, also, that upon the facts, the judgment of the trial judge should be restored, as the plaintiff was, to some extent if not

STATUTES—*Concluded*

29——*See also under appropriate subject headings, throughout the index.*

STOCK AND GRAIN EXCHANGES

See BROKERS 1; CONTRACTS 2; RES JUDICATA 1.

STREET RAILWAYS—*Negligence—Collision between street car and milk-wagon at street intersection—Responsibility for accident—Findings of jury—Interpretation of findings — Evidence — Negligence and responsibility in law—Proximate cause of accident—Duty of appellate court when asked to reverse decision, on the evidence, of trial tribunal*..... **287**

See NEGLIGENCE 4.

SUPERANNUATION

See MUNICIPAL CORPORATIONS 2.

SUPERIOR COURT (QUEBEC)—*Jurisdiction* **458**

See MUNICIPAL CORPORATIONS 2.

TRADE MARK—*Petition under s. 29 of Unfair Competition Act (Dom., 1932, c. 38)—Registration sought of certain words as trade mark—Effect of prior proceedings and decision therein dealing with same words previously registered as trade mark—Res judicata.*]—Appellant on May 5, 1938, presented a petition to the Exchequer Court of Canada, under s. 29 of the *Unfair Competition Act* (Dom., 1932, c. 38) for a declaration to enable appellant to register the words "Shredded Wheat" as a trade mark. Maclean J., dealing with certain points of law raised in a statement of objections by respondent, dismissed the petition, [1939] Ex. C.R. 58, one ground of dismissal being that the issues raised therein were *res judicata* by reason of the judgment of the Judicial Committee of the Privy Council, 55 R.P.C. 125 (affirming judgment of the Court of Appeal for Ontario, [1936] O.R. 613, affirming judgment of McTague J., [1936] O.R. 281), which held, in an action commenced in June, 1934, by appellant against respondent for alleged infringement of appellant's trade marks of the same words registered in March, 1928, and April, 1929, that said trade marks were not valid; that the words were purely descriptive of the product and had not acquired a secondary meaning as indicating goods exclusively manufactured by appellant. *Held:* The dismissal of the petition should be affirmed. The said judgment of the Judicial Committee of the Privy Council in the former action clearly proceeded (as regards the issue of passing off raised in the action) on the footing that its

TRADE MARKS—*Concluded*

findings were valid as of the date of the commencement of that action in June, 1934. *Res judicata* applied unless there were special user or special circumstances since June, 1934, on which could be based appellant's general plea that the words in question had at the date of the present petition acquired the essential secondary signification to entitle it to have the words registered as a trade mark. In the allegations in the petition no distinction was drawn as to the manner or circumstances of appellant's user of the words since June, 1934, and appellant's preceding long user thereof. Moreover, the effect of a certain undertaking by respondent at the outset of said former action was to give appellant a practical monopoly for nearly four years from June, 1934; and the effect of such a monopoly is, generally speaking, that in the absence of competition there is no occasion in anybody's mind for adverting to distinctiveness in respect of the maker or seller of the goods (*Cellular Clothing Co.* v. *Maxton*, 16 R.P.C. 397, at 409; *Siegert* v. *Findlater*, 7 Ch. D. 801, at 813, referred to). On the allegations in the petition and the admitted facts, and there being no averment of special user or special circumstances as aforesaid, no reasonable ground is disclosed for granting the petition. As to appellant's contention that there was no estoppel by *res judicata* because in the present proceedings respondent appeared in a character (as a member of, and on behalf of, the public) different from that in which it was sued (in its personal character) in said former proceedings—*held*, that that was a technical point to which effect ought not to be given in the circumstances (*Reichel* v. *Magrath*, 14 App. Cas. 665). THE CANADIAN SHREDDED WHEAT CO. LTD. *v.* KELLOGG COMPANY OF CANADA LTD. **329**

TRIAL—*Procedure — Proper practice — Trial judge deciding there is no evidence to go to jury, withdrawing case from jury and giving judgment for acquittal—Jurisdiction on appeals — Criminal Code (R.S.C., 1927, c. 36, as amended), ss. 1013 (4), 1025 (3)*..... **214**

See EVIDENCE 1.

2——*Procedure—Jury visiting locus and other places for inspection*..... **287**

See NEGLIGENCE 4.

3——*Action for damages by wife and children of person killed by alleged negligence of tramway company—Whether such action triable by jury—Article 1056, C.C. —Article 421, C.C.P*..... **405**

See PROCEDURE 1.

WORDS AND PHRASES—*Continued*

WORDS AND PHRASES—*Concluded*