1951

CANADA
LAW REPORTS

Supreme Court of Canada

Editors

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Stuart Sinclair Garson K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Stuart Sinclair Garson K.C.

ERRATA

in Volume 1951

Page 137, fn. (3) should read: "[1935] S.C.R. 53".

Page 421, fn. (2) should read fn. (1).

Pages 423 to 427 inclusive, in margin, for "Rinfret C.J." read "Cartwright J".

Page 428, at line 25, after "Christopher Robinson K.C." add "and R. S. Smart".

Page 447, add footnote: "(1) (1882) 21 Ch. D. 442".

Page 567, fn. (1) should read: "42 R.L. (N.S.) 173".

Page 596, add footnote: "Present: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.".

NOTICE

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

A. G. for Alberta v. *Huggard Assets* [1951] S.C.R. 427. Petition for special leave to appeal granted, 16th July, 1951.

A.G. for Canada and Wheat Board v. *Hallet and Carey* [1951] S.C.R. 81. Petition for special leave to appeal granted on terms as to costs, 5th July, 1951.

Bennett and White v. *Sugar City* [1950] S.C.R. 450. Appeal allowed with costs, 23rd July, 1951.

Boiler Inspection v. *Sherwin-Williams Co.* [1950] S.C.R. 187. Appeal dismissed with costs, 19th February, 1951.

Canadian Steamship Lines v. *The King* [1950] S.C.R. 532. Petition for special leave to appeal granted, 15th March, 1951.

Marston v. *Roche* [1951] S.C.R. 494. Petition for special leave to appeal dismissed with costs, 1st November, 1951.

May v. *Daybreak Mining Co.* (not reported). Petition for special leave to appeal dismissed, 11th October, 1951.

McKee v. *McKee* [1950] S.C.R. 700. Appeal allowed, 15th March, 1951.

Montreal, City of v. *Sun Life Assurance* [1950] S.C.R. 220. Appeal dismissed, 5th November, 1951.

Moore v. *Eaton* [1951] S.C.R. 470. Petition for special leave to appeal refused, 16th July, 1951.

Pitt and Co. v. *Metropolitan Corp. of Canada* (not reported). Petition for special leave to appeal dismissed, 24th July, 1951.

UNREPORTED JUDGEMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, The Supreme Court of Canada, between the 18th of October, 1950 and the 1st of December, 1951, delivered the following judgments, which will not be reported in this publication:*

Chapman v. *McLean* (Ont.): Not reported. Appeal dismissed with costs, 13th April, 1951.

Charland v. *Grant Mills Ltd. and Siscoe Metals Ltd.* Q.R. [1950] K.B. 822. Appeal dismissed with costs, 2nd November, 1951.

Heath v. *Ramussen* [1950] 1 W.W.R. 904. Appeal dismissed with costs; cross-appeal without costs, 18th October, 1950.

*NOTE:—Some judgments delivered in October and November, 1951, will be reported in the 1952 volume of the Reports.

Indian Molybdenum Ltd. v. *The King* (Ex.): Not reported. Appeal dismissed with costs, Cartwright J. dissenting, 10th May, 1951.

Joy Oil Co. Ltd. v. *J. McWilliams Blue Line* [1950] O.W.N. 712. Appeal dissmised with costs, 13th April, 1951.

King, The v. *Lavoie* Q.R. [1949] K.B. 312. Appeal and cross-appeal both dismissed with costs, 18th December, 1950.

Montreal Tramways Co. v. *Belair* Q.R. [1950] K.B. 571. Appeal dismissed with costs, The Chief Justice dissenting, 20th June, 1951.

Montreal Tramways Co. v. *Commission des Accidents du Travail* Q.R [1950] K.B. 571. Appeal dismissed with costs, The Chief Justice dissenting, 20th June, 1951.

Morley v. *Forster* (Ont.): Not reported. Appeal dismissed with costs including costs of any motion which have not yet been disposed of. Respondent's motion to set aside the suggestion whereby Cook was added as a party plaintiff granted with costs. There will be no costs of the appeal against Cook, 28th December, 1950.

Metropolitan Corp. of Canada v. *Pitt Inc.* Q.R. [1950] K.B. 159. Appeal allowed with costs here and in the Court of King's Bench (Appeal Side) and judgment of the trial judge restored, 13th April, 1951.

Murzak v. *The King* 98 Can. C.C. 317. Appeal dismissed, 21st May, 1951.

Ouellette v. *The King* 99 Can. C.C. 230. Appeal dismissed, 18th May, 1951.

Pacific Bedding Co., Ltd. v. *The King* [1950] Ex. C.R. 456. Appeal dismissed with costs, 17th May, 1951.

Planters Nut & Chocolate Co. Ltd. v. *The King* [1951] Ex. C.R. 122. Appeal dismissed with costs, 20th November, 1951.

Rose v. *Fontaine* (B.C.): Not reported. Appeal dismissed with costs, 20th June, 1951.

St. John Tug Boat Co. v. *City of St. John* 27 M.P.R. 418. Appeal allowed and trial judgment restored to the extent of one third of the damages, with costs in this Court. Respondent city will have its costs in the Court of Appeal, 10th May, 1951.

Sandwich, Windsor & Amherstburg Ry. v. *Pettigrew* (Ont.): Not reported. Appeal allowed with costs here and in the Court of Appeal and judgment of trial judge, including his disposition of costs, restored, Cartwright and Fauteux JJ. dissenting, 12th March, 1951.

Sherbrooke, City of v. *Dawson* Q.R. [1950] K.B. 486. Appeal dismissed with costs, Kerwin and Taschereau JJ. dissenting, 20th June, 1951.

Smolak v. *Bilanycz* (Ont.): Not reported. Appeal dismissed with costs, 21st November, 1951.

Tesluk v. *Shub* (Ont.): Not reported. Appeal allowed and judgment of trial judge restored with costs throughout, 6th February, 1951.

Watterworth v. *The King* 100 Can. C.C. 64. Appeal dismissed, 23rd October, 1951.

White v. *Stirling et al* [1950] O.W.N. 770. Appeal dismissed with costs, 22nd March, 1951.

A TABLE

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THE SUPREME COURT OF CANADA

31st January, 1951.

It is hereby ordered, pursuant to the powers conferred by section 104 of the Supreme Court Act (R.S.C. 1927, ch. 35, as amended by S.C. 1949, 2nd Session, ch. 37), that as of the first day of April, 1951:

1. Rule 11 is amended by adding thereto the following paragraph:

   2. *As soon as the case has been printed the solicitor for the appellant shall deliver three printed copies thereof to the solicitors of each of the other parties to the appeal.*

2. Rule 30, Part 3, is repealed and replaced by the following:

   PART 3—A brief of the argument setting out the points of law or fact to be discussed, with a particular reference to the page and line of the case and the authorities relied upon in support of each point. When a statute, regulation, rule, ordinance or by-law is cited, or relied on, so much thereof as may be necessary to the decision of the case shall be printed at length, *as an appendix to the factum,* or *ten* copies of such statute, regulation, rule, ordinance or by-law may be filed for the use of the Court.

3. The first paragraph of Rule 37 is repealed and replaced by the following:

   37. Appeals shall be set down or inscribed for hearing in a book to be kept for that purpose by the Registrar, at least fourteen days before the first day of the session of the Court at which the appeal is to be heard. But no appeal shall be so inscribed in which the case shall not have been filed twenty-seven clear days before the first day of the said session *or in which the appellant's factum shall not have been filed,* without the leave of the Court or a Judge in Chambers.

4. Form I, being the Tariff of Fees, is amended by striking out the figure "7" as it appears in the eighth and tenth lines from the bottom of page 25 of the printed Rules and substituting therefor in each case the figure "10".

(Signed)

" T. RINFRET, C.J.C.
" P. KERWIN, J.
" ROBERT TASCHEREAU, J.
" I. C. RAND, J.
" R. L. KELLOCK, J.
" J. W. ESTEY, J.
" C. H. LOCKE, J.
" J. R. CARTWRIGHT, J.
" GÉRALD FAUTEUX, J.

COUR SUPRÊME DU CANADA

le 31 janvier 1951.

En vertu des pouvoirs conférés par l'article 104 de la Loi de la Cour suprême, chapitre 35 des S.R.C. de 1927, modifié par le chapitre 37 des S.C. de 1949 (seconde session), il est par les présentes ordonné que, à compter du 1er avril 1951:

1. La règle 11 sera modifiée par l'adjonction du paragraphe suivant:
   "2. *Dès que le dossier sera imprimé, le procureur de l'appelant en fera parvenir trois exemplaires aux procureurs de chacune des autres parties dans l'appel*".

2. La Partie III de la règle 30 sera abrogée et remplacée par ce qui suit:
   "PARTIE III.—Un exposé condensé indiquant les points de droit ou de fait à discuter, avec un renvoi particulier à la page et à la ligne du dossier ainsi qu'aux autorités invoquées à l'appui de chaque point. Lorsqu'une loi, règle ou ordonnance, un règlement ou statut est cité ou invoqué, il doit en être imprimé au long, *comme appendice du factum*, tout ce qui peut être nécessaire pour la décision de la cause, ou *dix* copies de cette loi, règle ou ordonnance, de ce règlement ou statut peuvent être produites à l'usage de la cour."

3. Le premier paragraphe de la règle 37 sera abrogé et remplacé par le suivant:
   "37. Les appels sont inscrits pour audition, dans un livre que le registraire tient à cette fin, au moins quatorze jours avant le premier jour de la session de la cour pendant laquelle l'appel doit être entendu. Toutefois, nul appel dont le dossier n'a pas été produit vingt-sept jours francs avant le premier jour de ladite session *ou dans lequel le factum de l'appelant n'a pas été déposé*, ne doit être ainsi inscrit sans l'autorisation de la cour ou d'un juge en chambre."

4. La formule I, soit le tarif des honoraires, sera modifiée en remplaçant le chiffre "7" par le nombre "10" aux lignes 22 et 24 de la page 27 des règles imprimées.

(Signé)

" T. RINFRET, J.C.C.
" P. KERWIN, J.
" ROBERT TASCHEREAU, J.
" I. C. RAND, J.
" R. L. KELLOCK, J.
" J. W. ESTEY, J.
" C. H. LOCKE, J.
" J. R. CARTWRIGHT, J.
" GÉRALD FAUTEUX, J.

THE SUPREME COURT OF CANADA

13th December, 1951.

It is hereby ordered, pursuant to the powers conferred by section 104 of the Supreme Court Act (R.S.C. 1927, c. 35) that as of the first day of February, 1952, paragraph 2 of Rule 54 of the Rules and Orders of the Supreme Court of Canada, as amended by order made the seventh day of January, 1949, be and the same is hereby further amended by inserting the words "and shall be accompanied by a memorandum of points of argument containing a reference to any authorities relied upon" at the end of the second sentence so that as amended the paragraph will read as follows:—

> 2. All affidavits and material to be used on a motion shall be filed with the Registrar at least two clear days before the motion is heard. The notice of motion shall set out fully the grounds upon which it is based and shall be accompanied by a memorandum of points of argument containing a reference to any authorities relied upon. In all motions to quash for want of jurisdiction, or for special leave to appeal, a copy of the pleadings and judgments in the courts below shall form part of the material filed.

(Signed)

" THIBAUDEAU RINFRET, C.J.C.
" P. KERWIN, J.
" ROBERT TASCHEREAU, J.
" I. C. RAND, J.
" R. L. KELLOCK, J.
" J. W. ESTEY, J.
" C. H. LOCKE, J.
" J. R. CARTWRIGHT, J.
" GÉRALD FAUTEUX, J.

COUR SUPRÊME DU CANADA

Le 13 décembre 1951.

En vertu des pouvoirs conférés par l'article 104 de la Loi de la Cour suprême (ch. 35 des S.R.C. de 1927), il est par les présentes ordonné que, à compter du premier février 1952, le paragraphe 2 de la règle 54 des Règles et Ordonnances de la Cour suprême du Canada, tel qu'il a été modifié par une ordonnance rendue le 7 janvier 1949, soit de nouveau modifié par l'insertion des mots "et doit être accompagné d'un mémoire des motifs de discussion, renfermant un renvoi à toutes autorités sur lesquelles on s'appuie", à la fin de la deuxième phrase, et ledit paragraphe est par les présentes ainsi modifié. En conséquence, il se lira comme suit:

> 2. Les affidavits et pièces devant servir à une motion doivent être produits au bureau du registraire au moins deux jours francs avant l'audition de la motion. L'avis de motion doit énoncer au long les motifs qu'elle invoque et doit être accompagné d'un mémoire des motifs de discussion, renfermant un renvoi à toutes autorités sur lesquelles on s'appuie. Dans les motions en annulation pour défaut de compétence, ou pour permission spéciale d'appel, une copie des plaidoiries écrites et des jugements des tribunaux inférieurs doit faire partie des pièces déposées.

(Signé)

" THIBAUDEAU RINFRET, J.C.C.
P. KERWIN, J.
" ROBERT TASCHEREAU, J.
" I. C. RAND, J.
" R. L. KELLOCK, J.
" J. W. ESTEY, J.
" C. H. LOCKE, J.
" J. R. CARTWRIGHT, J.
" GÉRALD FAUTEUX, J.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

77062—1

CITY OF VANCOUVER *(Plaintiff)*.....APPELLANT;

1950

AND

*Apr. 25, 26
*Jun. 23

B.C. TELEPHONE COMPANY,
B.C. ELECTRIC RY. CO. LTD.,
B.C. ELECTRIC COMPANY LTD.
(Defendants) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation—Tax liability—Statute increasing tax rate—Whether retroactif.

By s. 39*a* of c. 55 of the Vancouver Incorporation Act, 1921, enacted by s. 3, c. 78 of the statutes of 1931 and amended by s. 7, c. 68 of the statutes of 1936, it was provided that "from January 1, 1937, until the year 1939, inclusive, and thereafter until amended by Statute", the public utility companies would be taxed at the rate of 1½ per cent per annum on the gross rentals received by the Telephone Co. and on the amount annually received for gas, light and power and for fares, by the other defendant companies. Each company was to file a return of its revenues forming the basis of taxation on or before January 31 of each year. In 1947, by ss. 3 and 4 of c. 103, s. 39*a* was amended to provide for an increase in rate to 2½ per cent and to change the basis of taxation in the case of the B.C. Electric Ry. Co. from "the amount of fares annually received" to "the basic fare revenue as defined in an agreement between the City and the said Company dated December 30, 1946", this last mentioned provision "to have had effect on and from the first day of January, 1947". The 1947 Act, which became effective on April 3, 1947, was not otherwise made retroactive.

Appellant contended that the new rate became effective in respect of the taxation period of 1947, or alternatively as of the date the Act was assented to. The defendants claimed that it became effective commencing with the taxation year 1948. The Court of Appeal affirmed the dismissal of the action by the trial judge.

Held: (Affirming the judgment appealed from), that the new rate of 2½ per cent did not apply to taxation of the respondents for the year 1947, and was not retroactive to January 1, 1937.

Held: Respondents became liable for the tax before the new rate under the 1947 Act had become effective, and not at the time that the rating by-law for 1947 was passed on April 18, 1947.

Miller v. *Salomons* (1852) 7 Ex. 476; *Queen* v. *Judge of City of London* (1892) 1 Q.B. 273; *Mersey Dock* v. *Turner* [1893] A.C. 468 and *Bradlaugh* v. *Clarke* [1883] 8 A.C. 354 referred to.

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

77062—1½

1950

CITY OF VANCOUVER v. B.C. TELEPHONE Co. et al

Rand J.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming a judgment of Macfarlane J. dismissing an action to recover taxes.

H. E. Manning K.C. and *J. B. Roberts* for the appellant.

J. W. de B. Farris K.C. and *A. Bruce Robertson* for the respondents.

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

RAND J.:—In this appeal, a question of taxation is raised. Prior to April 3, 1947, section 39A of the charter of Vancouver, as enacted by chapter 78 of the statutes of 1931, was in the following language:—

39A. (1) The poles, conduits, cables, and wires of any telephone, electric light, or electric power company; the mains of any gas company; the rails, poles and wires of any street-railway or tramway company; and the plant and machinery, being fixtures appurtenant thereto and used in any way in connection therewith by any such company when situate on any street or public place, shall be deemed to be rateable property and shall be liable to taxation as provided in subsection (2) hereof.

(2) The several companies aforesaid *shall be taxed annually* at the rate of one per cent per annum (*a*) in the case of every telephone company on the gross rentals . . .; (*b*) in the case of every gas company on the amount annually received . . .; (*c*) in the case of every street-railway company on the amount of fares . . . The foregoing rates of taxation shall be in force from the first day of January, 1932, until the year 1936, inclusive, and thereafter until amended by Statute. The taxation imposed shall be in lieu of all taxes otherwise imposed and payable to the city upon the aforesaid property after the said first day of January, 1932.

(3) Every company to which this section applies shall annually, without any notice or demand, make a return of its revenue which forms the basis of the taxation hereunder, and shall file a return with the City Assessor on or before the thirty-first day of January in each year.

(4) For the purposes of recording on the assessment roll the property represented in this section, the Assessor shall, in respect to each and every one of the several companies aforesaid, set out on the assessment roll an amount which as a capital sum would yield on the basis of the taxation of improvements for rateable property within the city for the previous year an amount equivalent to the taxes payable under this section based on the revenues of the said companies as herein prescribed at the rate of one per cent per annum.

By chapter 68, 1936, the rate under the section was increased from 1 per cent to 1½ per cent and the duration

(1) [1950] 1 D.L.R. 207.

dates changed to January 1, 1937 and the year 1939 respectively. By chapter 103, 1947, assented to on April 3, the following amendments were made:

3. (1) Subsection (2) of section 39A, as enacted by section 3 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1931," and amended by section 7 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1936," is further amended by striking out the words "in the case of every street-railway company on the amount of fares annually received upon its street-cars within the city" in the ninth and tenth lines, and substituting therefor the following: "in the case of the British Columbia Electric Railway Company, Limited, on the basic fare revenue as defined in an agreement between the city and the said company, dated the thirtieth day of December, 1946, in respect of its street-cars and trolley coaches operated under such agreement."

(2) Subsection (1) hereof shall not come into force and shall have no effect unless the agreement therein mentioned has been validated and confirmed by Statute of the Province, in which case it shall be deemed to have come into force and to have had effect on and from the first day of January, 1947.

4. (1) Subsection (2) of section 39A, as enacted by section 3 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1931," and amended by section 7 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1936," is further amended by striking out the words "one and one-half" in the second line, and substituting therefor the words "two and one-half."

(2) Subsection (4) of said section 39A is amended by striking out the words "one and one-half" in the eighth line, and substituting therefor the words "two and one-half".

The agreement mentioned in section 3(2) was confirmed by chapter 94, 1947, as of the same date, April 3.

As it was impracticable for the respondents to furnish audited returns by January 31 in any year, the revenue in each case for the second anterior year was taken to be that for the preceding year, so that for 1947 the figures used were those for 1945, returned some time in 1946. From January 1, 1947, then, that datum for the purposes of the tax was officially in the records of the City.

The assessment roll is to be completed by December 31 and, subject to amendment thereafter by the assessment courts, is declared to be the roll for the ensuing year. The final closure took place in the month of February, 1947.

Prior to that, and pursuant to ss. (4) of section 39A, a constructive valuation of the properties of the respondents, described in 39A (1), through the capitalization of the tax, being $1\frac{1}{2}$ per cent of the revenue returned, at the rate for improvements in 1946, was entered on the roll, and this valuation at the latter rate would, of course,

1950

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Rand J.

reproduce the tax. In February, then, both assessed value and rate were likewise officially in the records of the City.

In those circumstances, at what moment can it be said that the tax against the respondents was imposed? If, in any case, that took place after April the 3rd the new rate undoubtedly applied; it was then the only rate in force. But Mr. Manning argues that all taxes founded on the assessment roll become imposed at the same moment, and if the constructive value is strict assessment, that moment could not be prior to the passage of the by-law levying the general rate on April 18, at a time when the rate of 2½ per cent was effective. If, on the other hand, the tax, so founded, was imposed before April 3, or the entry is for other than assessment purposes and the tax is external to the roll, then the concluding language of 39(2) relates the tax at 2½ per cent back to the beginning of 1937.

By section 57, in each year the by-law levies the general rate to provide tax revenue for the year's financial requirements. Section 59 directs the collector to make out a tax roll in which is to be set down "with respect to each parcel of land upon which *taxes have been imposed,* the following information . . ." Then follow particulars of land, ownership, assessed value, etc.; and ss. (2) provides that "the said roll shall be prima facie evidence of the correctness of its contents, and shall be received in evidence in any court of law."

The word "levying", the equivalent of "imposing", signifies the execution of legislative power which charges on person or property the obligation of or liability for a tax. As early as 1864, in *Laughtenborough* v. *McLean* (1), it was stated that "the collector's roll is made, not for the purpose of creating a charge, but for the purpose of collecting a charge already made by the assessment roll." *Devanney* v. *Dorr* (2), after a reference to the binding effect of the assessment roll, continues, "and the person assessed becomes chargeable for any sums *ordered to be levied.*" This conception of the provisions of the Ontario Assessment Acts, in general the prototypes of enactments

(1) 14 U.C.C.P. 175.

(2) (1883) 4 O.R. 206.

in the Western provinces, was followed in *Rural Municipality of Armstrong* v. *Gibson* (1); and in its reference to taxes which "have been imposed" the language of section 59 seems to me to conclude the question.

The result, then, is that upon the concurrence of the closed assessment roll and the by-law levying the rate, the imposition of the tax is effected, and the extension of the details on the tax roll is a ministerial or executive act.

The taxes here are in a special category. The assessment can be said to be represented by the capitalization, and the rate is that of the previous year. But it is said you cannot have impositions of tax, related to an assessment roll, arising at different times. I cannot see why not. The roll furnishes one factor and there is nothing in the statute that suspends the execution when both are operative; and by section 61 all taxes are referred back to January 1 as the date from which they are to be deemed due. If, then, the tax is one which the assessment roll embraces, it was imposed before April 3. The same result follows if the taxes are external to the roll: the tax became imposed upon the concurrence of the return of revenue and the statutory rate, which would be not later than January 31.

In either of the cases mentioned, what is the effect of the amendment on the years, including 1947, back to 1937? The contention is that it levies additional taxes on the respondents regardless of financial requirements of the City or of any other consideration.

The language "the *foregoing* rates of taxation shall be in force from the first day of January, 1937, until the year 1939, inclusive" in ss. (2) were enacted in 1936; by the same enactment the rate was increased from 1 per cent to 1½ per cent; and it was that particular rate which was to continue from 1937 to and after 1939 "until amended by Statute." The change of rate in 1947 is such an amendment, and it brings to an end the duration of the provision of 1936: upon its enactment, the clause was fulfilled. It is altogether misleading to read the particulars of amendment as inserted in the section but without reference to the original and the amending enactments. Although a statute is to be read as always speaking, that rule cannot

(1) [1923] 3 D.L.R. 1008.

1950

CITY OF VANCOUVER v. B.C. TELEPHONE Co. *et al*

Kerwin J.

continue in force a provision which by its terms has ceased to be operative on a certain event; to speak it must be revived, which, in this case, it was not.

In *The King* v. *Spirit River Lumber Co.* (1), what was in question was the applicability of a general provision for the recovery of any tax imposed under the Act to a tax provided subsequently by an amendment. The provision by its nature was to continue and to attach to whatever tax liability from time to time arose under the statute. Here the clause is limited in its application to a specific rate under legislation enacted in a certain year; and when that rate is repealed the clause is exhausted of effect.

That we may look at the history of legislation to ascertain its present meaning is undoubted: *Attorney-General* v. *Lamplough* (2), and in the language of Brett, L.J. at p. 231:—

> 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.

I would, therefore, dismiss the appeal with costs.

The judgment of Kerwin and Taschereau JJ. was delivered by

KERWIN J.:—This is an appeal by the City of Vancouver from the unanimous judgment of the Court of Appeal for British Columbia (3), affirming the judgment at the trial of three actions (now consolidated) brought against British Columbia Telephone Company, British Columbia Electric Railway Company, Limited, and British Columbia Electric Company, Limited, by the City for the recovery of taxes alleged to have fallen due in 1947 at the rate of two and one-half percentum on certain receipts of the Companies. The determination of the right of the City to succeed depends upon the relevant provisions of an Act known as the *Vancouver Incorporation Act,* 1921, chapter 55 of the British Columbia Statutes of 1921, and amending Acts, and particularly an amendment of 1947.

(1) [1925] 4 D.L.R. 794.
(2) (1878) 3 Ex. D. 214.
(3) [1950] 1 D.L.R. 207.

The first amendment to the Act to be noted was enacted in 1931 by chapter 78 whereby, for the first time, section 39A was inserted in the following terms:

39A. The poles, conduits, cables and wires of any telephone, electric light, or electric power company; the mains of any gas company; the rails, poles, and wires of any street-railway or tramway company; and the plant and machinery, being fixtures appurtenant thereto and used in any way in connection therewith by any such company when situate on any street or public place, shall be deemed to be rateable property and shall be liable to taxation as provided in subsection (2) hereof.

(2) The several companies aforesaid shall be taxed annually at the rate of one per cent per annum (*a*) in the case of every telephone company on the gross rentals actually annually received from its subscribers for telephones situate within the city, including inter-exchange tolls for calls between exchanges within the city;

(*b*) in the case of every gas company, electric lighting company, and electric power company on the amount annually received by such company for gas, electric light, or electric power consumed within the city; (*c*) in the case of every street-railway company on the amount of fares annually received upon its street-cars within the city. The foregoing rates of taxation shall be in force from the first day of January, 1932, until the year 1936, inclusive, and thereafter until amended by Statute. The taxation imposed shall be in lieu of all taxes otherwise imposed and payable to the city upon the aforesaid property after the said first day of January, 1932.

(3) Every company to which this section applies shall annually, without any notice or demand, make a return of its revenue which forms the basis of the taxation hereunder, and shall file a return with the City Assessor on or before the thirty-first day of January in each year.

(4) For the purposes of recording on the assessment roll the property represented in this section, the Assessor shall, in respect to each and every one of the several companies aforesaid, set out on the assessment roll an amount which as a capital sum would yield on the basis of the taxation of improvements for rateable property within the city for the previous year an amount equivalent to the taxes payable under this section based on the revenues of the said companies as herein prescribed at the rate of one per cent per annum.

In 1936, by chapter 68, section 7, it was provided as follows:

7. (1). Subsection (2) of section 39A of said chapter 55, as enacted by section 3 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1931" is amended by striking out the word "one" in the second line thereof, and substituting therefor the words "one and one-half"; and by striking out the words and figures "1932 until the year 1936" in the twelfth line thereof, and substituting therefor the words and figures "1937 until the year 1939"; and by striking out the figures "1932" in the last line thereof, and substituting therefor the figures "1937".

(2) Subsection (4) of said section 39A is amended by striking out the word "one" in the eighth line thereof, and substituting therefor the words "one and one-half".

(3) Subsection (1) of this section shall come into force and take effect on the first day of January, 1937.

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In 1947, sections 3 and 4 of chapter 103 of the British Columbia Statutes enacted:

3. (1). Subsection (2) of section 39A, as enacted by section 3 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1931," and amended by section 7 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1936," is further amended by striking out the words "in the case of every street-railway company on the amount of fares annually received upon its street-cars within the city" in the ninth and tenth lines, and substituting therefor the following: "in the case of the British Columbia Electric Railway Company, Limited, on the basic fare revenue as defined in an agreement between the city and the said Company, dated the thirtieth day of December, 1946, in respect of its street-cars and trolley-coaches operated under such agreement."

(2) Subsection (1) hereof shall not come into force and shall have no effect unless the agreement therein mentioned has been validated and confirmed by Statute of the Province, in which case it shall be deemed to have come into force and to have had effect on and from the first day of January, 1947.

4. (1) Subsection (2) of section 39A, as enacted by section 3 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1931," and amended by section 7 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1936," is further amended by striking out the words "one and one-half" in the second line, and substituting therefor the words "two and one-half."

(2) Subsection (4) of said section 39A is amended by striking out the words "one and one-half" in the eighth line, and substituting therefor the words "two and one-half."

The agreement referred to in subsection 1, above quoted, although dated December 30, 1946, provided by paragraph 59:

59. (*a*) The Company shall consent to a request by the Corporation to the Legislature of the Province of British Columbia for the amendment of section 39A of the Vancouver Incorporation Act so that commencing on the 1st day of January, 1947 the tax of 1½ per cent now imposed under subsection (2) of the said section on the fares annually received by the Company upon its street cars within the city shall be calculated upon the basic fare revenue as hereinafter defined in respect of its street cars and trolley coaches operated under this agreement.

(*b*) In the meantime and commencing on the first day of January, 1947, the parties shall govern themselves as though the said section 39A had been amended as aforesaid, and any moneys paid under this clause shall, until the said section shall have been so amended, be applied on account of the Company's obligation from time to time under the said section to the extent necessary to discharge such obligation.

While the reference in clause (a) to the tax of 1½ per cent might be said only to identify the tax under subsection 2 of section 39A of the Act, whatever might be the rate, it is of significance when taken in conjunction with the provisions of clause (*b*) by which, commencing January

1, 1947, the parties were to govern themselves in the meantime, before ratification of the agreement by the Legislature, as though section 39A had been amended. The agreement was ratified by an Act assented to on April 3, 1947, the same day that the 1947 amendment to the Act received the Royal Assent. It has not been overlooked that this agreement is with one only of the respondents.

Another significant fact is that while subsection 1 of section 3 of the 1947 amendment is to come into force on and from January 1, 1947, no date is fixed for the coming into force of the other provisions. In view of this, I take the intention of the Legislature to be that all the Companies are subject to taxation for the year 1947 at the old rate of one and one-half percentum per annum and not at the new rate.

While it was arranged between the City and the Companies that "for the purposes of recording on the assessment roll the property represented" in section 39A, the assessor should take the audited statements of receipts by the Companies, say for the year 1945, in making the entry on the assessment roll in 1946, that arrangement cannot, of course, alter the proper construction of the 1947 amendment. Nevertheless it is important to notice that the assessor is to begin to make the assessment not later than November 1 in each year for the year following and is to return to the City Clerk the assessment roll not later than December 31 in each year. The entry made by the assessor in the assessment roll, under the provisions of subsection 4 of section 39A of the Act, has no relevancy to the taxation to which the respondents are subject under that section. The entry made in 1946 in an assessment roll which is to be used in 1947 is of a capital sum that would yield "on the basis of the taxation of improvements for rateable property within the City for the previous year" an amount equivalent to the taxes payable under section 39A. The tax rate for such previous year might, or might not, be the tax rate for the year 1947. That being so, the assessment cannot be the basis for the taxation of the Companies under section 39A. The respondents are in a

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special position so far as taxation under that section is concerned and the general incidence of assessment under the Act does not affect the point to be determined.

The appeal should be dismissed with costs.

LOCKE, J.:—By section 39 of the *Vancouver Incorporation Act*, c. 55, Statutes of British Columbia 1921, 2nd Session, all rateable property in the City, or any interest therein, is made liable to assessment at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the value of the improvements, if any, being estimated separately from the value of the land. By an amendment made in 1931 (s. 3, c. 78) section 39A was added whereby special provision was made for the assessment of, inter alia, telephone, electric light and power and street railway companies by defining that portion of their assets which should be deemed to be rateable property and liable to taxation, and providing for a tax at the rate of 1 per cent of a defined proportion of their receipts. Section 39A thus introduced was amended by section 7 of chapter 68 of the statutes of 1936 and, as thus amended, read as follows:

39A. (1) The poles, conduits, cables, and wires of any telephone, electric light, or electric power company; the mains of any gas company; the rails, poles, and wires of any street-railway or tramway company; and the plant and machinery, being fixtures appurtenant thereto and used in any way in connection therewith by any such company when situate on any street or public place, shall be deemed to be rateable property and shall be liable to taxation as provided in subsection (2) hereof.

(2) The several companies aforesaid shall be taxed annually at the rate of one and one-half per cent per annum (*a*) in the case of every telephone company on the gross rentals actually annually received from its subscribers for telephones situate within the city, including inter-exchange tolls for calls between exchanges within the city, (*b*) in the case of every gas company, electric lighting company and electric power company on the amount annually received by such company for gas, electric light, or electric power consumed within the city, (*c*) in the case of every street railway company on the amount of fares annually received upon its street cars within the city. The foregoing rates of taxation shall be in force from the first day of January, 1937, until the year 1939, inclusive, and thereafter until amended by Statute. The taxation imposed shall be in lieu of all taxes otherwise imposed and payable to the city upon the aforesaid property after the said first day of January, 1937.

(3) Every company to which this section applies shall annually, without any notice or demand, make a return of its revenue which

forms the basis of the taxation hereunder, and shall file a return with the City Assessor on or before the thirty-first day of January in each year.

(4) For the purposes of recording on the Assessment Roll the property represented in this section, the Assessor shall, in respect to each and every one of the several companies aforesaid, set out on the Assessment Roll an amount which as a capital sum would yield on the basis of the taxation of improvements for rateable property within the city for the previous year an amount equivalent to the taxes payable under this section based on the revenues of the said companies as herein prescribed at the rate of one and one-half per cent per annum.

Subsection (1) of this section shall come into force and take effect on the first day of January, 1937.

By an agreement made between the appellant corporation and the respondent British Columbia Electric Railway Company Limited, dated December 30, 1946, the parties agreed, subject to confirmation by the legislature, upon terms for the extension of the franchise of the street railway company for the operation of street cars, trolley coaches and motor buses for a term of twenty years. By the agreement the City undertook to make a request to the Legislature at its next session for the enactment of legislation confirming it and authorizing the parties to carry it into effect as though it had been confirmed and come into force on January 1, 1947, the street railway company agreed to support the request and the parties undertook that in the meantime, commencing on the said last mentioned date, they would govern themselves as though the agreement had come into force on that day. Paragraph 59 of the agreement reads as follows:

59. (*a*) The Company shall consent to a request by the Corporation to the Legislature of the Province of British Columbia for the amendment of section 39A of the Vancouver Incorporation Act so that commencing on the 1st day of January, 1947 the tax of 1½ per cent now imposed under subsection (2) of the said section on the fares annually received by the Company upon its street cars within the city shall be calculated upon the basic fare revenue as hereinafter defined in respect of its street cars and trolley coaches operated under this agreement.

(*b*) In the meantime and commencing on the first day of January, 1947, the parties shall govern themselves as though the said section 39A had been amended as aforesaid, and any moneys paid under this clause shall, until the said section shall have been so amended, be applied on account of the Company's obligation from time to time under the said section to the extent necessary to discharge such obligation.

The expression "basic fare revenue" appearing in clause (*a*) of the section was by section 61 defined as including amongst other revenues "City fare revenue" and this in

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turn was defined as meaning "the total of all passenger fares collected by the company for travel on its street cars, trolley coaches and motor buses (including chartered vehicles) operated under this agreement wholly within the City" less certain specified deductions.

On April 3, 1947, an Act to amend the *"Vancouver Enabling Act"* (c. 94) was assented to which approved the terms and validated and confirmed as of the first day of January, 1947, the above mentioned agreement in the following terms:

2. Notwithstanding anything contained in the "Vancouver Incorporation Act, 1921," or any other Act, the agreement entered into on the thirtieth day of December, 1946, and made between the City of Vancouver of the one part and British Columbia Electric Railway Company Limited of the other part, for granting a transportation franchise in the City of Vancouver, is hereby validated and confirmed as of the first day of January, 1947, and the parties thereto are hereby empowered and authorized to carry the same into effect accordingly.

On the same date an Act to amend the *"Vancouver Incorporation Act,* 1921" (c. 103) was assented to. Sections 3 and 4 of this Act read:

3. (1) Subsection (2) of section 39A, as enacted by section 13 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1931," and amended by section 7 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1936," is further amended by striking out the words "in the case of every street-railway company on the amount of fares annually received upon its street-cars within the city" in the ninth and tenth lines, and substituting therefor the following: "in the case of the British Columbia Electric Railway Company, Limited, on the basic fare revenue as defined in an agreement between the city and the said Company, dated the thirtieth day of December, 1946, in respect of its street-cars, and trolley-coaches operated under such agreement."

(2) Subsection (1) hereof shall not come into force and shall have no effect unless the agreement therein mentioned has been validated and confirmed by Statute of the Province, in which case it shall be deemed to have come into force and to have had effect on and from the first day of January, 1947.

4. (1) Subsection (2) of section 39A, as enacted by section 3 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1931," and amended by section 7 of the "Vancouver Incorporation Act, 1921, Amendment Act, 1936," is further amended by striking out the words "one and one-half" in the second line, and substituting therefor the words "two and one-half."

(2) Subsection (4) of said section 39A is amended by striking out the words "one and one-half" in the eighth line, and substituting therefor the words "two and one-half."

The question to be determined upon the present appeal is as to whether the rate of $2\frac{1}{2}$ per cent imposed by section 4 of the 1947 amendment applies to the taxation of the

respondent companies for the year 1947. Macfarlane, J. by whom the actions were tried considered that it did not and an appeal from his judgment was dismissed by the unanimous judgment of the Court of Appeal. For the appellant it is contended that the question is determined by the very terms of the section. As amended section 39A by subsection 1 provides that the described property of the respondents shall be liable to taxation as provided in subsection 2, which declares that they shall be taxed annually at the rate of 2½ per cent on the described revenues in lieu of all other taxes, and subsection 4 states that subsection 1 shall come into force and take effect on the first day of January, 1937. This language, it is said, is free from ambiguity and must be construed literally. If this be correct, not only would the respondents be found liable for the tax at the increased rate for the taxation year 1947 but, in the result, their liability would be declared in respect of the years 1937 to 1946 both inclusive. It is not sufficient, in my opinion, to say that this would be so manifestly unjust that the Legislature could not have intended such a result if, as contended for by the appellant, the language is so clear as to permit of no other reasonable meaning. It is not an answer to such a contention to say that the result thus reached would be absurd. As was pointed out by Cockburn, C.J. in *Miller* v. *Salomons* (1), where the meaning of a statute is plain and clear the courts have nothing to do with its policy or impolicy, its justice or injustice: it is for them to administer it as they find it and that to take a different course is to abandon the office of judge and to assume the province of legislation. The rule is stated by Lord Esher, M.R. in *The Queen* v. *Judge of City of London* (2), where he referred to what had been said by Sir George Jessel in *The Alina* (3) thus:

> Jessel, M.R., says that the words of s. 2 are quite clear, and that, if the words of an Act of Parliament are clear, you must take them in their ordinary and natural meaning, unless that meaning produces a manifest absurdity. Now, I say that no such rule of construction was ever laid down before. If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion, the rule has always been this—if the words of an Act admit of two interpretations, then they are not clear; and if one

(1) (1852) 7 Ex. 476 at 560.
(2) [1892] 1 Q.B. 273 at 290.
(3) (1880) 5 Ex. D. 227.

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interpretation leads to an absurdity, and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation.

This language was expressly approved by Herschell, L.C. in *Mersey Dock* v. *Turner* (1). Construing section 39A in its present form the terms of the Vancouver Incorporation Amendment Act of 1947, which authorized its amendment, must be considered. That statute not only changed the rate of the tax by section 4 but also in the case of the respondent B.C. Electric Railway Company Limited altered subsection 2 by providing that, in lieu of imposing the tax on the amount of fares annually received upon its street cars within the City, it should be imposed on the basic fare revenue as defined in the agreement of December 30, 1946, in respect of its street cars and trolley coaches operated under such agreement, and further that this change should not come into force unless the agreement was validated and approved by a statute of the province "in which case it shall be deemed to have come into force and to have had effect on and from the first day of January, 1947." If the appellant's present contention were right the tax of 2½ per cent would be imposed upon the basic fare revenue from and after January 1, 1937, since if the amended rate became effective as of that date by reason of the concluding sentence in the amended section 39A, the tax must be computed upon the basic fare revenue if the section be construed literally. This would be in direct conflict with the terms of section 3 of the Vancouver Incorporation Amendment Act of 1947. As to the other respondents, it cannot, in my opinion, be fairly contended that whereas in the case of the street railway company the increased rate of taxation was not to affect its revenues prior to those received in the year 1947, they are to be taxed retroactively to January 1, 1937: the section may not be construed in one manner for the street railway company and in another for other companies affected.

Subsection 1 of section 3 of the amending Act of 1947 must be read as if it were incorporated in section 39A and accordingly, in my opinion, the increased tax is not retroactive to January 1, 1937. By subsection 2 of section 39A, as it read following the amendment of 1936, the rate of

(1) (1893) A.C. 468 at 477.

1½ per cent per annum was to continue in force from the 1st day of January, 1937, until the year 1937 inclusive "and thereafter until amended by statute." The provision that the tax imposed by subsection 1 should come into force and take effect on the 1st day of January, 1937, read together with the provisions of subsection 2, should be construed as meaning that the rate thus imposed should continue after the year 1939 until it was amended by statute and, having been amended by the 1947 Act, thereafter ceased to be of any effect. This interpretation appears to me to be clearly what was intended by the Legislature. To interpret the statute in this manner is, in my view, to adopt and apply the principle stated by Turner, L.J. in *Hawkins* v. *Gathercole* (1), which was referred to with approval by Lord Hatherley in *Garnett* v. *Bradley* (2), and by Lord Blackburn in *Bradlaugh* v. *Clarke* (3).

It is further contended for the appellant that in any event the revenues of the respondents subject to taxation for the year 1947 are liable to be taxed at the advanced rate since it is said the tax was imposed after April 3, 1947, when the amendment received royal assent. In support of this contention it is said that the rating by-law for the taxation year 1947 not having been passed until April 18 of that year the liability arose after the legislation came into force. As to this, it is my opinion that the liability of the respondents did not arise by virtue of the rating by-law or depend in any manner upon it. The liability is imposed by the statute and depends neither upon an assessment (since there was nothing to value) nor upon the ordinary municipal procedure for the imposition of taxation. I think the increased rate did not apply to the designated revenues of any of the respondents for the taxation year 1947. When by chapter 78 of the Statutes of 1931, assented to on April 1 of that year, section 39A was introduced into the charter the taxation was declared to be in force from the 1st day of January, 1932, and the return which the companies were required to file with the City Assessor on or before January 31 in the latter year

(1) (1855) 6 DeG. M. & G. 1 at 21.
(2) [1878] 3 A.C. 944 at 950-1.
(3) (1883) 8 A.C. 354 at 372.

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was of the revenues for the year 1931. While the moneys here in dispute are for taxes imposed by the statute for the taxation year 1947, they are levied upon the revenues for the year 1946. In the case of the street railway company, until the amendment of 1947 the tax was imposed upon the amount of fares annually received upon its street cars within the City. Since the section as amended in 1947 imposes the increased rate only upon the basic fare revenue, as defined in the agreement, in respect of its street cars and trolley coaches, and since the provision subjecting this revenue to the increased tax is by virtue of subsection 2 of section 3 of the Vancouver Incorporation Amendment Act, 1947, effective only as and from January 1, 1947, there was no statutory authority, other than the section as it stood prior to its amendment, under which the "amount of fares annually received upon its street cars within the City" in 1946 could be taxed. The tax on the basic fare revenue becomes effective only as of January 1, 1947, and the rate of $2\frac{1}{2}$ per cent could for the first time be imposed only for the taxation year 1948. The company, it must be presumed, then made the required return of its basic fare revenue for the year 1947 and was taxed upon it. As, in my opinion, the section must be construed in the same manner in so far as it affects each of the respondent companies, the increased rate should, in my opinion, be held as not applicable to the tax levied in 1947 upon their 1946 revenues.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Arthur E. Lord.*

Solicitors for B.C. Telephone Co.: *Farris, Stultz, Bull & Farris.*

Solicitor for B.C. Electric Ry. Co. and B.C. Electric Co.: *A. Bruce Robertson.*

ADELARD LATOUR.....APPELLANT; 1950

AND *Oct. 12, 13
*Oct. 13.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Murder—Trial by jury—Misdirection—Pleas of self-defence, provocation and drunkenness—Onus probandi—Reasonable doubt—Evidence—Use of word "establish" in charge is potentially dangerous—Intent in drunkenness—Criminal Code, ss. 263, 1025(1).

Appellant was convicted of murder after a trial by jury. He had pleaded self-defence, provocation and drunkenness. His appeal was unanimously dismissed by the Court of Appeal.

Held: The appeal should be allowed and a new trial ordered.

Held: That, when dealing with the specific pleas of self-defence and provocation, there was a grave departure by the trial judge from the general principles he had laid down in the opening part of his charge with respect to the burden of proof—using the word "establish" in such a way that the jury could reasonably understand it to mean "if it was established by the accused"—and that it was never stated to the jury, either expressly or by clear implication, that, if they were in doubt as to whether the act was provoked, it was their duty to reduce the offence from murder to manslaughter.

Held: A direction to the jury (which could reasonably be, by them, related to the accused) that, if on one point they found the evidence of a witness to be deliberately untrue, they could not believe him in any other particular, was a misdirection of a most serious nature and tantamount to an encroachment upon the right of full answer and defence.

Held: The validity of the defence of drunkenness is dependent upon the proof that the accused was at the time of the commission affected by drunkenness to the point of being unable to form not any intent but the specific intent to commit the crime charged.

Held: As it is the duty of a juror to disagree if unable conscientiously to accept the views of his colleagues, it is wrong in law to tell the jury that they "must agree upon a verdict".

APPEAL from the judgment of the Court of Appeal for Ontario dismissing appellant's appeal from his conviction by a judge and jury on a charge of murder.

C. L. Dubin, M. N. Lacourcière and R. H. Frith for the appellant.

W. B. Common K.C. and *H. D. Wilkins K.C.* for the respondent.

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

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Fauteux J.

The judgment of the Court was delivered by

FAUTEUX J.:—The appellant has been convicted, in the city of Sudbury, in the province of Ontario, of the murder of the wife of his first cousin, one Cécile Rainville. His appeal against such conviction was unanimously dismissed by the Court of Appeal, the reasons for judgment reading:

> After listening to the able and elaborate argument addressed to us, we are quite unable to find anything in what has been adduced, which would warrant our interfering with the verdict of the jury. There is nothing to be gained by going over, one by one, the items so ably put before us but the facts in this case are overwhelming and, in view of the findings of the jury and the interpretation they put upon them, there is nothing to be said. The appeal will be dismissed.

Pursuant to section 1025(1), 1948 ch. 39 s. 42 of the *Criminal Code,* leave to appeal was granted on the following points of law: (*a*) Misdirection of the trial judge as to the *onus probandi.* (*b*) Lack of adequate direction with respect to the benefit of reasonable doubt on every issue raised in the defence (*Latour* v. *The King*) (1). (*c*) Misdirection in the following instructions to the jury:—

> Should you come to the conclusion that any witness came here and told something that he knew was not true, that would be tantamount to perjury, and anybody who gives evidence that was not true in any one instance, could not be believed in any other particular.

and (*d*) Failure of the trial judge to relate to the specific crime charged, the rule as to intent applicable in the defence of drunkenness.

At the close of the argument, the Court indicating that reasons for judgment would be delivered later, allowed the appeal, quashed the conviction and ordered a new trial. In view of this order, only such circumstances as are necessary for the determination of the questions raised will be referred to.

On the morning of September 12, 1949, the appellant, both hands badly bleeding, was seen by the landlady and another tenant of the building, leaving the apartment occupied by his cousin Peter Rainville, the deceased Cécile Rainville, and her brother Alexander Verdon. After a short visit to the home of some friends, to wash his hands, he immediately proceeded to the police department where he reported that he had been in a fight and, from there, was escorted to the hospital where he received

(1) 97 C.C.C. 385.

surgical attendance on his injuries on both hands. Meanwhile, the police, alerted by the landlady of the apartment, proceeded thereto and found the body of the deceased bearing some thirty-two wounds; they also found a knife admittedly identified as belonging to the appellant and a coat the latter had borrowed from Verdon. As to what took place in the apartment, there is no evidence but the incomplete account—hereinafter referred to—given by the appellant himself; the evidence of the landlady and of the other witness on the point throws little or no light. The theory submitted to the jury by the Crown was that the appellant, well aware of the absence of both his cousin and the brother of the victim, Verdon, visited the apartment that morning for the purpose of having carnal knowledge with the victim and that, when she refused, he stabbed her with his knife. It was conceded that there is no evidence in point of an assault prompted by such motives nor of any prior guilty passion by the accused towards the deceased. The evidence reveals that the appellant, a bushman, was, on the day of the fatal occurrence, terminating, in the city of Sudbury, a two-weeks vacation during which, being on good terms with the Rainvilles, he freely visited their home. The appellant testified that the return of the coat of Verdon was the purpose of his visit to the apartment on the morning of the 12th. He relates the following facts: Having delivered the coat, he was departing from the apartment when the deceased invited him to stay, sit and talk and, eventually, proposed to have sexual relations with him. He says that he then scolded her and told her he knew much of how she was carrying on. It may be pointed out here that independent evidence shows that the day before, the appellant having, in the presence of Peter Rainville and Verdon, made unfavourable remarks as to the moral conduct of the deceased, Verdon became angry and left the company in protest. There is no evidence, however, that these remarks of the appellant were subsequently conveyed to the victim either by her husband or by Verdon. The appellant testified that the victim became incensed and told him he knew too much of her past and that she then drew a knife from behind her back and went to stab him. He protected

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himself with his hands but being then stabbed and by reason of the combined effect of the stabbing, of pain in his hands and of two weeks of persistent drinking, he said he lost his head and does not recall what happened from that moment, up to time he was washing his hands at the home of their common friends. He further denied having brought the knife with him suggesting the deceased must have taken it from his room, which she visited with him two days before, for the purpose of looking over some old family pictures. The occurrence of this visit is corroborated by an independent witness. On the basis of these facts, pleas of self-defence, provocation and drunkenness were advanced on behalf of the appellant, and with respect to each of these pleas, the jurors received from the trial judge instructions which must now be considered conjunctively with the above grounds of appeal.

Dealing with grounds (*a*) and (*b*). The principles of the criminal law as to the *onus probandi* and the benefit of the doubt being substantially correlated in their application, the merits of the first two grounds of appeal may, in this case, conveniently be dealt with together.

In the early part of his charge the trial judge, before entering upon the discussion of the facts of the case and before any reference whatever to the pleas of self-defence, provocation and drunkenness, and to the different verdicts resulting respectively therefrom, properly charged the jury as to the burden of the proof and the benefit of the doubt, making his own the following words of Viscount Sankey, Lord Chancellor, in *Woolmington* v. *Director of Public Prosecutions,* (1), particularly at page 94:—

> . . . it is not until the end of the evidence that a verdict can properly be found and that at the end of the evidence, it is not for the prisoner to establish his innocence but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution, so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. It must be kept in mind that while the prosecution must prove the guilt of the prisoner, there is no such burden laid upon the prisoner, to prove his innocence and it is sufficient for him to raise a doubt as to his guilt. He is not called upon to satisfy the jury of his innocence.

And he further instructed the jury with respect to circumstantial evidence, giving them the rule formulated

(1) 25 C.A.R. 72.

by Baron Alderson in the *Hodge* (1) case. No complaint is made as to the way in which these matters were explained as general principles in criminal law. It is complained, however, that, when he later dealt with the pleas of self-defence and of provocation, there was a grave departure by the learned trial judge from the general principles he had laid down with respect to the doubt, he entirely failed throughout the charge to direct the attention of the jurors, in their consideration of the plea of provocation, to their duty, to give the appellant the benefit of the doubt, if any, in favour of the lesser charge of manslaughter. The following excerpts from the charge, fairly representing the substance of the directions with which the jury was left in the matter, are impeached by the appellant as casting the burden of proof upon him and, therefore, as being in violation of the principles laid down particularly in the Woolmington case. As to the plea of self-defence, the trial judge said, at page 407 of the record:

> It is for the jury to say whether or not the necessary facts have been established to warrant a plea of self-defence.

and as to the plea of provocation, he said, at page 413:

> The doctrine is that an unlawful killing resulting from a deliberate act of violence is *prima facie* murder but that, if it is established that the accused acted under a certain set of conditions which were such as to deprive an ordinary person of the power of self-control, that presumption is rebutted and the killing is only manslaughter.

On behalf of the respondent, it was pointed out that the trial judge did not say "established by the accused" but simply "established" and then argued that no burden was consequently cast upon the appellant to prove the ingredients necessary to a plea of self-defence or to a plea of provocation as had been explained to the jury. In the circumstances of this case, the jury, in my view, could only, or to say the least, could reasonably understand the directions as if it had, in effect, been said: "if it was established by the accused" for, in this case, it is virtually only from the account given by the appellant of what took place in the apartment between himself and the victim, that the proof of the ingredients necessary to each defence could, if at all, be found. It is on that view that the legality

(1) 2 Lewin 227.

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of the instructions must be considered for, in *Bigaouette* v. *The King* (1), Duff J., as he then was, delivering the judgment for the Court, stated at page 114:

> The law, in our opinion, is correctly stated in the judgment of Mr. Justice Stuart in *Rex* v. *Gallagher*, in these words:
>
> > . . . it is not what the judge intended but what his words as uttered would convey to the minds of the jury which is the decisive matter. Even if the matter were evenly balanced, which I think it is not, and the language used were merely just as capable of the one meaning as the other, the position would be that the jury would be as likely to take the words in the sense in which it was forbidden to use them as in the innocuous sense and in such circumstances I think the error would be fatal.

It is suggested, on behalf of the appellant, that according to the dictionary, the word "establish" means "place beyond dispute." (Shorter Oxford English Dictionary, 3rd edition, page 684). On that basis, it would then appear sufficient to substitute these words to the word "establish" to conclude that, had it been said:

> It is for the jury to say whether or not the necessary facts have been placed beyond dispute by the accused to warrant a plea of self-defence.

or had it been said with respect to the plea of provocation:

> . . . if it is placed beyond dispute by the accused that he acted under a certain set of conditions . . .

the two directions, standing alone, would have been palpably wrong, for the law only requires that the evidence in the record,—introduced by the Crown or the defence, it does not matter—be sufficient to raise in the minds of the jury a reasonable doubt as to whether the accused acted in self-defence or under provocation.

In judicial proceedings, the word "establish" is correlated to the burden of the proof but to the burden of the proof not in the sense of the necessity there may be for an accused in the course of the enquête to introduce evidence in order to explain away the case being made by the Crown, but in the sense of the permanent and paramount obligation there is for the Crown, at the end and on the whole of the case, to have proved the guilt beyond all reasonable doubt.

In Phipson on Evidence, 8th edition, it is stated at page 27:

> As applied to judicial proceedings, the phrase "burden of proof" has two distinct and frequently confused meanings: (1) The burden of proof as a matter of law and pleading—the burden, as it has been called, of

(1) [1927] S.C.R. 112.

establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) The burden of proof in the sense of *introducing evidence* . . . So in criminal cases, even where the second, or the minor burden of introducing evidence is cast upon or shifted to the accused, yet the major one of satisfying the jury of his guilt beyond a reasonable doubt is always upon the prosecution and never changes; and if, on the whole case, they have such a doubt, the accused is entitled to the benefit of it and must be acquitted.

(*Mancini* v. *D.P.P.* (1); *Woolmington* v. *D.P.P.* (2)).

It is clearly in relation to the "major burden," it may be pointed out, that the word "establish" is used by the House of Lords in the above excerpt from the Woolmington case. In giving directions to the jury, the use of the word "establish" in relation to the "minor burden" of introducing evidence, is inadequate, confusing and potentially dangerous as it may, depending upon the context or upon the whole charge and the nature and circumstances of the case, lead the jury into error as to the plain nature of their duty with respect to the most important feature of our criminal law, the paramount and permanent burden of the Crown to establish ultimately its case beyond all reasonable doubt. Not that it is suggested that the word "establish" is necessarily improper in all cases. Used with proper qualifications, it has been approved—it was pointed out on behalf of the respondent—in cases where a defence of insanity is raised. This, however, affords no argument in favour of the latter's views, for a defence of insanity is a matter altogether different. In point of fact, the legislature affirms a legal but rebuttable presumption against insanity. Section 18 of the *Criminal Code* reads:

> Everyone shall be presumed to be sane at the time of doing or omitting to do any act *until the contrary is proved.*

So, there is, in such case, an obligation to prove or to establish the defence of insanity even if it needs not be established beyond reasonable doubt but only to the reasonable satisfaction of the jury. (*Smythe* v. *The King* (3). No similar presumption exists, however, with respect to the issue of self-defence or of provocation. Even the presumption that everyone intends the natural consequences of his act needs, in order to be rebutted, no more than evidence sufficient to raise a doubt as to the intent.

(1) [1941] 3 All E.R. 272.
(2) [1935] A.C. 462.
(3) [1941] S.C.R. 17.

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Nor is it suggested that the use of the word "establish" will always be fatal in all of the cases, for each case must be judged upon its merits but confusion in words naturally, if not always, leads to confusion in ideas and, in the matter, to confusion as to what the duty is. Again and in the case at bar, all what was said as to the burden of proof and the benefit of reasonable doubt, has been indicated above and was further stated as general principles in the earlier part of a charge, necessarily lengthy, and long before any reference was made to the special issues raised in the case, to the necessary ingredients thereof and to the different verdicts resulting therefrom. But the principle that, if the jurors were in doubt as to whether the act was provoked, it was their duty to reduce the offence from murder to manslaughter, was never stated to them, either expressly or by clear implication. In the case of *Prince* (1), the accused, charged with murder, pleaded provocation. This was the only issue. A verdict of murder was set aside for the following reasons stated by the Lord Chancellor at page 64:

> We think that the summing up was insufficient. Having regard to the absence of any direction that, if upon the review of all the evidence, the jury were left in reasonable doubt whether, even if the appellant's explanation were not accepted, the act was provoked, the appellant was entitled to be acquitted of the charge of murder.

In the case of *Manchuk* v. *The King* (2), the jury, while considering the case, returned to Court to request the assistance of the learned trial judge upon a difficulty which they explained in the following question:

> In order to reduce a murder charge to a manslaughter charge, is it necessary to establish the fact that the person killed committed the act of provocation?

At page 349, Sir Lyman Duff, the then Chief Justice of Canada, said:

> The terms in which the question is expressed manifest plainly that (notwithstanding some observations in the earlier part of the charge as to the burden resting upon the Crown up to the end of the case of establishing guilt beyond a reasonable doubt) they had fallen into the very natural error of thinking that, in proving the killing, the Crown had disposed of the presumption of the prisoner's innocence and that they must find the prisoner guilty of murder unless he affirmatively established to their satisfaction provocation in the pertinent sense. The interrogatory of the jury ought to have been answered in such a manner as to remove this error from their minds. It ought to have been made clear to them

(1) 28 C.A.R. 60. (2) [1938] S.C.R. 341.

that in the last resort the prisoner could not properly be convicted of murder if, as the result of the evidence as a whole, they were in reasonable doubt whether or not he was guilty of that crime.

On behalf of the respondent, it was suggested that the general instructions given at the beginning of the charge of the trial judge as to the burden of proof and the doubt, were sufficient and that, as stated at page 280 in the *Mancini* case (*supra*):

> There is no reason to repeat to the jury the warning as to the reasonable doubt again and again, provided that the direction is plainly given.

It is not difficult to agree with this sentence from the *Mancini* case but it is impossible to accept that in the charge made in the present case, the pertinent direction was "plainly given."

In *Albert Edward Lewis* (1), Avory J., as he then was, stated, at page 34:

> The importance of telling the jury that the burden has not shifted is probably greater in a case in which the defendant goes into the witness-box (as the appellant did) than in one in which he does not. The jury not unnaturally are apt to think that when a defendant goes into the witness-box the burden is on him to satisfy them of his innocence.

While one may regard the direction given with respect to the plea of self-defence as being less questionable because of the general instructions given in the earlier part of the charge, the impeached direction with respect to the plea of provocation, coupled with the complete lack of direction as to the duty of the jury to give the benefit of the doubt, if any, on the issue raised and bring a verdict of manslaughter instead of a verdict of murder, leaves no doubt, I must say with deference, that the jury was not instructed according to law. For, once properly instructed as to what the law recognizes as ingredients of self-defence or of provocation, the accurate question for the jury is not whether *the accused has established* such ingredients but whether *the evidence indicates them.* And they, then, must be directed that, should they find affirmatively or be left in doubt on the question put to them, the accused is entitled, in the case of self-defence to a complete acquittal, or in the case of provocation to an acquittal of the major offence of murder.

(1) 14 C.A.R. 33.

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To dispose of the third ground of appeal, it could be sufficient to say that, with natural fairness, it was conceded by Mr. Common, K.C., of counsel for respondent, that it was a misdirection to instruct the jury in the following terms:

> Should you come to the conclusion that any witness came here and told something that he knew was not true, that would be tantamount to perjury and anybody who gives evidence that was not true in any one instance, could not be believed in any other particular.

And it could be added that this Court, in *Deacon* v. *The King* (1), approved, at page 536, what had been said by Riddell J. in *Rex* v. *Kadeshewitz* (2), when the latter refused to accept, as being the law in Canada, the following summarized statement, the substance of which is attributed to Lord C.J. Hewart in the case of *Harris* (3):

> If a witness is proved to have made a statement, though unsworn, in distinct conflict with his evidence on oath, the proper direction to the jury is that his testimony is negligible and that their verdict should be found on the rest of the evidence.

But to examine in a proper light the ultimate suggestion made on behalf of the respondent that no substantial wrong or miscarriage of justice resulted from such misdirection, it is further convenient to consider two questions: To which of the witnesses heard in this case such warning could reasonably be related by the jury, and, then, what effect, if any, it could have in the result.

The facts, proof of which was material to the case of the Crown—the death of Cécile Rainville, the violent cause of her death, and the author of her death,—were not virtually disputed by the appellant who, by his very testimony, assumed the task of explaining them away in relating what, according to him, took place between him and the victim in the apartment, for the advancement of his pleas of self-defence and of provocation. At the end of the case, the veracity and the credibility of the accused really turned to be the crucial point for the decision of the case. Naturally, any direction in this respect would particularly and at first be applied to the accused by the jury. Furthermore, the manner and the measure in which the appellant was cross-examined by the Crown Attorney and the trial judge as well, could only add to the natural disposition of

(1) [1947] S.C.R. 531.
(2) 61 C.C.C. 193.
(3) 20 C.A.R. 144.

the jury to relate the misdirection to him. Throughout the address to the jury, the instructions with respect to the special pleas advanced, were either prefaced or followed by the *caveat*: "If you accept the testimony of the accused." To be virtually directed that, if on one point, they found his evidence deliberately untrue, they could not believe him in any other particular, was a misdirection of a most serious nature as, if the condition on which rested the direction was found to exist, the jury was then instructed to entirely disregard the whole defence. To say that, in the circumstances of this case, this misdirection could be tantamount to an encroachment upon the right of full answer and defence, would not be an extravagant statement.

Dealing now with the last ground of appeal. It was formulated orally in the course of the argument, leave to do so being then granted upon the consent of the Crown, and in view of the importance of the case. The grievance is that the trial judge failed to direct the jury that the validity of the defence of drunkenness is dependent upon the proof that the accused was, at the time of the commission, affected by drunkenness to the point of being unable to form not any intent but the specific intent to commit the crime charged in this case, the crime of murder, or the lesser crime of manslaughter. As it turned out, this ground was not pressed in the argument and, for this reason, its merits will not be discussed. As there will be a new trial, it may be pertinent to say a word on this and another matter. The rules of law for determining the validity of the defence of drunkenness have been stated, in the two following propositions, by Lord Birkenhead, in the *Beard* case (1):

> That evidence of drunkenness which renders the accused incapable of forming the *specific intent* essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had *this intent*.
>
> That evidence of drunkenness falling short of a proved incapacity in the accused to form *the intent necessary to constitute the crime*, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

Reference may equally be had to the judgment of this Court in *MacAskill* v. *The King* (2).

(1) [1920] A.C. 479 at 501 and 502. (2) [1931] S.C.R. 330.

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The other matter in which comments may be added, although the point was not raised by the appellant, is related to the following direction given to the jury:

> This is an important case and you must agree upon a verdict. This means that you must be unanimous.

This is all that was said on the subject. If one of the jurors could have reasonably understood from this direction—and it may be open to such construction—that there was an obligation to agree upon a verdict, the direction would be bad in law. For it is not only the right but the duty of a juror to disagree if, after full and sincere consideration of the facts of the case, in the light of the directions received on the law, he is unable conscientiously to accept, after honest discussion with his colleagues, the views of the latter. To render a verdict, the jurors must be unanimous but this does not mean that they are obliged to agree, but that only a unanimity of views shall constitute a verdict bringing the case to an end. The obligation is not to agree but to co-operate honestly in the study of the facts of a case for its proper determination according to law.

In the presence of the misdirections above discussed, their gravity and their combined effect, I am unable to say that the respondent has affirmatively shown that there was, in the result, no substantial wrong and that justice was done according to law. And, as above indicated, the judgment rendered by the Court is that the appeal is allowed, the verdict of murder is quashed and a new trial is ordered.

Appeal allowed and new trial directed.

Solicitor for the appellant: *J. E. Lacourcière.*

Solicitor for the respondent: *W. B. Common.*

THE ATTORNEY GENERAL OF NOVA SCOTIA, ... APPELLANT;

AND

THE ATTORNEY GENERAL OF CANADA, ... RESPONDENT,

AND

LORD NELSON HOTEL COMPANY LIMITED, ... INTERVENANT.

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*May 25, 26
*Oct. 3

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Constitutional Law—Jurisdiction, Delegation of—Whether Federal Parliament or Provincial Legislature can transfer powers vested exclusively in the one to the other—The British North America Act, 1867, ss. 91, 92 and 94.

Held: (Affirming the judgment of the Supreme Court of Nova Scotia *en banc*) that the contemplated legislation of the Legislature of the Province of Nova Scotia, Bill No. 136 entituled "An Act Respecting the Delegation of Jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia and vice versa" if enacted, would not be constitutionally valid since it contemplated delegation by Parliament of powers, exclusively vested in it by s. 91 of the *British North America Act,* to the Legislature of Nova Scotia; and delegation by that Legislature of powers, exclusively vested in Provincial Legislatures under s. 92 of the Act, to Parliament.

The Parliament of Canada and each Provincial Legislature is a sovereign body within its sphere, possessed of exclusive jurisdiction to legislate with regard to the subject matters assigned to it under s. 91 or s. 92, as the case may be. Neither is capable therefore of delegating to the other the powers with which it has been vested nor of receiving from the other the powers with which the other has been vested.

C.P.R. v. *Notre Dame de Bonsecours* [1899] A.C. 367 per Lord Watson and Lord Davey, during the argument as quoted by Lefroy in *Canada's Federal System,* 1913, p. 70 note 10(*a*), followed.

Hodge v. *The Queen* 9 App. Cas. 117; The Chemical Reference [1943] S.C.R. 1, distinguished.

APPEAL from a judgment of the Supreme Court of Nova Scotia *en banc,* Doull J., dissenting, (1), answering in the negative some certain six questions put to that Court by the Governor in Council in the matter of a

(1) [1948] 4 D.L.R. 1.

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

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Reference as to the constitutional validity of Bill No. 136 of the adjourned meeting of the 2nd Session of the 43rd General Assembly of the Legislature of Nova Scotia, entitled "An Act Respecting the Delegation of Jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia and Vice Versa".

J. A. Y. MacDonald K.C. and *L. H. McDonald* for the Attorney General of Nova Scotia.

F. P. Varcoe K.C. and *A. J. MacLeod* for the Attorney General of Canada.

C. R. Magone K.C. for the Attorney General of Ontario.

John C. Osborne for the Attorney General of Alberta.

THE CHIEF JUSTICE:—This is a reference by the Lieutenant Governor in Council of the Province of Nova Scotia, submitting to the Supreme Court of that Province the question of the constitutional validity of a Bill, Number 136, entitled "An Act respecting the delegation of jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia and *vice versa.*"

By virtue of this Bill, if it should come into force, by proclamation, as therein provided, the Lieutenant Governor in Council, may from time to time delegate to and withdraw from the Parliament of Canada authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter is, by section 92 of *The British North America Act, 1867,* exclusively within the jurisdiction of the Legislature of Nova Scotia. It provides that any laws so made by the Parliament of Canada shall, while such delegation is in force, have the same effect as if enacted by the Legislature.

The Bill also provides that if and when the Parliament of Canada shall have delegated to the Legislature of the Province of Nova Scotia authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter is, under the provisions of *The British North America Act, 1867,* exclusively within the legislative jurisdiction of such

Parliament, the Lieutenant Governor in Council, while such delegation is in force, may, by proclamation, from time to time apply any or all of the provisions of any Act in relation to a matter relating to employment in force in the Province of Nova Scotia to any such industry, work, or undertaking.

Finally, the Bill enacts that if and when the Parliament of Canada shall have delegated to the Legislature of the Province of Nova Scotia authority to make laws in relation to the raising of a revenue for provincial purposes by the imposing of a retail sales tax of the nature of indirect taxation, the Lieutenant Governor in Council, while such delegation is in force, may impose such a tax of such amount not exceeding three per cent (3%) of the retail price as he deems necessary, in respect of any commodity to which such delegation extends and may make regulations providing for the method of collecting any such tax.

The provisions of the Bill, therefore, deal with employment in industries, works, or undertakings, exclusively within the legislative jurisdiction in the one case of the Legislature of the Province of Nova Scotia and in the other case within the exclusive legislative jurisdiction of the Parliament of Canada, and it also deals with the raising of revenue for provincial purposes by means of indirect taxation.

In each of the supposed cases either the Parliament of Canada, or the Legislature of Nova Scotia, would be adopting legislation concerning matters which have not been attributed to it but to the other by the constitution of the country.

The Supreme Court of Nova Scotia *en banc,* to which the matter was submitted, answered that such legislation was not within the competence of the Legislature of Nova Scotia, except that Doull J. dissented and expressed the opinion that the Bill was constitutionally valid, subject to the limitations stated in his answers. I agree with the answers given by the majority of the Judges in the Supreme Court *en banc.*

The Parliament of Canada and the Legislatures of the several Provinces are sovereign within their sphere defined

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by *The British North America Act*, but none of them has the unlimited capacity of an individual. They can exercise only the legislative powers respectively given to them by sections 91 and 92 of the Act, and these powers must be found in either of these sections.

The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject matters referred to it by section 91 and that each Province can legislate exclusively on the subject matters referred to it by section 92. The country is entitled to insist that legislation adopted under section 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively from their respective Legislatures. In each case the Members elected to Parliament or to the Legislatures are the only ones entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them.

No power of delegation is expressed either in section 91 or in section 92, nor, indeed, is there to be found the power of accepting delegation from one body to the other; and I have no doubt that if it had been the intention to give such powers it would have been expressed in clear and unequivocal language. Under the scheme of the *British North America Act* there were to be, in the words of Lord Atkin in *The Labour Conventions Reference* (1), "watertight compartments which are an essential part of the original structure."

Neither legislative bodies, federal or provincial, possess any portion of the powers respectively vested in the other and they cannot receive it by delegation. In that connection the word "exclusively" used both in section 91 and in section 92 indicates a settled line of demarcation and it does not belong to either Parliament, or the Legislatures,

(1) [1937] A.C. 326.

to confer powers upon the other. (*St. Catharine's Milling Co.* v. *The Queen,* (1), by Strong J.; *C.P.R.* v. *Notre Dame de Bonsecours Parish* (2)).

Delegations such as were dealt with *In re Gray* (3) and in *The Chemical Reference* (4), were delegations to a body subordinate to Parliament and were of a character different from the delegation meant by the Bill now submitted to the Court.

I need hardly add that these reasons apply only to the questions as put and which ought to be answered in the negative. The appeal should be dismissed with costs.

KERWIN J.:—I agree with the majority of the Supreme Court of Nova Scotia *en banc* that Bill No. 136 of the adjourned Meeting of the Second Session of the Forty-third General Assembly of the Legislature of Nova Scotia, intituled "An Act respecting the Delegation of Jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia and vice versa" would not be constitutionally valid if enacted into law and that the answer to each of the six questions submitted to the Court by the Lieutenant Governor in Council is in the negative.

At the outset it should be emphasized that we are not concerned with delegation in the sense in which that expression is used in the *Chemicals Reference Case* (4), or in the sense that it may be said that a provincial legislature in its various municipal Acts delegates to municipal authorities power to enact by-laws and regulations. Nor are we dealing with a provincial statute stating, as some do, that certain parts of the *Criminal Code* shall apply.

In the provincial courts expressions may be found favouring the view pressed upon us in this case. So far as this Court is concerned, Davies J. does say in *Ouimet* v. *Bazin* (5): "As to the power of the Dominion Parliament to delegate its powers I have no doubt." This statement was *obiter* and if it means more than that Parliament could delegate as it did in the *Chemicals Reference case,* it is

(1) [1887] 13 Can. S.C.R. 577 at 637.
(2) [1899] A.C. 367,—per Lord Watson and Lord Davey—See Lefroy's *Canada's Federal System,* 1913, p. 70 note 10(*a*).
(3) [1918] 57 Can. S.C.R. 150.
(4) [1943] S.C.R. 1.
(5) (1912) 46 Can S.C.R. 502 at 514.

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contrary to what had already been said in *Citizen's Insurance Co.* v. *Parsons* (1), by Taschereau J. at 317: "But the Federal Parliament cannot amend the *British North America Act*, nor give, either expressly or impliedly to the local legislatures, a power which the Imperial Act does not give them. This is clear, and has always been held in this court to be the law", and by Gwynne J. at 348. The point was not decided in *Ouimet* v. *Bazin.*

As to the Judicial Committee, a suggestion to the effect now contended for, made by counsel in *C.P.R.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (2), was dismissed by Lord Watson and Lord Davey as follows, according to the verbatim report of the argument referred to in Lefroy's *Canada's Federal System,* 1913, page 70, note 10(*a*):—

Lord Watson:

The Dominion cannot give jurisdiction, or leave jurisdiction, with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction. To which Lord Davey adds: or curtail.

In *Lord's Day Alliance of Canada* v. *Attorney General for Manitoba* (3), the Judicial Committee affirmed the Court of Appeal for Manitoba and held that a Manitoba statute of 1923 providing that it should be lawful to run or conduct Sunday excursions to resorts within the province was *intra vires.* This statute was passed in pursuance of the exception in the Dominion *Lord's Day Act* making it a punishable offence to run or conduct Sunday excursions "except as provided by any provincial Act or law now or hereafter in force." It was held that the Manitoba statute was merely permissive, their Lordships adopting what Duff J. had said in *Ouimet* v. *Bazin* at page 526.

At page 394 of the Lord's Day Alliance report, their Lordships say:—

In this view of the matter it becomes unnecessary for their Lordships to consider, as some of the learned judges of the Court of Appeal have done, whether such Provincial legislation as that now in question may be justified as being in effect Dominion legislation by delegation or reference. They prefer, without saying more on that matter, to justify it on the grounds they have set forth.

(1) (1880) 4 Can. S.C.R. 215.
(2) [1899] A.C. 367.
(3) [1925] A.C. 384.

The Court of Appeal judgment is found in [1923] 3 D.L.R. 495, and at page 507, Fullerton J.A., after stating that it was strenuously maintained that the Dominion Parliament could not delegate its authority to legislate, stated that this was inconceivable,—referring to *in Re Gray* (1); but it should be noted that in the *Gray case* there was an entirely different matter under consideration. Dennistoun J.A. at 510, referring to counsel's argument that the Dominion could not delegate the power to the provinces of enacting or repealing criminal law states that it would not seem to him that there was any delegation. However, while he deemed it unnecessary to deal further with the point, he stated that there were many recorded instances of regulating delegated powers in Canada but the examples he gives are in the same class as *in Re Gray* or similar thereto. As has been pointed out, the Judicial Committee declined to deal with the argument.

The reasons of their Lordships in *In Re The Initiative and Referendum Act* (2) are instructive. The actual decision was that the *Initiative and Referendum Act* of Manitoba was invalid since it would compel the Lieutenant Governor to submit a proposed law to a body of voters totally distinct from the Legislature of which he was the constitutional head and would render him powerless to prevent the same becoming an actual law as approved by those voters. However, in delivering the judgment on behalf of the Committee, Viscount Haldane, after referring to the analogy between the British Constitution and that of Canada, and disposing of the question in the manner indicated, proceeds at page 945 to state that he would not deal finally with another difficulty that those who contended for the validity of the Act in question had to meet but thought it right to advert to it. After pointing out that a body with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature could while preserving its own capacity intact seek the assistance of subordinate agencies as had been done in *Hodge* v. *The Queen* (3). Viscount Haldane continues:—"but it does not follow that it (i.e. a Provincial

(1) (1918) 57 Can. S.C.R. 150
(2) [1919] A.C. 935.
(3) 1883) 9 App. Cas. 117.

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Legislature) can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence."

The *British North America Act* divides legislative jurisdiction between the Parliament of Canada and the Legislatures of the Provinces and there is no way in which these bodies may agree to a different division. The fact that section 94 was considered necessary to provide in certain contingencies for the uniformity in some of the provinces of laws relating to property and civil rights and court procedure, indicates that an agreement for such a delegation as is here contended for was never intended. To permit of such an agreement would be inserting into the Act a power that is certainly not stated and one that should not be inferred. The appeal should be dismissed with costs.

TASCHEREAU J.:—In August, 1947, the Attorney-General of Nova Scotia introduced in the House of Assembly for the Province, Bill No. 136 which was read a first time and ordered to be read a second time upon a future day. This Bill reads as follows:

BE IT ENACTED by the Governor and Assembly as follows:

1. This Act may be cited as The Delegation of Legislative Jurisdiction Act.

2. The Governor in Council may, by proclamation, from time to time delegate to and withdraw from the Parliament of Canada authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter is, by Section 92 of The British North America Act, 1867, exclusively within the legislative jurisdiction of this Legislature and any laws so made by the said Parliament shall, while such delegation is in force, have the same effect as if enacted by this Legislature.

3. If and when the Parliament of Canada shall have delegated to the Legislature of this Province authority to make laws in relation to any matter relating to employment in any industry, work or undertaking in respect of which such matter is, under the provisions of The British North America Act, 1867, exclusively within the legislative jurisdiction of such Parliament, the Governor in Council, while such delegation is in force, may, by proclamation, from time to time apply any or all the provisions of any Act in relation to a matter relating to employment in force in this Province to any such industry, work or undertaking.

4. If and when the Parliament of Canada shall have delegated to the Legislature of this Province authority to make laws in relation to the raising of a Revenue for Provincial Purposes by the imposing of a retail sales tax of the nature of indirect taxation, the Governor-in-Council while such delegation is in force, may impose such a tax of such amount not exceeding three per cent (3%) of the retail price as he

deems necessary, in respect of any commodity to which such delegation extends and may make regulations providing for the method of collecting any such tax.

5. This Act shall come into force on, from and after, but not before, such day as the Governor-in-Council orders and declares by proclamation.

The validity of this proposed legislation was submitted to the Supreme Court of Nova Scotia, and the majority of the Court were of the opinion that the Bill was not constitutionally valid, and answered the six questions in the negative. The questions put to the Court under and by virtue of Chapter 226 of the Revised Statutes of Nova Scotia, 1923, were the following:—

1. Is the said Bill constitutionally valid or in part, and if in part, in what respect?

2. Is it within the competence of the Parliament of Canada to delegate to the Legislature of Nova Scotia authority to impose a tax in the nature of indirect taxation, as referred to in Section 4 of the said Bill?

3. In the event of such a delegation being made, is it competent for the Legislature of Nova Scotia to impose such a tax?

4. Is it within the competence of the said Parliament to delegate to the said Legislature authority to make laws in relation to employment matters otherwise within the exclusive legislative jurisdiction of such Parliament as referred to in Section 3 of said Bill?

5. Is it within the competence of the said Legislature to delegate or to empower the Governor in Council to delegate authority to such Parliament to make laws in relation to employment matters otherwise within the exclusive legislative jurisdiction of such Legislature, as referred to in Section 2 of the said Bill?

6. In the event of such a delegation as is referred to in Sections 2 and 3 of the said Bill being made, is it within the competence of (*a*) the said Legislature, and (*b*) the said Parliament, respectively, to make laws in relation to such employment matters?

These questions, although limited to indirect taxation and to laws in relation to employment matters, cover a much wider field. For if it is within the powers of Parliament and of the Legislatures to confer upon each other by consent, a legislative authority which they do not otherwise possess, to deal with the subject matters found in the questions submitted, the same powers would naturally exist to enact laws affecting all the classes of subjects enumerated in Sections 91 and 92 of the *B.N.A. Act.* I may say at the outset that I am of the opinion that the conclusion arrived at by the Supreme Court of Nova Scotia is right.

The *British North America Act, 1867,* and amendments has defined the powers that are to be exercised by the

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Dominion Parliament and by the Legislatures of the various provinces. There are fields where the Dominion has exclusive jurisdiction, while others are reserved to the provinces. This division of powers has received the sanction of the Imperial Parliament, which was then and is still the sole competent authority to make any alterations to its own laws. If Bill 136 were *intra vires,* the Dominion Parliament could delegate its powers to any or all the provinces, to legislate on commerce, banking, bankruptcy, militia and defence, issue of paper money, patents, copyrights, indirect taxation, and all other matters enumerated in Section 91; and on the other hand, the Legislatures could authorize the Dominion to pass laws in relation to property and civil rights, municipal institutions, education, etc. etc., all matters outside the jurisdiction reserved to the Dominion Parliament. The powers of Parliament and of the Legislatures strictly limited by the *B.N.A. Act,* would thus be considerably enlarged, and I have no doubt that this cannot be done, even with the joint consent of Parliament and of the Legislatures.

It is a well settled proposition of law that jurisdiction cannot be conferred by consent. None of these bodies can be vested directly or indirectly with powers which have been denied them by the *B.N.A. Act,* and which therefore are not within their constitutional jurisdiction.

This question has often been the subject of comments by eminent text writers, and has also been definitely settled by numerous authoritative judicial pronouncements.

Lefroy *Canada's Federal System* (1913 at p. 70) cites the words of Lord Watson on the argument in *C.P.R.* v. *Bonsecours* (1):—

> The Dominion cannot give jurisdiction, or leave jurisdiction, with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction. To which Lord Davey adds: "or curtail."

Clement *"The Law of the Canadian Constitution"* 3rd ed., dealing with the same subject, says at page 380:—

> It is equally clear upon authority that a federal statute cannot enlarge the ambit of provincial authority as fixed by the British North America Act.

(1) [1899] A.C. 367.

And he states at page 382:—

But, it is conceived, there is nothing in all this to give any countenance to the notion that by Canadian legislation, federal or provincial or both, a readjustment of the respective spheres of legislative authority as fixed by the British North America Act can be brought about; that, for example, the Dominion parliament can confer upon a provincial assembly any power of legislation not possessed by such assembly under the imperial statute. No such constituent power has been given by the Act to either legislature. It is not covered by any affirmative words and is radically repugnant to the principle underlying the use of the mutually restrictive word "exclusive" as applicable to the two competing groups of class-enumerations. Provincial legislation which, *ex hypothesi*, requires federal legislation to support it is not legislation at all.

In *The Citizens' and The Queen Ins. Cos.* v. *Parsons* (1), Mr. Justice Taschereau expresses his views as follows:—

The Constitutional Act does not, as I read it, bear an interpretation inevitably leading to such anomalous consequences; the powers of the federal authority cannot, to such an extent, be dependent upon the consent and good-will of the provincial authorities.

And at page 317, he says:—

But the Federal parliament cannot amend the *British North America Act*, nor give, either expressly or impliedly, to the local legislatures, a power which the Imperial Act does not give them. This is clear and has always been held in this court to be the law.

And, in the same case, at page 348, Mr. Justice Gwynne also says:—

How the species of legislation which appears upon the statute books, upon the subject of insurance and insurance companies, came to be recognized (by which it would seem as if the parliament and the legislatures had been attempting to make among themselves a partition of jurisdiction, for which the *B.N.A. Act* gives no warrant whatever), I confess appears to me to be very strange, for it surely cannot admit of a doubt that *no act* of the Dominion Parliament can give to the local legislatures over any subject which, by the *B.N.A. Act*, is placed exclusively under the control of parliament, and as the parliament cannot by Act or acquiescence transfer to the local legislatures any subject placed by the *B.N.A. Act* under the exclusive control of parliament, so neither can it take from the local legislatures any subject placed by the same authority under *their* exclusive control.

In *St. Catharines Milling Co.* v. *The Queen* (2), Mr. Justice Strong as he then was, says:—

That Parliament has no power to divest the Dominion in favour of the Provinces of a legislative power conferred on it by the British North America Act is, I think, clear.

(1) (1881) 4 Can. S.C.R. 215 at 314.

(2) (1887) 13 Can. S.C.R. 577 at 637.

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More recently in *Rex* v. *Zaslavsky* (1), the Saskatchewan Court of Appeal held as follows:—

> A Province cannot enlarge the jurisdiction of Parliament or surrender jurisdiction belonging exclusively to the Province. Since the control and regulation of sales and purchases of live stock and live stock products lies entirely within provincial boundaries it is *ultra vires* and a conviction under the Act will be quashed.

The Manitoba Court of Appeal in *Rex* v. *Brodsky et al* (2), held as follows:—

> Neither the Dominion nor the Province can delegate to each other powers they do not expressly possess under the *B.N.A. Act.*

The Alberta Supreme Court in *Rex* v. *Thorsby Traders Ltd.* (3), without delivering written reasons, stated that they followed *Rex* v. *Zaslavsky* cited *supra.*

All these authorities show clearly to my mind that Bill No. 136 is *ultra vires* and that the argument of the appellants cannot prevail.

It is submitted on behalf of the appellants that in numerous cases the Judicial Committee of the Privy Council and the Courts of this country have admitted the principle of delegation of powers. In support of that proposition the following cases have been cited to the Court: *Hodge* v. *The Queen* (4), *In Re Gray* (5), *Shannon* v. *Lower Mainland Dairy Products Board* (6), *Chemicals Reference* (7).

These cases differ fundamentally from the present one. There is no doubt, as it has been very often recognized by the Courts, that Parliament or a provincial legislation may in certain cases delegate some of its powers.

For instance, in the *Gray* case, Mr. Justice Anglin said at page 176:—

> A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction certainly as wide as that of which it has been said by incontrovertible authority that it is "as plenary and as ample * * * as the Imperial Parliament in the plenitude of its powers possessed and could bestow."

(1) [1935] 3 D.L.R. 788; 64 Can. C.C. 106.
(2) [1936] 1 D.L.R. 578.
(3) [1936] 1 D.L.R. 592.
(4) (1883) 9 App. Cas. 117.
(5) 57 Can. S.C.R. 150.
(6) [1938] A.C. 708.
(7) [1943] S.C.R. 1.

In *Shannon* v. *Lower Mainland Dairy Products Board* (1) at page 722 Lord Atkin said:

> The third objection is that it is not within the powers of the Provincial Legislature to delegate so-called legislative powers to the Lieutenant-Governor in Council, or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is unnecessary to try to enumerate the innumerable occasions on which Legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act.

But we are not dealing here with a similar situation. In the *Gray* case, the delegation was given by Parliament to the Executive Government. In the *Hodge* and *Shannon* cases, the delegation was to authorize Boards of Commissioners to enact regulations. In the *Chemicals* case, the delegation was to the Governor in Council, who by regulation appointed a controller of chemicals. In all these cases of delegation, the authority delegated its powers to subordinate Boards for the purpose of carrying legislative enactments into operation.

It is true that in *Ouimet* v. *Bazin* (2), Mr. Justice Davies said:—

> As to the power of the Dominion Parliament so to delegate its power, I have no doubt.

I agree with Chief Justice Chisholm of the Supreme Court of Nova Scotia that this observation is an *"obiter"* which is not concurred in by the other members of the Court who heard the appeal, and with respect I may say, that it is not founded upon any authority.

In Clement, *"Canadian Constitution"* cited *supra,* at pages 380, 381 and 382, the learned author deals with this subject and does not contest the right of a sovereign Legislature to delegate to a subordinate body some part of its legislative functions and, as the Parliament of Canada and the Assemblies of the several Provinces are all sovereign Legislatures within their respective spheres, the right to so delegate is beyond question. And, not only can a sovereign Legislature delegate part of its legislative functions, but it may also confer power upon a subordinate agency to make regulations for the better

(1) [1938] A.C. 708. (2) (1912) 46 Can. S.C.R. 502.

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carrying out in detail of the enactment. But the learned author proceeds to say that there is nothing in all this to give countenance to the notion that a readjustment of the respective spheres of legislative authority, as fixed by the *British North America Act,* can be brought about.

Lefroy in *"Legislative Power in Canada"* at page 242, expresses the view with which I agree, that the Federal Parliament cannot amend the British North America Act, nor either expressly or impliedly take away from, or give to, the provincial Legislatures a power which the Imperial Act does, or does not give them; and he adds that the same is the case, *mutatis mutandis,* with the Provincial Legislatures. At page 689, the same author adds that within the area and limits of subjects mentioned in Section 92 of the British North America Act, the provincial Legislatures are supreme and have the same authority as the Imperial Parliament or the Dominion would have under like circumstances, to confide to a municipal institution or body of its own creation, authority to make by-laws or regulations as to subjects specified in the enactment and with the object of carrying the enactment into operation and effect. This proposition rests upon the language and decision of the Judicial Committee of the Privy Council in *Hodge* v. *The Queen,* cited *supra.*

It will be seen therefore that as a result of all these authorities and pronouncements, Parliament or the Legislatures may delegate in certain cases their powers to subordinate agencies, but that it has never been held that the Parliament of Canada or any of the Legislatures can abdicate their powers and invest for the purpose of legislation, bodies which by the very terms of the *B.N.A. Act* are not empowered to accept such delegation, and to legislate on such matters.

It has been further argued that as a result of the delegation made by the Federal Government to the Provinces, the laws enacted by the Provinces as delegatees would be federal laws and that they would, therefore, be constitutionally valid. With this proposition I cannot agree. These laws would not then be enacted "with the advice and consent of the Senate and House of Commons", and would not be assented to by the Governor General, but by

the Lieutenant Governor, who has no power to do so. Moreover, as already stated, such a right has been denied the Provinces by the *B.N.A. Act*.

If the proposed legislation were held to be valid, the whole scheme of the Canadian Constitution would be entirely defeated. The framers of the *B.N.A. Act* thought wisely that Canada should not be a unitary state, but it would be converted into one, as Mr. Justice Hall says, if all the Provinces empowered Parliament to make laws with respect to *all matters* exclusively assigned to them. Moreover, it is clear that the delegation of legislative powers by Parliament to the ten Provinces on matters enumerated in Section 91 of the *B.N.A. Act* could bring about different criminal laws, different banking and bankruptcy laws, different military laws, different postal laws, different currency laws, all subjects in relation to which it has been thought imperative that uniformity should prevail throughout Canada.

For the above reasons, I have come to the conclusion that this appeal should be dismissed.

RAND J.:—This appeal is from a majority judgment of the Supreme Court of Nova Scotia in which negative answers were given to certain questions referred to it by the Lieutenant-Governor in Council. They arise out of a bill introduced into the Provincial Legislature which purports to authorize the delegation of certain legislative power to Parliament and the acceptance and exercise of the converse delegation from Parliament; and their purpose is to obtain the opinion of the Court on the competency of Legislature and Parliament to such delegation. Both the questions and the text of the bill are set out in the reasons of other members of the Court and I will not repeat them.

The considerations pertinent to the answers to be given are to be found in the circumstances of the creation and evolution of constitutional self-goverment under the British Crown. The devolution of legislative power in the administration of the Empire, issuing in the Commonwealth relations of today, evolved a characteristic polity through the investment, either under the prerogative or

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by statute of the Imperial Parliament, of jurisdiction in local legislative bodies. By the Confederation Act of 1867, that jurisdiction and its concomitant executive authority were committed to Parliament and Legislature in as plenary and ample manner "as the Imperial Parliament in the plenitude of its power * * * could bestow"; *Hodge* v. *The Queen* (1). The essential quality of legislation enacted by these bodies is that it is deemed to be law of the legislatures of Canada as a self-governing political organization and not law of the Imperial Parliament. It was law within the Empire and is law within the Commonwealth; but it is not law as if enacted at Westminster, though its source of authority is derived from that Parliament.

The distinction between the status of such a legislature and a delegate arises from the difference between an endowment by a paramount legislature of an original, self-responsible, and exclusive jurisdiction to enact laws, subject, it may be, to restrictions and limitations, and the entrustment of the exercise of legislative action to an agency of the entrusting authority. The latter is a present continuing authority to effect provisions of law which are attributed to the delegating power. The difference between these conceptions is of substance, a difference lying in the scope and nature of the powers conferred and retained.

The extent of delegation depends upon the language of the grant, but the full original powers are retained: *Huth* v. *Clarke* (2); Wills J. at page 395:—

> Delegation, as that word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself * * * It is never used, by legal writers, so far as I am aware, as implying that the delegating person parts with his powers so as to denude himself of his rights. If it is correct to use the word in the way in which it is used in the maxim as generally understood, the word "delegate" means little more than an agent.

Whether the authority of sub-delegation is conferred depends likewise on the language of the grant in the framework of the circumstances: *The Chemicals Reference* (3). That Canadian legislatures may delegate has long been settled: *Hodge* v. *The Queen*, (*supra*).

(1) (1883) 9 App. Cas. 117 at 132.
(2) (1890) 25 Q.B.D. 391 at 395.
(3) [1943] S.C.R. 1.

Notwithstanding the plenary nature of the jurisdiction enjoyed by them, it was conceded that neither Parliament nor Legislature can either transfer its constitutional authority to the other or create a new legislative organ in a relation to it similar to that between either of these bodies and the Imperial Parliament. On the former, the observation of Lord Watson in the argument in *C.P.R.* v. *Notre Dame de Bonsecours* (1), as reported in Lefroy, *Canada's Federal System* (1913) p. 70 note 10(*a*):—

> The Dominion cannot give jurisdiction or leave jurisdiction with the Province. The provincial parliament cannot give legislative jurisdiction to the Dominion parliament. If they had it, either one or other of them, they have it by virtue of the Act of 1867. I think that we must get rid of the idea that either one or other can enlarge the jurisdiction of the other or surrender jurisdiction.

seems to me, if I may say so, to be incontrovertible; and the latter is settled by the judgment of the Judicial Committee in *The Queen* v. *Burah* (2). There are to be kept in mind, also, certain conditions to the procedure of enactment such as, for example, the participation in legislation of the Sovereign through the Lieutenant-Governor as exemplified in *In re The Initiative and Referendum Act* (3), and the provisions of sections 53 and 54 of the Act of 1867 dealing with taxation and the appropriation of the public revenue by Parliament.

On the argument, discussion as to the precise delegate, whether the Legislature as such or the individuals comprising it, tended to confuse the issue raised by the proposed bill. The language of the latter leaves us in no doubt of what is intended: it is the Legislature of the Province or Parliament acting as such which is intended to exercise the delegated authority, and on this footing the questions are to be answered.

Can either of these legislative bodies, then, confer upon the other or can the latter accept and exercise in such a subsidiary manner legislative power vested in the former? They are bodies of co-ordinate rank; in constitutional theory, legislative enactment is that of the Sovereign in Parliament and in Legislature, to each of which, as legislative organs of a federal union, has been given exclusive authority over specified matters in a distribution of total

(1) [1899] A.C. 367.
(2) (1877) 3 App. Cas. 889.
(3) [1919] A.C. 935.

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legislative subject-matter. Delegation has its source in the necessities of legislation; it has become an essential to completeness and adaptability of much of statutory law; but if one legislature is adequate, by its own action, to enactment, so, surely, is the other; in the proposed bill, there is no suggestion of authorizing Parliament, as delegate, in turn to sub-delegate to agencies of its own, and the practical ground of delegation is absent. But even where the broadest authority is intended, can we seriously imagine the Imperial Parliament, in the implication of the power to delegate, intending to include delegation by and to each other? These bodies were created solely for the purposes of the constitution by which each, in the traditions and conventions of the English Parliamentary system, was to legislate, in accordance with its debate and judgment, on the matters assigned to it and on no other. To imply a power to shift this debate and this judgment of either to the other is to permit the substance of transfer to take place, a dealing with and in jurisdiction utterly foreign to the conception of a federal organization.

So exercising delegated powers would not only be incompatible with the constitutional function with which Nova Scotia is endowed and an affront to constitutional principle and practice, it would violate, also, the interest in the substance of Dominion legislation which both the people and the legislative bodies of the other provinces possess. In a unitary state, that question does not arise; but it seems to be quite evident that such legislative absolutism, except in respects in which, by the terms express or implied of the constituting Act, only one jurisdiction is concerned, is incompatible with federal reality. If a matter affects only one, it would not be a subject for delegation to the other; matters of possible delegation, by that fact, imply a common interest. Dominion legislation in relation to employment in Nova Scotia enacted by the legislature may affect interests outside of Nova Scotia; by delegation Nova Scotia might impose an indirect tax upon citizens of Alberta in respect of matters arising in Nova Scotia; or it might place restrictions on foreign or interprovincial trade affecting Nova Scotia which impinge on interests in Ontario. The incidence of laws

of that nature is intended by the constitution to be determined by the deliberations of Parliament and not of any Legislature. In the generality of actual delegation to its own agencies, Parliament, recognizing the need of the legislation, lays down the broad scheme and indicates the principles, purposes and scope of the subsidiary details to be supplied by the delegate: under the mode of enactment now being considered, the real and substantial analysis and weighing of the political considerations which would decide the actual provisions adopted, would be given by persons chosen to represent local interests.

Since neither is a creature nor a subordinate body of the other, the question is not only or chiefly whether one can delegate, but whether the other can accept. Delegation implies subordination and in *Hodge* v. *The Queen,* (*supra*), the following observations (at p. 132) appear:—

> Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.
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> * * *
>
> It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of Law, to decide.

Subordination, as so considered, is constitutional subordination and not that implied in the relation of delegate. Sovereign states can and do confer and accept temporary transfers of jurisdiction under which they enact their own laws within the territory of others; but the exercise of delegation by one for another would be an incongruity; for the enactments of a state are of its own laws, not those of another state.

Subordination implies duty: delegation is not made to be accepted or acted upon at the will of the delegate; it is ancillary to legislation which the appropriate legislature thinks desirable; and a duty to act either by enacting or by exercising a conferred discretion not, at the particular time, to act, rests upon the delegate. No such duty could be imposed upon or accepted by a co-ordinate legislature

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and the proposed bill does no more than to proffer authority to be exercised by the delegate solely of its own volition and, for its own purposes, as a discretionary privilege. Even in the case of virtually unlimited delegation as under the Poor Act of England, assuming that degree to be open to Canadian legislatures, the delegate is directly amenable to his principal for his execution of the authority.

In another aspect the proposal is equally objectionable. Would it be within constitutional propriety for the representatives both of the Sovereign and of the people of Nova Scotia, to appropriate their legislative ritual to the enactment of a law not of Nova Scotia, but of Canada? Acting as a subordinate body, the recital in the usual formula of enactment would be false; and the Lieutenant-Governor as well as the members of the Legislature could decline to participate in such roles.

The argument, in relation to taxation, seemed to assume a power in the Dominion to tax for interests or purposes local to Nova Scotia which by a delegation to that province could be more appropriately exercised; but the language of Lord Atkin in the *Unemployment Insurance Reference* (1), would appear to reject such a view.

The practical consequences of the proposed measure, a matter which the Courts may take into account, entail the danger, through continued exercise of delegated power, of prescriptive claims based on conditions and relations established in reliance on the delegation. Possession here as elsewhere would be nine points of law and disruptive controversy might easily result. The power of revocation might in fact become no more feasible, practically, than amendment of the Act of 1867 of its own volition by the British Parliament.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.:—All of the questions which are the subject matter of the reference dealt with by the judgment in appeal involve the one question as to the competence either of Parliament or a provincial Legislature to delegate, one to the other, authority to enact legislation exclusively within the power of the delegating authority under the terms of the British North America Act. In my opinion,

(1) [1937] A.C. 326 at 366.

the point does not lend itself to extended discussion. Under the statute the powers committed to Parliament and to the Provincial Legislatures respectively are, as already stated, exclusive. If therefore Parliament, for example, were to purport to authorize a Provincial Legislature to exercise legislative jurisdiction assigned exclusively to the former, any exercise of such authority by the latter would in fact be an attempt "to make laws" in relation to a matter "assigned exclusively" to Parliament, and consequently prohibited to the Provincial Legislature. In the same way, if a Provincial Legislature purported to authorize Parliament to legislate with respect to any of the matters enumerated in section 92, and Parliament attempted to act upon such authorization, it would similarly be attempting to "make laws" in relation to a matter assigned exclusively to the Provinces.

During the argument in *C.P.R.* v. *Notre Dame* (1), Lord Watson, with the apparent approval of Lord Davey, said:

> The Dominion cannot give jurisdiction, or leave jurisdiction with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction.

(see Lefroy, *Canada's Federal System*, 1913, p. 70, Note).

The same view had been earlier expressed by Strong J., as he then was, in *St. Catharines Milling Company* v. *The Queen* (2).

Davies J. as he then was, in *Ouimet* v. *Bazin* (3), indicated perhaps a contrary view at page 513, but in *Lord's Day Alliance of Canada* v. *Attorney General for Manitoba* (4), the Judicial Committee explained the real basis of provincial Lord's Day legislation as not involving any delegation of legislative jurisdiction by the Dominion, and for that reason the Committee refrained from dealing with the question now under discussion.

Counsel for the Attorney General for Ontario in his argument referred to the language of Lord Phillimore in *Caron* v. *The King* (5), where, in referring to taxation powers of

(1) [1899] A.C. 367.
(2) 13 Can. S.C.R. 577 at 637.
(3) (1912) 46 Can. S.C.R. 502.
(4) [1925] A.C. 384.
(5) [1924] A.C. 999 at 1004.

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Parliament and the provincial legislatures respectively, his Lordship quoted from an earlier judgment of the Committee in *Bank of Toronto* v. *Lambe* (1), as follows:

> Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures.

Lord Phillimore continued:

> Both sections of the Act of Parliament must be construed together; and it matters not whether the principle to be applied is that the particular provision in head 2 of s. 92 effects a deduction from the general provision in head 3 of s. 91, or whether the principle be that head 3 of s. 91 is confined to Dominion taxes for Dominion purposes.
>
> The only occasion on which it could be necessary to consider which of these two principles was to guide, would be in the not very probable event of the Parliament of Canada desiring to raise money for provincial purposes by indirect taxation. It might then become necessary to consider whether the taxation could be supported, because the power to impose it, given by head 3 of s. 91, had not been taken out of the general power by the particular provision, or because though not given by head 3, it was given as a residual power by the other parts of s. 91. But no such question arises now.

In considering the power of Parliament "to raise money for provincial purposes by indirect taxation", Lord Phillimore was not considering that power as the subject matter of delegation from a provincial legislature at all, such legislature having no such power.

Appellant's contention would appear to be contrary to the whole theory of the Constitution Act under which, to adopt the language of the Quebec Resolutions, the central government was to be "charged" with matters of common interest to the whole country, and the local governments "charged" with the control of local matters in their respective sections. The effect of the statute is that each is "charged" with their respective responsibilities to the exclusion of the other.

Counsel for the appellants sought to avoid the above conclusion by contending that if either Parliament or a provincial legislature should act under a power delegated by the other, such act would not be the act of a legislature but that of *personae designatae,* their act being in reality that of the delegating authority.

In my opinion, this contention is really not open upon the questions submitted, for the reason that in the questions themselves, as well as in Bill No. 136, the delegation

(1) (1887) 12 App. Cas. 575.

is invariably described as a delegation to "the Legislature of Nova Scotia" or to "Parliament". In the contemplation of the questions, both the Provincial Legislature and Parliament, in purporting to exercise the delegated power, would be acting in the character of Legislature and Parliament respectively and as though each were exercising an additional head of jurisdiction written into section 91 or 92, rather than as mere groups of individuals. I therefore follow the course indicated by the Judicial Committee in the *Lord's Day Alliance case* (*supra*) where it is pointed out at page 389 that it is more than ordinarily expedient in the case of a reference such as this that the court should refrain from dealing with questions other than those which are in express terms referred to it. I would therefore dismiss the appeal.

ESTEY J.:—Bill No. 136 entitled "An Act Respecting the Delegation of Jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia and vice versa" was introduced into the Legislature of the Province of Nova Scotia on August 26, 1947. After its first reading the bill was referred, under R.S. of N.S., 1923, c. 226, to the Supreme Court of Nova Scotia for an opinion as to its constitutional validity. The majority of the learned Judges, Mr. Justice Doull dissenting, expressed the opinion that it was beyond the jurisdiction of the Province to enact such legislation.

The Parliament of Canada and the Provincial Legislatures are created by and derive their respective legislative jurisdictions from the *British North America Act*. Within their respective legislative jurisdictions these legislative bodies possess complete legislative power. This includes the power to delegate legislative authority respectively to the Governor and Lieutenant Governor-in-Council and to subordinate bodies of their own creation. *Hodge* v. *The Queen* (1). *In Re Gray* (2). *Fort Frances Pulp and Power Company* v. *Manitoba Free Press Company* (3). *Shannon* v. *Lower Mainland Dairy Products Board* (4). *Chemicals Reference,* (5).

(1) (1883) 9 App. Cas. 117; 1 Cam. 333.
(2) (1918) 57 Can. S.C.R. 150.
(3) [1923] A.C. 695; 2 Cam. 302.
(4) [1938] A.C. 708; Plaxton 379
(5) [1943] S.C.R. 1.

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Estey J.

In this reference it is submitted that the principle of delegation should be extended in order that the Parliament of Canada may delegate legislative power to the Provincial Legislatures and, in turn, that the Provincial Legislatures may delegate legislative power to the Parliament of Canada.

In *Huth* v. *Clarke* (1), Wills J. discusses delegation as between legislative bodies and, in part, states:

> Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself.

The fact that each of these legislative bodies—the Parliament of Canada and the Provincial Legislatures—as delegator would retain all of its legislative jurisdiction and might revoke the authority delegated does not detract from, nor militate against, the conclusion that, in so far as the legislative body as delegatee purports to exercise the delegated authority, it is acting under a jurisdiction to legislate given to it by the delegator. The Parliament of Canada, in so far as it seeks to delegate to a Provincial Legislature authority to legislate, thereby purports to enlarge the legislative jurisdiction of that Legislature. The same is true when a Provincial Legislature seeks to delegate its authority to legislate to the Parliament of Canada. It is beyond the jurisdiction of these respective bodies to give legislative jurisdiction one to the other.

> The Dominion cannot give jurisdiction, or leave jurisdiction, with the province. The provincial parliament cannot give legislative jurisdiction to the Dominion parliament. If they have it, either one or the other of them, they have it by virtue of the Act of 1867. I think we must get rid of the idea that either one or the other can enlarge the jurisdiction of the other or surrender jurisdiction.—Lord Watson in Lefroy's *Canada's Federal System*, 1913 ed., p. 70 1 Note 10(*a*).

Moreover, the provisions of the British North America Act contemplate these legislative bodies will, at all times, in the exercise of their sovereign jurisdiction, act as principals. There is no express provision nor is there any under which it could be reasonably implied that these bodies were intended to act as agents one for the other.

(1) (1890) 25 Q.B.D. 391 at 395.

Bill 136, in so far as it provides for the delegation of Provincial legislative powers or the reception of legislative powers from the Parliament of Canada, is beyond the jurisdiction of the Province to enact.

The appeal should be dismissed with costs.

FAUTEUX J.:—The true question is whether or not it is within the competence of the Parliament of Canada and within the competence of the Legislature of a province to exchange between themselves or transfer to one another, directly or indirectly, temporarily and from time to time, a legislative authority they both possess only by virtue of the British North America Act, 1867 (hereinafter referred to as the Act) and which each, to the exclusion of the other, can exercise only with respect to certain classes of subjects.

The suggestion of delegation running through Bill 136, in reference to such transfer of legislative authority or the method therein devised to achieve such transfer does not, in my respectful view, go to the essence of the question involved. For, and it may be at once stated, the word "delegate" is not only an inadequate but a confusing designation of what the Bill purports to authorize. In the concept of delegation: the acceptation of the delegation is imperative and not permissive; the delegatee does not make laws but by-laws, orders, rules or regulations; and such a subordinate legislation is, of its nature, ancillary to the statute which delegates the power to make it. As to the method to achieve the purpose of the Bill, it may be sufficient to say that in as much as it purports, in effect, to constitute Parliament a legislative agent of the Legislature of a province and the Legislature of a province the legislative agent of Parliament, it is incompatible with the normal operation of the Act.

The British North America Act, 1867 is the sole charter by which the rights claimed by the Dominion and the provinces respectively can be determined. No one has ever contended that a direct or indirect transfer of legislative authority—whatever be the name used to designate such transfer—is provided for in express terms under the Act, nor can it be implied without doing violence to the

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intent of the draftsman, to what is expressed in it and to the weight of judicial pronouncements available in the matter.

What induced the Imperial Parliament to pass the Act must be found in the recitals in its preamble. Briefly, it is as therein indicated: the desire of the provinces of Canada, Nova Scotia and New Brunswick to be federally united into one Dominion under the Crown; the expectation that such union would be conducive to the welfare of the provinces and to the promotion of the interests of the British Empire; the necessity to provide, on the establishment of the union, for the constitution of legislative authority and to declare the nature of executive government. This desire of the provinces to be united and the conditions upon which such union was agreed by them had been previously expressed in the Quebec and London Resolutions. In both it is stated that:

* * * the system of government best adapted under existing circumstances to protect the diversified interests of the several provinces and secure efficiency, harmony and permanency in the working of the union is a general government charged with matters of common interest to the whole country and local governments for each of the Canadas, and for the provinces of Nova Scotia and New Brunswick, charged with the control of local matters in their respective sections * * *

Speaking to the point, Lord Atkin, in *Attorney General for Canada* v. *Attorney General for Ontario* (1), said:

No one can doubt that this distribution (of powers) is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the British North America Act gives effect.

In the result, each of the provinces, enjoying up to the time of the union, within their respective areas, and *quoad* one another, an independent, exclusive and over-all legislative authority, surrendered to and charged the Parliament of Canada with the responsibility and authority to make laws with respect to what was then considered as matters of common interest to the whole country and retained and undertook to be charged with the responsibility and authority to make laws with respect to local matters in their respective sections. This is the system of government by which the Fathers of Confederation intended—and their intentions were implemented in the

(1) [1937] A.C. 326 at 351.

Act—to "protect the diversified interests of the several provinces and secure the efficiency, harmony and permanency in the working of the union."

The suggestion that this distribution of legislative authority, enacted by the Imperial Parliament, under the then "existing circumstances", could now be altered by Parliament or the Legislature of a province by transfer, exchange, or delegation, is repugnant to the very intent manifested in the above Resolutions ultimately implemented under the Act.

It is difficult to conceive that the provinces, so strongly desirous of retaining for themselves the legislative authority they then had with respect to local matters in order to continue, each of them, to attend to its own diversified interests, would have, at the same time, entertained the idea of giving to Parliament any kind of legislative authority—subordinate or original—with respect to such matters. Equally it is difficult to accept that the provinces, merging in Parliament so much of their legislative authority as was then considered necessary to properly attend to matters of common interest to the whole country, intended that such legislative authority should in turn be retransferred by Parliament, in part or temporarily, to the Legislature of one of the provinces, when it was so clearly intended that it should be shared and exercised at any and all times, in Parliament, by the people of all the provinces of the union, through a pre-determined proportion of representatives for each of the provinces. I am unable to imagine that what Bill 136 purports to authorize was ever intended by the Imperial Parliament.

Turning to what is expressed in the Act. It is convenient to say, at first, that the appellant did not suggest that the legislative authority of Parliament and of the Legislatures of the provinces respectively, can be transferred the one to the other, but contended it could be delegated the one to the other. What Bill 136 purports to authorize is not, for the reasons above indicated, a delegation within the ordinary meaning of the word but, in my views, a temporary and indirect transfer. Assuming, how-

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ever, that it could be a delegation, there can be no doubt that the express terms of sections 91 and 92 and the necessary implication flowing from the enactment of section 94 prohibits such delegation.

While the two former sections provide for a distribution of legislative powers between Parliament and the Legislatures of the provinces, they go further and bar one from entering the legislative field assigned to the other. This distribution, and the prohibition which is a necessary corollary of it, constitute a peculiar feature of the Act with respect to the right of delegation and calls for different considerations in applying it. Each of these legislative bodies, equally sovereign within its own field, has the right to delegate its legislative authority to a subordinate body, for,—as was done under the *War Measures Act*—generally, the right to delegate is tacitly included in the right to legislate and, within one's own field, is not denied under the Act. Beyond their respective spheres, both Parliament and the Legislatures are powerless and each is specially denied the legislative powers given to the other. In these circumstances, I fail to see, firstly, how in the absence of express terms, one could assume the right to accept delegation and, secondly, how one could claim the right to make a delegation of powers to one which, in express terms, is barred from exercising them. Either one of these conclusions would justify the statement that such right to delegate is excluded under the Act, for delegation implies a delegator capable to delegate and a delegatee capable to accept. Legislative jurisdiction cannot be assumed or be given by consent. Had it been the intention of the Imperial Parliament to give to one legislative body the right to delegate to the other, the word "exclusively" in both sections would have been omitted. In the context, this word is without object unless it is to debar one legislative body from exercising any kind of legislative authority with respect to matters within the jurisdiction of the other.

Section 94 of the Act makes an exception to the rigidity of the rule related to the distribution of legislative powers

and gives Parliament a relative power of legislation for uniformity of laws in three of the provinces of the union. It reads:—

94. Notwithstanding anything in this Act, the Parliament of Canada may make provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

The presence of the above provisions in the Act clearly indicates that the right of one of the legislative bodies to delegate to the other, cannot be implied under the Act; otherwise, the section would be useless.

The complete review of the judicial pronouncements and their appreciation, made by Chief Justice Chisholm of the Supreme Court of Nova Scotia, and the various comments made with respect to some of these pronouncements by other members of this Court, dispense with repetition and establish that the weight of authority is against the views expounded on behalf of the appellant.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the Attorney General of Nova Scotia: *J. A. Y. MacDonald.*

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

Solicitor for the Attorney General of Ontario: *C. R. Magone.*

Solicitor for the Attorney General of Alberta: *H. J. Wilson.*

1950
*Oct. 23
*Nov. 20

PAUL MAJOR ..... APPLICANT;

AND

THE TOWN OF BEAUPORT *et al*..... RESPONDENT;

AND

THE ATTORNEY GENERAL OF QUEBEC ..... } MIS-EN-CAUSE.

MOTION FOR SPECIAL LEAVE TO APPEAL.

Appeal—Special Leave to Appeal within Court's discretion—Where validity of Provincial law questioned, leave refused until opinion of highest Provincial Court obtained—"Final judgment of court of highest resort in Province"—"Question of law or jurisdiction"—The Supreme Court Act, R.S.C. 1927, c. 35, s. 41 (1), (3) as amended by 1949 (Can.) 2nd Sess., c. 37, s. 2.

This appeal deals with a provincial criminal offence. (*Saumur* v. *Recorder's Court of Quebec* [1947] S.C.R. 492). If, therefore, this Court has jurisdiction to grant leave, it is only by virtue of s. 41(1) and (3) of the *Supreme Court Act* as amended. The proper remedy where the validity of a provincial law (the Quebec *Cities and Towns Act*), and a municipal by-law authorized thereby is questioned, is by way of writ of Prohibition (art. 1003 C.P.), or by way of writ of *Certiorari* (arts. 1392, 1393), and since when a case is submitted to this Court for final determination it is desirable that it should have the opinion of the highest court of the Province from which the appeal is taken, this Court, in the exercise of the discretion vested in it under s. 41, should refuse leave to appeal until such opinion has been obtained.

Under s. 41(3) the Court may grant special leave to appeal on a question of law or jurisdiction, but the question of law raised must be a question of law alone and not a mixed question of law and fact. *The King* v. *Decary* [1942] S.C.R. 80.

Application for special leave to appeal dismissed.

MOTION for special leave to appeal under s. 41 of the *Supreme Court Act*, R.S.C. 1927, c. 35 as amended by 1949 (Can.) 2nd Sess., c. 37, s. 2.

The applicant, a witness of Jehovah, was convicted by a District Magistrate under the *Quebec Summary Convictions Act* of distributing a pamphlet contrary to a by-law of the Town of Beauport which prohibits the distribution of circulars etc., until a permit has been obtained and a license fee paid as therein provided.

W. G. How for the motion.

Paul Miquelon K.C. contra.

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

The judgment of the Court was delivered by:

TASCHEREAU J.:—The petitioner has applied to this Court for special leave to appeal under s. 41 of the *Supreme Court Act,* R.S.C. 1927, c. 35, as amended by 13 Geo. VI, 1949, 2nd Sess., c. 37, s. 2.

The Town of Beauport has enacted a by-law bearing No. 120, prohibiting the distribution of circulars, and was authorized to do so by virtue of a provision of the *Cities and Towns Act,* c. 233, 1941, as amended by 11 Geo. VI, c. 59, s. 7, sub-sec. (*b*). This amendment reads as follows:

> 15*a*. To prohibit the distribution of circulars, advertisements, prospectuses or other similar printed matters, on the streets, avenues, lanes, sidewalks, public lands and places as well as in private dwellings, or to authorize such distribution, upon conditions determined by the by-law and on issuance of a permit for which a fee may be exigible;

On or about the 21st of April, 1950, the petitioner distributed circulars in the streets of the Town of Beauport, in violation of the by-law, as no copy was deposited at the office of the Council of the Town, and approved by the Secretary-Treasurer of the Council. The petitioner was therefore charged under the *Cities and Towns Act* (sections 610 and 617), which state that the fines imposed by the by-laws are recoverable before a District Magistrate, or before a Justice of the Peace, and that all prosecutions shall be decided by either of them, according to the rules contained in Part I of the *Quebec Summary Convictions Act,* c. 29, R.S.Q., 1941.

District Magistrate André Régnier who heard the case found the petitioner guilty, and condemned him to a fine of $40 and costs, and in default of payment to a period of two months imprisonment. The petitioner admitted having distributed the circulars without having obtained the prior authorization required by by-law No. 120, but submitted that the by-law was *ultra vires* as well as the provincial law authorizing the Town of Beauport to enact such a by-law. He alternatively contended that, if the by-law and the provincial statute were *intra vires* of the powers of the City of Beauport and of the Provincial Parliament, he did not fall within the scope of such by-law for various reasons, and particularly for the reason that in distributing such pamphlet, being a Witness of Jehovah,

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Taschereau J.

he was lawfully exercising his rights of freedom of worship as guaranteed by the *Freedom of Worship Act.* (R.S.Q. 1941, c. 307).

Under the Summary Convictions Act, there is no appeal from the judgment rendered by Magistrate Régnier to any provincial court. No appeal lies unless the statute creating the offence declares that there is an appeal, and in such a case, it is lodged under Part 2 of the Act. Counsel for the petitioner submitted that by virtue of section 41 of the *Supreme Court Act* as amended, the Supreme Court of Canada may grant leave to appeal on the ground that the judgment rendered by Magistrate Régnier is "a final judgment of the highest court of final resort in a province, in which judgment can be had in the case sought to be appealed to this Court." He further submitted that under section 41, para. 3, there is an appeal to this Court with special leave on a *"question of law or jurisdiction"*, as the petitioner has been convicted of an offence *"other than an indictable offence."* He finally argued that as the validity of a provincial law of the Province of Quebec and the validity of a by-law of the Town of Beauport were challenged, as well as the application of the by-law to the petitioner, important questions of law of general application arose, and that special leave to appeal should be granted.

Dealing with the first point, namely the validity of the by-law and of the provincial law, I believe that leave to appeal to this Court should not be granted.

We are dealing here with a provincial criminal offence (*Saumur* v. *Recorder's Court of Quebec* (1)). If, therefore, this Court has jurisdiction to grant leave, it is only by virtue of section 41 (1) and (3) of the *Supreme Court Act* of Canada.

The proper remedy available to the appellant, who raises the question of validity of a provincial law and of a municipal by-law, is by way of prohibition (C.P. 1003) to restrain the Magistrate from proceeding on the matter, or by way of certiorari (1392-1393), to have the judgment revised.

(1) [1945] S.C.R. 526.

I do not find it necessary to determine whether or not the judgment of Magistrate Régnier is that of the highest court of final resort in which judgment can be had in this particular case within the meaning of section 41 of the *Supreme Court Act,* or if the writs of prohibition and *certiorari* are procedural or not, as further remedies were available to the appellant (*vide Storgoff* (1)). If the judgment was not that of the highest court in which judgment could be had in this case, this Court has obviously no power to grant leave and if it was, I am of opinion that the remedies afforded where the offence is alleged to have been committed should be resorted to. It is, I think, desirable that we should have the opinions of the highest courts of a province, when a case is submitted to this Court for final determination. The section of the Act authorizing us to grant leave is only *permissive,* and this is a case, I think, where our discretion may be exercised. I have not overlooked Mr. How's argument that in other cases in the Province of Quebec in which similar by-laws were brought before the courts on motions for prohibition, decisions were rendered adverse to his contention. The judgments to which he referred us were not uniform and it is my view that an application should be made to the Superior Court to obtain a decision on one of the remedies available in this case, before we decide whether or not leave should be granted.

The second point raised by the petitioner is that even if the by-law should be held to be valid he does not fall within its scope. Two arguments are submitted on this point. First, that the by-law should be construed so as not to conflict with the *Freedom of Worship Act,* R.S.Q. 1947, c. 307; and secondly, that the pamphlet in question was a religious pamphlet and that its distribution was part of the exercise of the religious profession of the petitioner, and so expressly allowed to him by the last mentioned Act.

Under section 41, para. 3, we may grant leave on a *question of law or jurisdiction,* but it is clear that the question of law raised must be a question of law alone and not a mixed question of law and fact (*The King* v. *Decary,* (2)). This second point would arise for determi-

(1) [1947] S.C.R. 492. (2) [1942] S.C.R. 80.

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nation only in the event of the by-law having been held to be valid and, as, for the reasons set out above, I do not think we should now grant leave on the first point, I do not think we should, at this time, grant leave on the second point. If and when a further application is made to us after the remedies in the province have been resorted to on the first point, it will be necessary to consider whether we have any jurisdiction to grant leave on the second point, or whether its determination must not inevitably depend, in part at least, upon questions of fact.

The application should be dismissed.

Motion for leave to appeal dismissed.

1950
*June 13, 15, 16
*Nov 20

ANNIE MAUD NOBLE (Vendor) and BERNARD WOLF (Purchaser) .... } APPELLANTS;

AND

W. A. ALLEY, *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real Property—Restrictive Covenant—Covenant not to sell land to persons of Jewish or Negro race—Validity—Certainty.

A restrictive covenant in a deed drawn in 1933 provided that the lands therein described should never be sold to any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood and that the restriction should remain in force until August 1, 1962.

A motion made in the Supreme Court of Ontario for an order declaring the covenant invalid was dismissed, the Court holding the covenant valid and enforceable. The decision was affirmed by the Court of Appeal.

Held: (Locke J. dissenting), that the appeal should be allowed.

Per Kerwin, Taschereau, Rand, Kellock and Fauteux JJ.—The covenant has no reference to the use or abstention from use of the land.

Per Kerwin and Taschereau JJ.—It would be an unwarrantable extension of the doctrine expounded in *Tulk* v. *Moxhay*, 2 Phil. 774; 41 E.R. 1143, or in subsequent cases, to say that it did.

Per Rand, Kellock and Fauteux JJ.—By its language the covenant is not directed to the land or some mode of its use but to transfer by act of the purchaser and on its own terms it fails in annexation to the land. On its true terms it is a restraint on alienation.

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

Per Rand, Kellock, Estey and Fauteux JJ.—The covenant is void for uncertainty; from its language it is impossible to set such limits to the lines of race or blood as would enable a court to say in all cases whether a proposed purchaser is or is not within the ban. *Clavering* v. *Ellison* 11 E.R. 282 at 289; *Clayton* v. *Ramdsen*, [1943] A.C. 320.

Locke J., dissenting, would have dismissed the appeal on the ground that the application of the equitable principle in *Tulk* v. *Moxhay* (1848) 2 Phil. 774, not having been raised before Schroeder J., and the Court of Appeal having in the exercise of its discretion declined to consider the point on that ground, this Court should not interfere in a matter that was one of practice in the Ontario courts. As to the remaining points of law he agreed with the reasons of the Chief Justice of Ontario.

APPEAL from the judgment of the Court of Appeal for Ontario, (1), affirming the judgment of Schroeder J., (2), on a motion under s. 3 of *The Vendors and Purchasers Act*, R.S.O., 1937, c. 168.

J. J. Robinette K.C. and *W. B. Williston* for the appellant Noble.

J. Shirley Dennison K.C. and *Norman Borins K.C.* for the appellant Wolf.

K. G. Morden K.C. and *J. C. Osborne* for the respondents.

The judgment of Kerwin and Taschereau JJ. was delivered by:

KERWIN J.: This is an appeal against a judgment of the Court of Appeal for Ontario (1) affirming the judgment of Schroeder J. (2) on a motion under s. 3 of *The Vendors and Purchasers Act*, R.S.O. 1937, c. 168. That section, so far as relevant, provides that a vendor of real estate may apply in a summary way to the Supreme Court in respect of any requisition or objection arising out of, or connected with, a contract for the sale or purchase of land. The motion was made by the present appellant, Mrs. Noble, as the vendor under a contract for the sale by her to the purchaser, her co-appellant Bernard Wolf, of land forming part of a summer resort development known as the Beach O'Pines.

(1) [1949] O.R. 503.
(2) [1948] O.R. 579.

(1) [1949] O.R. 503.
(2) [1948] O.R. 579.

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NOBLE *et al* v. ALLEY

Kerwin J.

This land had been purchased in 1933 by Mrs. Noble from the Frank S. Salter Company, Limited, and in the deed from it to her appeared the following covenant:

> And the Grantee for himself his heirs, executors, administrators and assigns, covenants and agrees with the Grantor that he will carry out, comply with and observe, with the intent that they shall run with the lands and shall be binding upon himself, his heirs, executors, administrators and assigns, and shall be for the benefit of and enforcible by the Grantor and/or any other person or persons seized or possessed of any part or parts of the lands included in Beach O'Pines Development, the restrictions herein following, which said restrictions shall remain in full force and effect until the first day of August, 1962, and the Grantee for himself, his heirs, executors, administrators and assigns further covenants and agrees with the Grantor that he will exact the same covenants with respect to the said restrictions from any and all persons to whom he may in any manner whatsoever dispose of the said lands.
>
> * * *
>
> (*f*) The lands and premises herein described shall never be sold, assigned, transferred, leased, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention and purpose of the Grantor, to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the lands and premises herein described, to persons of the white or Caucasian race not excluded by this clause.

Although the deed was not signed by Mrs. Noble, I assume that she is bound to the same extent as if she had executed it.

Each conveyance by the Company to a purchaser of land in the development contained a covenant in the same form. The present respondents, being owners of other parcels of land in the development, were served with notice of the application either before Schroeder J. or the Court of Appeal, and they and their counsel affirmed the validity of the covenant, its binding effect upon Mrs. Noble, and that any of the respondents are able to take advantage of the covenant so as to prevent by injunction its breach. While before the judge of first instance the vendor and purchaser apparently took opposite sides, each of them appealed to the Court of Appeal and, there, as well as before this Court, attacked the contentions put forward on behalf of the respondents.

In the Courts below emphasis was laid upon the decision of Mackay J. in *Re Drummond Wren* (1), and it was considered that the motion was confined to the consideration

(1) [1945] O.R. 778.

of whether that case, if rightly decided, covered the situation. The motion was for an order declaring that the objection to the covenant made on behalf of the purchaser had been fully answered by the vendor and that the same did not constitute a valid objection to the title or for such further and other order as might seem just. The objection was:

> REQUIRED in view of the fact that the purchaser herein might be considered as being of the Jewish race or blood, we require a release from the restrictions imposed in the said clause (*f*) and an order declaring that the restrictive covenant set out in the said clause (*f*) is void and of no effect.

The answer by the vendor was that the decision in *Re Drummond Wren* applied to the facts of the present sale with the result that clause (f) was invalid and the vendor and purchaser were not bound to observe it. In view of the wide terms of the notice of motion, the application is not restricted and it may be determined by a point taken before the Court of Appeal and this Court, if not before Mr. Justice Schroeder.

That point depends upon the meaning of the rule laid down in *Tulk* v. *Moxhay* (1). This was a decision of the Lord Chancellor, Lord Cottenham, affirming a decision of the Master of the Rolls. The judgment of the Master of the Rolls appears in 18 L.J.N.S. (Equity) 83, and the judgment of the Lord Chancellor is more fully reported there than in Phillips' Reports. In the latter, the Lord Chancellor is reported as saying, page 777:

> That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed.

In the Law Journal, the following appears at p. 87:

> I have no doubt whatever upon the subject; in short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this Court ever since I have known it. That this Court has authority to enforce a contract, which the owner of one piece of land may have entered into with his neighbour, founded, of course, upon good consideration, and valuable consideration, that he will either use or abstain from using his land in any manner that the other party by the contract stipulates shall be followed by the party who enters into the covenant, appears to me the very foundation of the whole of this jurisdiction. It has never, that I know of, been disputed.

(1) (1848) 2 Phil. 774; 41 E.R. 1143.

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At p. 88 of the Law Journal, the Lord Chancellor states that the jurisdiction of the Court was not fettered by the question whether the covenant ran with the land or not but that the question was whether a party taking property, the vendor having stipulated in a manner, binding by the law and principles of the Court of Chancery to use it in a particular way will not be permitted to use it in a way diametrically opposite to that which the party has covenanted for. To the same effect is p. 778 of Phillips's.

In view of these statements I am unable to gain any elucidation of the extent of the equitable doctrine from decisions at law such as *Congleton* v. *Pattison* (1) and *Rogers* v. *Hosegood* (2). It is true that in the Court of Appeal, at p. 403, Collins L.J., after referring to extracts from the judgment of Sir George Jessel in *London & South Western Ry. Co.* v. *Gomm* (3), said at p. 405:

> These observations, which are just as applicable to the benefit reserved as to the burden imposed, shew that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land.

This, however, leaves untouched the problem as to when a covenant binds the land.

Whatever the precise delimitation in the rule in *Tulk* v. *Moxhay* may be, counsel were unable to refer us to any case where it was applied to a covenant restricting the alienation of land to persons other than those of a certain race. Mr. Denison did refer to three decisions in Ontario: *Essex Real Estate* v. *Holmes* (1); *Re Bryers and Morris* (2); *Re McDougall* v. *Waddell* (3); but he was quite correct in stating that they were of no assistance. The holding in the first was merely that the purchaser of the land there in question did not fall within a certain prohibition. In the second an inquiry was directed, without more. In the third, all that was decided was that the provisions of s. 1 of *The Racial Discrimination Act,* 1944, (*Ontario*), c. 51 would not be violated by a deed containing a covenant on the part of the purchaser that certain lands or any buildings erected thereon should not at any time

(1) (1808) 10 East 130.
(2) [1900] 2 Ch. 388.
(3) (1882) 20 Ch. D. 562.

(1) (1930) 37 O.W.N. 392.
(2) (1931) 40 O.W.N. 572.
(3) [1945] O.W.N. 272.

be sold to, let to or occupied by any person or persons other than Gentiles (non-semitic (sic)) of European or British or Irish or Scottish racial origin.

It was a forward step that the rigour of the common law should be softened by the doctrine expounded in *Tulk* v. *Moxhay* but it would be an unwarrantable extension of that doctrine to hold, from anything that was said in that case or in subsequent cases that the covenant here in question has any reference to the use, or abstension from use, of land. Even if decisions upon the common law could be prayed in aid, there are none that go to the extent claimed in the present case.

The appeal should be allowed with costs here and in the Court of Appeal. There should be no costs of the original motions in the Supreme Court of Ontario.

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

RAND J.:—Covenants enforceable under the rule of *Tulk* v. *Moxhay* (1), are properly conceived as running with the land in equity and, by reason of their enforceability, as constituting an equitable servitude or burden on the servient land. The essence of such an incident is that it should touch or concern the land as contradistinguished from a collateral effect. In that sense, it is a relation between parcels, annexed to them and, subject to the equitable rule of notice, passing with them both as to benefit and burden in transmissions by operation of law as well as by act of the parties.

But by its language, the covenant here is directed not to the land or to some mode of its use, but to transfer by act of the purchaser; its scope does not purport to extend to a transmission by law to a person within the banned class. If, for instance, the grantee married a member of that class, it is not suggested that the ordinary inheritance by a child of the union would be affected. Not only, then, it is not a covenant touching or concerning the land, but by its own terms it fails in annexation to the land. The respondent owners are, therefore, without any right against the proposed vendor.

(1) (1848) 11 Beav. 571; 50 E.R. 937.

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Rand J.

On its true interpretation, the covenant is a restraint on alienation. The grantor company which has disposed of all its holdings in the sub-division has admittedly ceased to carry on business and by force of the provisions of *The Companies' Act,* R.S.O. 1937, c. 251, s. 28 its powers have become forfeited; but by ss. (4) they may, on such conditions as may be exacted, be revived by the Lieutenant-Governor in Council. Assuming the grantor would otherwise be entitled to enforce the covenant in equity against the original covenantor—and if he would not the point falls—it becomes necessary to deal with the question whether for the purposes of specific performance the covenant is unenforceable for uncertainty.

It is in these words: (See clause (*f*) p—?

> The lands and premises herein described shall never be sold, assigned, transferred, leased, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention and purpose of the Grantor, to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the lands and premises herein described, to persons of white or Caucasian race not excluded by this clause.

If this language were in the form of a condition, the holding in *Clayton* v. *Ramsden* (1), would be conclusive against its sufficiency. In that case the House of Lords dealt with a condition in a devise by which the donee became divested if she should marry a person "not of Jewish parentage and of the Jewish faith" and held it void for uncertainty. I am unable to distinguish the defect in that language from what we have here: it is impossible to set such limits to the lines of race or blood as would enable a court to say in all cases whether a proposed purchaser is or is not within the ban. As put by Lord Cranworth in *Clavering* v. *Ellison* (1), at p. 289 the condition "must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding estate was to determine."

The effect of the covenant, if enforceable, would be to annex a partial inalienability as an equitable incident of the ownership, to nullify an area of proprietary powers.

(1) [1943] A.C. 320.

(1) (1859) 7 H.L.C. 707; 11 E.R. 282.

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Estey J.

In both cases there is the removal of part of the power to alienate; and I can see no ground of distinction between the certainty required in the one case and that of the other. The uncertainty is, then, fatal to the validity of the covenant before us as a defect of or objection to the title.

I would, therefore, allow the appeal and direct judgment to the effect that the covenant is not an objection to the title of the proposed vendor, with costs to the appellants in this Court and in the Court of Appeal.

ESTEY J.:—The appellants Noble as vendor and Wolf as purchaser were negotiating relative to a summer residence in an area known as the Beach O'Pines on Lake Huron. In the course thereof questions were raised as to the validity of clause (*f*) (hereinafter quoted) in the agreement under which the appellant Noble acquired the premises on the 16th of January, 1933, from the Frank S. Salter Company Limited. The appellant Noble, therefore, brought a motion under the *Vendors and Purchasers Act* (R.S.O. 1937 c. 168) for an order, *inter alia*, that the restrictive covenant (clause (*f*)) did not constitute a valid objection to the title. Mr. Justice Schroeder held the covenant to be valid and his judgment was affirmed by the Court of Appeal for Ontario.

The appellants contend this clause (*f*) is contrary to public policy, constitutes a restraint upon alienation and is void for uncertainty.

Clause (*f*) is a subparagraph in the following clause:

And the Grantee for himself, his heirs, executors, administrators and assigns, covenants and agrees with the Grantor that he will carry out, comply with and observe, with the intent that they shall run with the lands and shall be binding upon himself, his heirs, executors, administrators and assigns, and shall be for the benefit of and enforceable by the Grantor and/or any other person or persons seized or possessed of any part or parts of the lands included in Beach O'Pines Development, the restrictions herein following, which said restrictions shall remain in full force and effect until the first day of August, 1962, and the Grantee for himself, his heirs, executors, administrators and assigns further covenants and agrees with the Grantor that he will exact the same covenants with respect to the said restrictions from any and all persons to whom he may in any manner whatsoever dispose of the said lands.

* * *

(*f*) The lands and premises herein described shall never be sold, assigned, transferred, leased, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any

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person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the intention and purpose of the Grantor, to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the lands and premises herein described, to persons of the white or Caucasian race not excluded by this clause.

This restrictive covenant literally construed would prohibit any person possessing the slightest degree of race or blood specified purchasing any land in this area. So construed it would be necessary to determine whether it constituted such a substantial restraint upon alienation as to make the clause void "as being repugnant to the very conception of ownership." Cheshire's *Modern Real Property*, 5th Ed. p. 528.

It is, however, submitted that the parties never intended that the language should be so strictly construed. Once, however, another or more liberal construction be given the issue becomes one of what degree of race or blood would be permitted. As to what degree the contract is silent. A judge, therefore, called upon to determine this issue, finds in the contract no standard or other assistance that would constitute a basis upon which the issue might be determined. His position would be analogous to that of the Earl of Halsbury in *Murray* v. *Dunn* (1), where he stated:

> I confess I have been looking in vain for some definite guide as to what is suggested to be the real meaning. Both the learned counsel who have addressed your Lordships have, I think, failed to give any definite meaning to the words.

In *Sifton* v. *Sifton* (2), the testator provided for certain payments to be made to his daughter subject to a condition subsequent that "the payments to my said daughter shall be made only so long as she shall continue to reside in Canada." This was held to be void for uncertainty. It was agreed that the testator did not intend that his daughter should remain absolutely in Canada, but for what period and for what purpose she might remain outside of Canada could not be ascertained from the terms of the will.

In *Clayton* v. *Ramsden* (1), the testator bequeathed a pecuniary legacy and a share of the residue upon trust for his daughter subject to a condition subsequent that if his

(1) [1907] A.C. 283 at 290.
(2) [1938] 656.
(1) [1943] A.C. 320.

daughter "shall at any time after my death contract a marriage with a person who is not of Jewish parentage and of the Jewish faith then * * * all the * * * provisions * * * shall cease and determine * * *" Lord Romer, with whom Lord Atkin and Lord Thankerton agreed, was of the opinion that "Jewish parentage," as used in this will, meant of the Jewish race and that the condition subsequent was void for uncertainty. At p. 333 he stated:

> It seems far more probable that the testator meant no more than that the husband should be of Hebraic blood. But what degree of Hebraic blood would a permissible husband have to possess? Would it be sufficient if one only of his parents were of Hebraic blood? If not, would it be sufficient if both were? If not, would it be sufficient if, in addition, it were shown that one grandparent was of Hebraic blood or must it be shown that this was true of all his grandparents? Or must the husband trace his Hebraic blood still further back? These are questions to which no answer has been furnished by the testator. It was, therefore, impossible for the court to see from the beginning precisely or distinctly on the happening of what event it was that Mrs. Clayton's vested interests under the will were to determine, and the condition is void for uncertainty.

Lord Romer's decision is based upon *Clavering* v. *Ellison* (1), where at 725 Lord Cranworth stated:

> that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.

The foregoing are cases of conditions subsequent providing for the divesting of vested estates. It is contended that such precise and distinct language is not required in restrictive covenants. On the contrary, both upon principle and authority, the same clarity would appear to be essential.

Restrictive covenants constitute "an equity attached to land by the owner," Lord Cottenham in *Tulk* v. *Moxhay* (2); and in *Hall* v. *Ewin* (3), Lord Lindley states: "The principle of *Tulk* v. *Moxhay* * * * imposes a burden on the land * * *" This burden passes with the land against all but purchasers without notice thereof and parties interested are entitled to ascertain from the covenant the exact nature, character and extent of the restriction.

(1) (1859) 7 H.L. 707; 11 E.R. 282.
(2) (1848) 2 Phil. 774 at 779.
(3) (1887) 37 Ch. D. 74 at 81.

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Moreover, these covenants constituting a burden upon the land must, in general, interfere with the right of disposition thereof. Lord Dunedin, in speaking of a condition restricting land, and the same rule of construction would apply to a covenant, stated, in *Anderson* v. *Dickie* (1) at 227:

> Far earlier than this it had been held that all conditions restricting the use of land must be very clearly expressed, the presumption being always for freedom;

In *Murray* v. *Dunn* (2), a covenant, by way of a servitude, provided that "any building of an unseemly description" should not be erected upon the premises. Lord Kinnear in the First Division of the Court of Session for Scotland delivered a judgment which was approved of in the House of Lords. In the course of his judgment he stated that the bond of servitude "provides no standard for the specific application of the terms * * *" and at 287:

> So far as my opinion goes, I cannot say that it is unseemly; the utmost that can be said for the pursuers' case is that that is a matter of opinion, and if there may be a reasonable difference of opinion as to the specific application of the terms in which a servitude is expressed to the facts of a particular case, it is not a well-defined servitude.

In Brown—*Covenants Running with Land,* at p. 126, the author states:

> A restrictive covenant as to letting or user of property will be construed strictly; the Court will not extend it on the ground of presumed intention.

See also Jolly—*Restrictive Covenants Affecting Land,* at p. 77 and p. 79.

These authorities support the view that the language of a restrictive covenant must set forth clearly and distinctly the intent of the parties. The general language in clause (*f*), with great respect to those learned judges who hold a contrary view, fails to indicate the intention of the parties as to the amount or degree of the prohibited race or blood that might be permitted. It must, therefore, upon the authorities, be held void for uncertainty.

The appeal should be allowed with costs here and in the Court of Appeal. There should be no costs of original motion in the Supreme Court of Ontario.

(1) (1915) 84 L.J.P.C. 219. (2) [1907] A.C. 283.

LOCKE J. (dissenting):—The proceedings in this matter were initiated by an application made by the appellant Noble to the Supreme Court of Ontario under the provisions of *The Vendors and Purchasers Act* (R.S.O. 1937, c. 168) and *The Conveyancing and Law of Property Act* (R.S.O. 1937, c. 152) in the following circumstances. By deed dated January 10th. 1933, the Frank S. Salter Company Limited granted to the said appellant a plot of land situate in a summer resort known as Beach O'Pines in the Township of Bosanquet on the shores of Lake Huron, together with a right-of-way over certain lands described in a deed of land from that company to Beach O'Pines Club Limited, for the purpose of ingress and egress from and to the public highway and the water's edge of Lake Huron. By the conveyance it was recited, *inter alia,* that the grantee covenanted for herself, her heirs, executors, administrators and assigns to carry out, comply with and observe, with the intent that they should run with the lands and be binding upon her and upon them and be for the benefit of and enforcible by the grantor and any other persons seized or possessed of lands included in the Beach O'Pines Development, the restrictions thereafter recited which were to remain in force until August 1, 1962, and that she would exact the same covenants with respect to the said restrictions from any person to whom she might dispose of the lands of the various restrictions thereafter recited. The only one with which we are concerned is in a clause lettered (*f*) and provided that the lands should never be sold, rented or in any manner alienated to and never be occupied or used in any manner by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being the declared intention and purpose of the grantor to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the described lands, to persons of the white or Caucasian race. While Mrs. Noble apparently did not execute the conveyance she took possession under it and it is not contended on her behalf that if otherwise enforcible against her she is not bound by its terms.

By an offer to purchase dated April 19, 1948, the appellant Bernard Wolf offered to purchase the property from

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Mrs. Noble and while the fact was not proven it is apparently common ground that this offer was accepted in writing. The proposal stipulated that Wolf should be allowed twenty days from the date of its acceptance to investigate the title and if within that time he should present any valid objection to the title which the vendor should be unwilling or unable to remove, the agreement should terminate. Thereafter, by letter dated the 5th day of May, 1948, the solicitor for Wolf submitted the following requisitions to the solicitor for Mrs. Noble:

> Required in view of the fact that the purchaser herein might be considered as being of the Jewish race or blood, we require a release from the restrictions imposed in the said clause (*f*) and an order declaring that the restrictive covenant set out in the said clause (*f*) is void and of no effect.

Mrs. Noble's solicitor replied to that requisition by a letter dated May 6, 1948, stating:

> In our opinion the decision rendered in the case of *re Drummond Wren,* 1945 Ontario Reports p. 778 applies to the facts of the present sale, with the result that the clause (*f*) objected to is invalid and the vendor and purchaser are not bound to observe it.

In a letter written on the same date the purchaser replied insisting upon an order of the court being obtained in which it would be declared that the said restrictive covenant was "void and of no effect." These proceedings were then initiated by a notice of motion given on behalf of Mrs. Noble:

> for an order declaring that the objection to the restrictive covenant made in writing on behalf of the purchaser dated the 5th day of May, 1948, has been fully answered by the vendor and that the same does not constitute a valid objection to the title.

In view of the subsequent course of these proceedings it is of importance to consider the nature of the material filed on the application and the identity of the persons who were notified of the proceedings and took part in the argument. In support of the motion there was filed an affidavit of one of the solicitors for Mrs. Noble reciting the purchase of the property by her, the registration of the deed, the terms of the requisition made by the solicitor for Wolf, the terms of the subsequent correspondence, and stating that she had been advised by the solicitors from the Beach O'Pines Protective Association that if the sale to Wolf was to be concluded they were instructed to commence proceedings at once to enforce the restriction set out

in clause (*f*). On May 8, 1948, on the joint application of the parties MacKay J. directed that a copy of the notice of motion to be served on the Beach O'Pines Protective Association and upon the Frank S. Salter Company Limited at least ten days before the hearing of the application. This Association is apparently an unincorporated body formed by some 35 persons owning and occupying property in the Beach O'Pines Development who had associated themselves together for the purpose of improving the property and of safeguarding the rights, privileges and quiet enjoyment of their members. Apparently on its behalf an affidavit of one of its members, James Burgess Book, was filed stating, *inter alia,* that the community had been developed as a summer recreational area, that the improvements made by the Association and the congeniality of its members had to a large extent improved the value of the lands, and that unless the restrictions and conditions concerning the lands were enforced it was his opinion and that of the Committee of the Association that the character of the community would be changed, with the result that the desirability of the locality as a summer residence for the present owners would be lessened and the value of the lands depreciated. On behalf of Wolf an affidavit of one of his solicitors was filed stating that he had searched the file of the Frank S. Salter Company Limited in the office of the Provincial Secretary at Toronto, that the last named address of Salter was in Detroit and producing what was stated to be a true copy of a statutory declaration made by Salter, said to be filed with the Provincial Secretary dated April 1, 1937, in which it was said, *inter alia,* that the company had held no meeting of directors or shareholders during the past four years and that "by reason that the company has not used its corporate powers for three and a half consecutive years such powers have become forfeited under section 28 of the Companies Act." This apparently was intended to be proof of the facts stated in the copy of the declaration. In addition, there was an affidavit showing that all of the conveyances of lands in the development made by the Salter Company contained the same restrictive covenants and conditions as those in the deed to Noble.

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When the matter came before Mr. Justice Schroeder he considered that a representation order should be made and directed that the interests of other land owners interested but not represented should be represented by six named persons, presumably land holders in the development. Both Noble and Wolf were represented by counsel on the argument. It is clear from the reasons for judgment delivered by Schroeder J. that the only questions argued were that the restrictive covenant was unenforceable as being contrary to public policy, as being void for uncertainty and on the further ground that it was an unlawful attempt to restrain the alienation of property conveyed in fee simple. These issues were those which had been considered and decided by MacKay J. in the *Drummond Wren* case (1) and these Schroeder J. decided adversely to the contention of the vendor. When the matter came before the Court of Appeal other counsel represented Wolf and a further question of law was raised which had not theretofore been argued or considered. Stated briefly the point is that the covenant contained in clause (*f*) is neither a covenant which would run with the land and therefore bind Wolf or subsequent owners, nor did it create a negative easement binding upon him or subsequent purchasers from him, whether with or without notice of its existence. The equitable principle, the extent of which is to be decided if the question is before us, is that stated by Lord Cottenham in *Tulk* v. *Moxhay* (2). This question is entirely distinct from the three issues which were submitted for the opinion of Schroeder J. and the Chief Justice of Ontario with whom Aylesworth J.A. agreed, and Hogg J.A. declined to consider it. Henderson and Hope JJ.A. gave written reasons but did not refer to the point, directing their attention to the matters that had been raised before Schroeder J.: I would, however, assume that they also considered the matter should not be dealt with. As the matter comes before us a majority of the court at least, if not all of its members, have declined to consider this point of law upon which the opinion of the learned judge in chambers has not been obtained.

(1) [1945] O.R. 778.

(2) 18 L.J. N.S. Ch. 83; (848) 2 Phil. 774.

Speaking generally, it has not been the practice of this court to interfere with the decisions of courts of appeal in matters of their own procedure. In *Toronto Railway* v. *Balfour* (3), the court refused to interfere with a decision of the Court of Appeal for Ontario in a matter of procedure, Taschereau J. saying that the matter was but a question of practice and consequently one with which, in accordance with the jurisprudence, the court would not interfere and referring to *O'Donnell* v. *Beatty* (1); *Williams* v. *Leonard and Sons* (2), and *Price* v. *Fraser* (3). In *Finnie* v. *City of Montreal* (4), Girouard J. pointed out that in matters of mere procedure when no injustice is shown the court will not interfere with the action of the court below. See also *Laing* v. *Toronto General Trusts* (5). Where, however, a grave injustice has been inflicted upon a party to a suit the court has interfered for the purpose of granting the appropriate relief, though the question may be one of procedure only as in *Lamb* v. *Armstrong* (6), and *Eastern Townships Bank* v. *Swan* (7). The question as to whether a court of appeal should hear questions of law not raised in the court below frequently is a difficult one to determine. Some of the objections to permitting the practice are pointed out in the judgment of Lord Finlay L.C. in *Banbury* v. *Bank of Montreal* (8), at 661-2. In *S.S. "Tordenskjold"* v. *S.S. "Euphemia"* (9) at 163, Duff J. as he then was said:

> The principle upon which a Court of Appeal ought to act when a view of the facts of a case is presented before it which has not been suggested before is stated by Lord Herschell in *The "Tasmania"*, (10) at p. 225, thus:
>
> > My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinized. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
> >
> > It appears to me that under these circumstances a court of appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention,

(3) (1902) 32 Can. S.C.R. 239 at 243.
(1) 19 Can. S.C.R. 356.
(2) 26 Can. S.C.R. 406.
(3) 31 Can. S.C.R. 505.
(4) 32 Can. S.C.R. 335.
(5) [1941] S.C.R. 32.
(6) 27 Can. S.C.R. 309.
(7) 29 Can. S.C.R. 193.
(8) [1918] A.C. 627.
(9) 41 Can. S.C.R. 154.
(10) 15 App. Cas. 223.

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as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.

The settlement of the question involves the exercise of a discretion (*Banbury* v. *Bank of Montreal* (1),). It is, I think, of importance that when the matter was brought before the Court of Appeal, as noted in the judgment of the Chief Justice of Ontario, there was doubt as to whether the representation order made by Schroeder J. was authorized by the Rules of Court and that 37 additional interested parties were notified of the proceedings so that they might, if they wished, be heard. If under the practice the representation order was not properly made these persons were apparently not represented at the first hearing. Whether if the point now sought to be argued had been raised before Schroeder J. these persons or the six individuals who were then represented by Mr. Morden, K.C. would have considered that further evidence might be given which would affect the determination of the matter, I do not know and I must decline to speculate. The learned judges of the Court of Appeal for Ontario had exercised their discretion and declined to consider the matter and I think we should not interfere with their decision.

As to the remaining matters argued so fully before us, I agree with the learned Chief Justice of Ontario.

In my opinion this appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant (*Vendor*): *Carrothers, McMillan and Egener.*

Solicitors for the appellant (*Purchaser*): *Richmond and Richmond.*

Solicitors for the Respondents: *Day, Wilson, Kelly, Martin and Morden.*

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(1) [1918] A.C. 626.

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THE CANADIAN WHEAT BOARD (PLAINTIFF) ..... APPELLANT; *May 8, 9, 10, 11, 12 *Nov. 20

AND

HALLET AND CAREY LIMITED *et al* (DEFENDANTS) ..... RESPONDENTS;

AND

JEREMIAH J. NOLAN (DEFENDANT) RESPONDENT.

THE ATTORNEY GENERAL OF CANADA (DEFENDANT) ..... APPELLANT;

AND

JEREMIAH J. NOLAN (PLAINTIFF) .. RESPONDENT;

AND

HALLET AND CAREY LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law—National Emergency Transitional Powers Act, 1945, S. of C. 1945, c. 25—Order-in-Council under said Act, validity of—War Measures Act, R.S.C. 1927, c. 206.

P.C. 1292, adopted on April 3, 1947, by the Governor General in Council purporting to act under the powers conferred by the *National Emergency Transitional Powers Act*, 1945, after reciting that it was "necessary, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, for the purpose of maintaining, controlling and regulating supplies and prices to ensure economic stability and an orderly transition to conditions of peace", made provision for the vesting in the Canadian Wheat Board of all oats and barley in commercial positions in Canada, the closing out and termination of any open futures contracts relating to such grain and the prohibition of its export. The order also substituted for Part III of the Western Grain Regulations new Regulations which declared that all oats and barley in commercial positions in Canada, except such as were acquired by the owner from the Canadian Wheat Board or from the producers thereof on or after March 18, 1947, were thereby vested in the Board, which was directed to pay an amount equal to the maximum price at which these grains might have been sold on that date.

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

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Rinfret C.J.

On April 3, 1947, respondent Nolan had, in commercial positions in Canada, 40,000 bushels of barley, the warehouse receipts for which were held on his behalf by the respondents Hallet and Carey Limited.

Nolan declined to deliver his barley or the documents of title thereto to the Wheat Board and contended that the *National Emergency Transitional Powers Act,* 1945, did not authorize the Governor General in Council by enacting Part III of the Western Grain Regulations or otherwise to divest him of title to his barley. The trial judge and the Court of Appeal held that the order-in-council exceeded the powers conferred by the *Transitional Act.*

Held: (Affirming the judgment appealed from) Kerwin and Estey JJ. dissenting, that the provisions of P.C. 1292, dealing with the compulsory taking and vesting in the Canadian Wheat Board of all oats and barley in commercial positions in Canada and fixing the compensation to be paid therefor, were *ultra vires* of the Governor General in Council as not falling within the ambit of the powers conferred by s. 2 of the *National Emergency Transitional Powers Act,* 1945.

Apart from the fact that the power to appropriate property was not given in the *Transitional Act,* either in express terms or by plain implication from the language employed in s. 2, the omission of the provisions dealing with the subject contained in the *War Measures Act* from the *Transitional Act,* 1945, is a plain indication that it was not intended that the Governor in Council should be vested with any such power.

Chemicals reference [1943] S.C.R. 1; *Co-operative Committee on Japanese Canadians* v. *A.G. of Can* [1947] A.C. 87; *Western County Ry. Co.* v. *Windsor and Annapolis Ry. Co.* (1882) 7 A.C. 178 and *A.G.* v. *Horner* 14 Q.B.D. 245 and 11 A.C. 66 referred to.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) dismissing an appeal from two judgments of Williams C.J.K.B. holding that P.C. 1292, dated April 3, 1947, was *ultra vires* of the Governor General in Council.

F. P. Varcoe K.C., H. B. Monk K.C. and D. W. Mundell K.C. for the appellant.

W. P. Filmore K.C. for Hallet and Carey Ltd.

John A. Macaulay K.C., G. E. Tritschler K.C. and D. C. McGavin for Nolan.

THE CHIEF JUSTICE: I concur with my brothers Taschereau, Rand, Locke and Cartwright that this appeal should be dismissed with costs. As I agree substantially with the reasons delivered by them, I do not deem it

(1) 57 Man. R. 1.

necessary or advisable to state my reasons for coming to that conclusion as this would be merely a repetition of what they have already said to my satisfaction.

KERWIN J. (dissenting): These are appeals by the Canadian Wheat Board and the Attorney General of Canada from the judgments of the Court of Appeal for Manitoba (1) affirming judgments of the Chief Justice of the King's Bench in two separate actions dealing in substance with the same matter. While in the pleadings the question was raised that The *National Emergency Transitional Powers Act,* 1945, (hereafter called the statute) was *ultra vires* the Parliament of Canada, we were advised that the point was never argued in the King's Bench or in the Court of Appeal, and certainly no such contention was advanced before us. The matter may therefore be approached on the basis that the statute is *intra vires* and that the sole question is whether parts of Order in Council P.C. 1292, of April 3, 1947, were within the powers conferred upon the Governor in Council by the statute. The Courts below have answered that question in the negative.

The statute came into force January 1, 1946, and section 6 provides that on and after that date the war against Germany and Japan should, for the purposes of the *War Measures Act,* R.S.C. 1927, c. 206, be deemed no longer to exist. It was recognized, however, that chaos would result if all the measures adopted by the Governor in Council under the *War Measures Act* were abrogated and if no delegation of powers to that body were made. This is shown by the recital in the statute:

WHEREAS the War Measures Act provides that the Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war deem necessary or advisable for the security, defence, peace, order and welfare of Canada; And whereas during the national emergency arising by reason of the war against Germany and Japan measures have been adopted under the War Measures Act for the military requirements and security of Canada and the maintenance of economic stability; And whereas the national emergency arising out of the war has continued since the unconditional surrender of Germany and Japan and is still continuing; And whereas it is essential in the national interest that certain transitional powers continue to be exercisable by the Governor in Council during the continuation of the exceptional conditions brought about by the war and it is preferable that such tran-

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sitional powers be exercised hereafter under special authority in that behalf conferred by Parliament instead of being exercised under the War Measures Act; And whereas in the existing circumstances it may be necessary that certain acts and things done and authorized and certain orders and regulations made under the War Measures Act be continued in force and that it is essential that the Governor in Council be authorized to do and authorize such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance, in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency.

Subsection 1 of s. 2 provides:

2. (1) The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of

(*a*) providing for and maintaining the armed forces of Canada during the occupation of enemy territory and demobilization and providing for the rehabilitation of members thereof,

(*b*) facilitating the readjustment of industry and commerce to the requirements of the community in time of peace,

(*c*) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;

(*d*) assisting the relief of suffering and the restoration and distribution of essential supplies and services in any part of His Majesty's dominions or in foreign countries that are in grave distress as the result of the war; or

(*e*) continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war.

The important clauses are (*c*) and (*e*).

Jeremiah J. Nolan is a grain merchant residing in Chicago, Illinois, and is a citizen of the United States. Hallet and Carey Limited is a corporation duly incorporated under the laws of the Dominion of Canada and carries on the business of a grain merchant at Winnipeg, Manitoba. On or about July 31, 1943, that Company, as agents for Nolan, purchased 40,000 bushels of No. 3 C.W. Six-Row Barley and obtained warehouse receipts for it from various warehousemen in Port Arthur/Fort William, Ontario. From time to time, in accordance with a practice in the grain trade, the barley was loaned by Nolan but was returned to him each time, the last occasions being in December, 1946, and January, 1947. The warehouse receipts in existence at the relevant time are all dated in one or the other of these months.

Prior to January 1, 1946, the date of the coming into force of the statute, various steps had been taken to regulate the price and the export of barley, oats and wheat. While we are primarily concerned with barley, its position in the general economy of Canada cannot be isolated from that of the other two products or taken from its setting in the overall picture of Canadian life under the *War Measures Act* and under the statute. Under the former, the Wartime Prices and Trade Board was constituted, and that Board made regulations to provide safeguards under war conditions against any undue enhancement in the prices of food, fuel and other necessities of life and to insure an adequate supply and equitable distribution of such commodities. The Canadian Wheat Board had already been created by Parliament in 1935 and it was appointed an administrative agency under the Wartime Prices and Trade Board. On March 17, 1947, the Wheat Board issued "Instructions to Trade No. 59", addressed "To all Companies and Dealers in Oats and Barley". These instructions commenced: "In accordance with the new Government policy announced in Parliament March 17, 1947, regarding oats and barley (an outline of which is attached), the Board issues the following instructions effective midnight, March 17, 1947."

The outline of Government policy referred to in this statement and which as indicated was attached thereto, announced that the previous system of advance equalization payments would be discontinued and that the Wheat Board would stand ready to buy all oats and barley offered to it at new support prices, which in the case of barley would be based on 90c for One Feed Barley in place of the former support price of 56c in store Fort William/Port Arthur, and other grades at appropriate differentials to be fixed from time to time by the Wheat Board. The support prices would remain in effect until July 31, 1948. At the same time price ceilings for all grades would be raised, in the case of barley to 93c and in the case of oats to 65c basis in store Fort William/Port Arthur or Vancouver. These ceiling prices corresponded with the support prices for the highest grades of barley and oats. In order to avoid discrimination against producers who had already delivered

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barley during the current crop year, provision was made for an adjustment payment. By paragraph 4 of the outline of Government policy:

> 4. In order to avoid the fortuitous profits to commercial holders of oats and barley that would otherwise result from the action that has been described, handlers and dealers will be required to sell to the Wheat Board on the basis of existing ceilings of 64¾c. per bushel for barley and 51½c. per bushel for oats, all stocks in their possession at midnight tonight, March 17. Under certain conditions these stocks will be returned to the holder for resale. Allowances will be made for the purpose of taking care of such items as carrying charges in terminal positions, special selection premiums, etc., which are considered in the judgment of the Board fair and reasonable.

For the time being, because of the continuation of price ceilings on animal products, subsidies were provided for all oats and barley within the same conditions as a payment already authorized on wheat purchased for feed purposes, and it was stated that the payment of these subsidies would have the effect of leaving the cost of these feed grains to the feeder approximately at their present levels. The Wheat Board would become the sole exporter of oats and barley and any exports by the Board would be from grain acquired by it under the price support plan and the net profits therefrom would be paid into Equalization Accounts for the benefit of producers for distribution. It was pointed out that producers would have an additional return on their oats and barley, in addition to which they would continue to receive any net profits realized by the Board as an additional payment at the end of the season. On the other hand, feeders would be protected against any important increase in costs of the oats and barley.

Reverting now to the instructions to the trade, these followed the outline of Government policy in all important respects and, while it may be said that so far no authority for any action by the Wheat Board existed, this was remedied by the Order in Council 1292 passed April 3, 1947. It recited:

> WHEREAS it is necessary, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, for the purpose of maintaining, controlling and regulating supplies and prices to ensure economic stability and an orderly transition to conditions of peace, to make provision for
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> (*a*) the vesting in the Canadian Wheat Board of all oats and barley in commercial positions in Canada and products of oats and barley in Canada;

(b) the closing out and termination of any open futures contracts relating to oats or barley outstanding in any futures market in Canada; and

(c) the prohibition of the export of oats or barley by persons other than the Canadian Wheat Board until otherwise provided; and other matters incidental thereto as set forth in the Regulations set out below;

The Governor General in Council, under the powers conferred by the statute, amended the existing Western Grain Regulations by substituting a new Part III. While both oats and barley are dealt with by the Order in Council, it will be sufficient from this time on to refer particularly to barley. By the new Part III barley means barley grown in a designated area, and barley in commercial positions means barley which was not the property of the producer and was in store in warehouses, elevators or mills, etc. (It should be here interpolated that it is common ground that the barley in question in these actions came from a designated area as defined in an earlier part of the Western Grain Regulations and that it was in commercial positions). All barley in commercial positions, except such as was acquired by the owner from the Wheat Board or from the producer thereof, on or after March 18, 1947, was vested in the Wheat Board, which was directed to pay a person who was the owner at midnight on March 17, 1947, an amount equal to the previous maximum price, subject to adjustment and storage or handling charges, etc. Other provisions are included to take care of cases other than those similar to that of Nolan. The Board was directed to sell and dispose of all barley vested in it at such prices as it might consider reasonable. Net profits arising from such operations were to be paid into the Consolidated Revenue Fund.

While it is said on behalf of Nolan that there was no possibility of loss, the Order in Council provided that the Board should be reimbursed in respect of any net losses arising from its operations in respect of barley vested in it out of moneys provided by Parliament. Additional clauses provided that there should be no export of barley except by the Wheat Board or with its permission.

Nolan was directed to deliver his barley and the documents of title thereto to the Wheat Board but declined, and the two actions followed.

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Since the Governor in Council deemed it necessary or advisable by reason of the continued existence of the national emergency arising out of the war against Germany and Japan to promulgate P.C. 1292, for the purpose of maintaining, controlling and regulating supplies (s. 2, subsection 1(*c*) of the statute) and for the purpose of continuing or discontinuing in an orderly manner as the emergency permits, measures adopted during and by reason of the war (s. 2, subsection 1(*e*) of the statute), I am of opinion that looking only at the statute, the powers conferred by subsection 1 of s. 2 were sufficient to authorize what was done. Taking the words in their ordinary and natural meaning, they include a power to appropriate barley (*inter alia*) and pay the price fixed by the Governor in Council. The action taken was in the opinion of the Governor in Council, necessary or advisable and it is not for the judiciary to question that decision; *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (1); *Co-operative Committee on Japanese Canadians* v. *Attorney General of Canada* (2).

But it is said that a power to appropriate and fix compensation could never have been contemplated by Parliament if one looks at the provisions of the *War Measures Act,* which had been superseded by the statute. Under s. 3 of the former appears clause (*f*) "Appropriation, control, forfeiture and disposition of property and of the use thereof"; and by s. 7, whenever any property or the use thereof has been appropriated and compensation is to be made therefor and has not been agreed upon, the claim is to be referred by the Minister of Justice to a named Court or a judge thereof. It was pointed out that in the *Chemicals Reference* (3), it was decided that paragraph 4 of the Order in Council there under consideration was in conflict with section 7 of the *War Measures Act* as it provided for a method of fixing compensation other than that specified in section 7.

That was an entirely different case. In the statute here under consideration, the recital states that it is essential that the Governor in Council be authorized to do and

(1) [1923] A.C. 695.
(2) [1947] A.C. 87.
(3) [1943] S.C.R. 1.

authorize such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency. In view of this, I find it impossible to read the words of subsection 1 of s. 2 and particularly clauses (*c*) and (*e*) as withholding from the Governor in Council the power to appropriate barley and pay the price fixed by him. The fortuitous profits envisaged by the Government policy actually emerged in Nolan's case and the means adopted to capture them were within the powers conferred by the statute.

The appeals should be allowed and the judgments of the Court of Appeal and King's Bench set aside. Under an order of December 7, 1948, the barley was sold and the proceeds paid into Court. By another order of February 1, 1949, there were paid out of these proceeds the charges of the warehousemen, parties to the action brought by the Wheat Board, which warehousemen were by the same order, on consent dropped from the proceedings. According to the orders of the Court of Appeal of March 10, 1949, disposing of the appeals in the two actions, there was in Court the sum of $38,454.70 and accrued interest. Of this amount Nolan would be entitled, at the most, to $25,900 (being 64¾c per bushel for 40,000 bushels of barley), and accrued interest from the date of the payment into Court. The Wheat Board is entitled to the balance with accrued interest.

The action by Nolan against Hallet and Carey Limited is dismissed with costs, payable by him to the Company. Upon motion by the Attorney General of Canada, he was added as a party defendant in that action by an order of the Chief Justice of the King's Bench, dated October 15, 1948, and was thereby ordered to pay the costs of the other parties of and incidental to the motion. The Attorney General is entitled to his costs since that date as against Nolan, including the costs of the appeals to the Court of Appeal and to this Court. Since Hallet and Carey Limited were acting as agents for Nolan, they are entitled to their costs of those appeals against him.

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The Wheat Board is entitled as against Nolan to its costs of its action against him and Hallet and Carey Limited and of the appeals to the Court of Appeal and this Court. Hallet and Carey Limited are entitled as against Nolan to their costs of that action and of the appeals to the Court of Appeal and to this Court. They are also entitled as against Nolan to the amounts proper to be paid them by him for interest and storage.

All of the appropriate costs above referred to shall be taxed without regard to the limit fixed by s. 31 of the *Manitoba Court of Appeal Act* or by King's Bench Rule No. 630. All the costs and the interest and storage charges directed to be paid by Nolan may be paid out of his share of the money in Court. If there is any difficulty in working out the order, the matter may be spoken to.

TASCHEREAU J.:—The main question that has to be decided, and which is sufficient to dispose of these two appeals, may be briefly stated as follows: "Does P.C. 1292 of April 3, 1947, fall within the ambit of the powers conferred by Section 2(1) (*c*) of the *National Emergency Transitional Powers Act?* (9-10 Geo. VI c. 25)."

This Order-in-Council made provision for the vesting in the Canadian Wheat Board of all oats and barley in commercial positions in Canada, and determined what compensation the Board should pay to the owners. The relevant section of the *National Emergency Transitional Powers Act*, which it is submitted on behalf of the appellant, purports to give the necessary powers to the Governor in Council to enact P.C. 1292, reads as follows:

> 2. (1) The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable *for the purpose of*
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> (*c*) *maintaining, controlling* and *regulating* supplies and services, *prices,* transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;

The validity of the *National Emergency Transitional Powers Act* has not been challenged before this Court, but it is submitted that the words *"maintain", "control"* and

"regulate", are not wide enough to authorize the compulsory transfer of property to the Wheat Board, and the *ex parte* fixing of compensation to be paid.

There can be no doubt that under the *War Measures Act*, which ceased to be in force in Canada on the 1st of January, 1946, much wider powers were conferred upon the Governor in Council. For instance, section 3(*f*) of the *War Measures Act* read as follows:

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

The power to *appropriate* and *dispose of property* was clearly given to the Governor in Council, and it was further provided in section 7 of the *Act* that:

> 7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court. 1914 (2nd session), c. 2, s. 7.

It is because this clause was in conflict with section 4 of the Order-in-Council, authorizing the controller of chemicals in certain cases to determine the compensation payable for chemicals of which he had taken possession, that it was held by this Court, that such a power could not be exercised. (*In Re Chemicals* (1)).

These powers to appropriate property which were given to the Governor in Council by the *War Measures Act*, have been *deleted* from the *National Emergency Transitional Powers Act*, and I think that it is fair to assume that it was the clear intention of Parliament, that such powers would not exist in the future. The *National Emergency Transitional Powers Act* is to my mind without doubt a clear curtailment of the powers that the Governor in Council could validly exercise during the war under the

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

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War Measures Act. As Estey J. said in the *Japanese Reference* (1), in regard to the *Transitional Powers Act*:

> Parliament did recognize that the intensity and magnitude of the emergency had changed and diminished, and under the provisions of this Act curtailed the extensive powers exercised by the Governor in Council under the War Measures Act.

This statement is quite in harmony with the preamble of the *Act* which, by section 14 of the *Interpretation Act* (R.S.C. 1927, c. 1), is deemed a part of the Act, intended to assist in explaining the purport and object of the Act. The preamble states that it is essential in the national interest that *certain* transitional powers continue to be exercisable by the Governor in Council; that in the existing circumstances certain orders and regulations made under the *War Measures Act* be *continued* in force, and that it is also essential that the Governor in Council be authorized to do and authorize such further acts and things and *make such further orders and regulations* as he may deem necessary or advisable by reason of the emergency *and for the purpose of the discontinuance, in an orderly manner as the emergency permits,* of measures adopted during and by reason of the emergency. Section 2(1) (*c*) above quoted, which authorizes the Governor General to make from time to time orders and regulations as he may deem necessary or advisable, for the purpose of *maintaining, controlling,* and *regulating* prices to ensure economic stability and an orderly *transition to conditions of peace,* show as well as the preamble, the clear intention of Parliament to curtail the extensive powers that the Governor General in Council exercised during the war under the *War Measures Act.*

Furthermore, the *War Measures Act* gave general powers to pass regulations deemed necessary or advisable, *"for the security, defence, peace, order and welfare of Canada"*; and *"for greater certainty, but not so as to restrict the generality of the foregoing terms"*, it is declared that the powers of the Governor in Council shall extend to certain matters specifically enumerated, among which the *appropriation* and *forfeiture* of *property.* Despite the generality of the terms of the *War Measures Act,* Parliament thought it necessary to deal specifically with appropriation and forfeiture of property. The *National Emergency Transitional*

(1) [1946] S.C.R. 248.

Powers Act does not contain the words "for the security, defence, peace, order and welfare of Canada" nor "for greater certainty, but not so as to restrict the generality of the foregoing terms", so that it seems clear that the powers of the Governor General are limited to subsections *(a)*, *(b)*, (*c*) and (*d*) of section 2. The *National Emergency Transitional Powers Act* is enacted for five purposes and it is consequently in one of these purposes that the power to appropriate and fix compensation must be found.

I cannot find in this section 2 any words, general or specific, that can lead me to the conclusion that *maintain, control* and *regulate,* include compulsory taking and fixing the compensation to be paid. If it had been the intention of Parliament to give such a wide power to the Governor General in Council, this power would have been specifically mentioned, as it has been in the *War Measures Act,* or it would be found in the opening words of the section. It would surely not have been deleted as it has been in the statute now under consideration.

The *War Measures Act* is a general Act but the new *Act* is limited in its purposes, and cannot be extended. As Chief Justice Sir Charles Fitzpatrick said in the *Gray* case (1):

> Parliament cannot indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the Executive Government. Such powers must necessarily be subject to the termination at any time by Parliament, and needless to say the acts of the Executive, under its delegated authority, *must fall within the ambit of the legislative pronouncement* by which its authority is measured.

I have therefore reached the conclusion that under the guise of maintaining, controlling and regulating prices, the Governor General in Council cannot compulsorily appropriate property and arbitrarily fix the compensation to be paid. The exercise of such powers would be beyond the authority conferred by statute.

For these reasons, I think that the provisions of P.C. 1292, dealing with the compulsory taking and vesting in the Canadian Wheat Board of all oats and barley in commercial positions in Canada, and fixing the compensation to be paid, are *ultra vires* of the Governor in Council.

I would dismiss the appeal with costs.

(1) (1918) 57 Can. S.C.R. 150 at 157.

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Rand J.

RAND J.:—This appeal challenges the power of the Dominion Government by order-in-council under the *Transitional Powers Act* of 1945 to appropriate barley in commercial elevator storage or in transit at Fort William and western points on March 17, 1947 not owned by producers or by malsters or manufacturers of pot and pearl barley at the then existing controlled price of 64¾c a bushel. On the following day, March 18, the price was raised to 93c and in October of the same year the control was removed. The open price in the United States during this period was considerably higher than in this country, and upon the release in October the price on the Grain Exchange at Winnipeg led off at over $1.20. The barley here in question was sold in October, 1948, at the price of $1.24. Although by the order-in-council all barley vested in the Wheat Board, the latter offered it back to the former owners at the new price of 93c, and in all cases apparently except that of the respondent the offer was accepted. The result of this was that the increase permitted by the operation of the control was appropriated by the Government, leaving the benefit of any subsequent uncontrolled increase, such as actually took place in October, 1947, to the owner.

The *Transitional Powers Act* retained to the Governor in Council certain of the powers exercised under the *War Measures Act;* the latter, subject to such limitations as are contained in the *Act* itself and in the *British North America Act,* and except such acts as could not be deemed by the Governor in Council in good faith to be relevant to war, cover virtually the entire legislative field of both the Dominion and the Provinces. The reason is obvious: the political and social existence of the country is at stake; that interest rises above all distribution of legislative jurisdiction, and the fundamental duty of preservation is cast upon Parliament, by which those powers have been entrusted to the Executive.

Under the *War Measures Act,* the purposes of the powers granted were the "security, defence, peace, order and welfare of Canada" including trade, production, and the appropriation, control, forfeiture and disposition of property and the use of it; and the acts, things, orders and regulations authorized to be done or made were such as

the Governor in Council should deem "necessary or advisable" to effect those ends. The corresponding objects of the *Transitional Powers Act* were specifically enumerated, and those relevant to this controversy are:

> (c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;
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> * * *
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> (e) continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war;

and the Governor in Council was empowered likewise to do whatever, for such purposes, he deemed "necessary or advisable."

The aftermath of war presents abnormal conditions which similarly are of national interest and concern and which likewise transcend the ordinary plane of legislation; but they are of lessened scope and somewhat changed in character. Parliament, therefore, passed the Act of 1945 as a truncated War Measures Act in which the jurisdiction enjoyed by the Executive under the former Act was reduced. As these continued powers are in the nature of a residue from the previous investment, we may properly look at both statutes to ascertain precisely the extent of authority continued.

The appropriation of property of individuals was specifically mentioned as a power conferred in item (*f*) of section 3 of the *War Measures Act;* and section 7, in the absence of agreement, submits the ascertainment of compensation to the courts.

It is significant, then, that neither the latter provision nor mention of appropriation or forfeiture appears in the later statute: and neither, in the same sense, can, in my opinion, be implied. There is also the specific mention of the "use and occupation of property" as distinguished from the "appropriation, control, forfeiture and disposition" of property. I find no evidence of an intention to enlarge any power continued beyond its scope under the former statute, and it would be inconsistent with the declared purpose of Parliament to imply in the continued authority what was express in the original enactment.

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The appropriation of property for which the statutory compensation was provided means, I think, the absolute appropriation of the beneficial interest, for objects of the Government with which the individual has no private concern. But appropriation as a device for effecting an object validly incidental to price control presents a different question.

The object here, specifically set forth in the instructions to the trade issued by the Wheat Board on April 7, 1947 and by the declaration of Government policy in Parliament, was to capture the profit "fortuitously", as it was stated, resulting from the increase of price directly effected by the order. The appropriation or limitation of profit so arising was not a new incident in fact in price control; the requirement that authorized increases in price should not apply to existing stocks was a matter of common knowledge; the method followed here had been authorized by order-in-council No. P.C. 3223 in force from 1939 to at least 1947, in relation to sugar; order-in-council No. P.C. 7942, issued October 12, 1943 brought about a regulation of wheat of the most drastic sort: except with the permission of the Wheat Board, no person could buy wheat from a producer for resale; the Board could require any person to offer wheat owned by him for sale to any other person on terms prescribed by the Board; all futures contracts were voided; and any surplus resulting from the exclusive dealings in this grain by the Board went into the Consolidated Revenue Fund. These measures were well known to Parliament. The function of neither the Wheat Board nor the Sugar Controller was to acquire property as an immediate object in itself; it was to administer the commodity in the broadest sense as part of the total regulation of the country's economy in which equality of incidence was a working principle; and the decision of the Government that control of or elimination of other than actual service profit, as distinguished from capital profit, was "necessary or advisable," and the selection of the mode by which that was to be effected, as for instance by way of a charge, possessory or not, were, I think, clearly within the powers of price control committed to it under the *War Measures Act*: *The Japanese Reference* (1).

(1) [1947] A.C. 87.

Price control was continued under the Transitional Act in the broadest terms; and as the subsidiary object of profit limitation was a recognized measure in the total regulation, and the device of vesting title a known means of accomplishing it, in the absence of some indication to the contrary in the Transitional Act both should be taken to be continued: to change principles in bringing controls to a conclusion would give legitimate grounds for protest from those to whom they had been applied in the heat of the day. What, then, is the effect upon either or both of them of the omissions in the Transitional Act of the powers mentioned?

As a striking illustration of a circumstance frequently met, the conclusion on that question depends upon the extent to which the background facts are taken into account. If we look at the acquisition of the grain as an isolated act, detached from its context, it does seem to bear the countenance of a despotic exercise of power over which individualists may wax lyrical and which Parliament cannot be taken to have intended to confer; but if we envisage it in the body of the economic life of Canada, regulated in varying degrees from 1939 to the present time, the transaction becomes in reality a minor item of a vast, complex and consistent administration, of which, as observed, the operative principles incorporated in the earlier stages ought to be, and certainly could be, carried through to the end. It was under that control that Nolan was able to buy the barley in 1943 at the price he did; and who can say what the conditions in the trade would have been without it? What is complained against is the law of Parliament and the policy of government; but to the total interests of the Dominion in such an emergency and its aftermath that of the individual must be subordinated: and so long as he is dealt with on the basis of a rationally justifiable principle, he has no ground to object on moral, much less, legal considerations.

Set against the price increase and the appropriation of profit, and as elements in the body of regulation, were the increase of 10c in the subsidy to producers and the subsidy of 25c to stock owners of feed in the East. That producers and consumers should be specially dealt with, even at the

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expense, by restriction, of the respondent's normal activity of profit making, was obviously a matter of governmental policy; and it would be out of the question for any court, except at least in a case of demonstrated bad faith, to attempt to substitute its judgment for that of the Executive. For that reason I get no assistance from the evidence led to show the conditions of the barley trade: those conditions were only a part of the wider objects and concerns of the Government. When Parliament enables the Executive to take such measures for the purposes mentioned as it may "deem necessary or advisable," an endowment of legislative power which is here admitted to be valid, it will require more convincing reasons than have been addressed to us to satisfy me that the Government, in so acting, has exceeded the authority conferred upon it or has been guilty of misrepresenting its purpose.

The capture of the so-called profit, was, in my opinion, a legitimate measure in price control; but whether it could be achieved by the device of appropriating title is a question which I find unnecessary to answer because I am unable to construe the appropriation under the order-in-council to be limited to that purpose. The position of the Crown is that title was taken absolutely and that there was no obligation on the Crown to do more than to pay the maximum price then established, 64¾c a bushel: such a step is not, in my opinion, authorized by the *Transitional Act* and was *ultra vires* of the Governor in Council.

I would, therefore, dismiss the appeal with costs.

ESTEY J. (dissenting):—The Canadian Wheat Board claims 40,000 bushels of barley and the warehouse receipts covering same by virtue of para. 22 of Part III of the Western Grain Regulations as enacted by Order-in-Council P.C. 1292 passed the third day of April, 1947, pursuant to the provisions of the *National Emergency Transitional Powers Act*, 1945 (S. of C. 1945, c. 25). Para. 22 reads as follows:

22. All oats and barley in commercial positions in Canada, except such oats and barley as were acquired by the owner thereof from the Canadian Wheat Board or from the producers thereof on or after the eighteenth day of March, nineteen hundred and forty-seven, are hereby vested in the Canadian Wheat Board.

The issue in this appeal turns upon the respondent's contention that this paragraph is invalid because Parliament, under the *N.E.T.P. Act,* 1945, did not confer powers upon the Governor in Council to enact it.

The barley in question was the property of J. J. Nolan. On July 31, 1943, Hallet & Carey Ltd., acting as agents for J. J. Nolan, purchased 40,000 bushels of barley and obtained the warehouse receipts covering same. Nolan never disposed of this 40,000 bushels of barley and as owner held it under warehouse receipts on April 3, 1947.

The price of barley, along with other commodities under the circumstances of the war, was fixed on November 1, 1941. Thereafter floor and ceiling prices were fixed and export prohibited except by permit. On March 17, 1947, the Government announced in Parliament certain changes in its policy with respect to oats and barley. On the same date and pursuant to that policy the Canadian Wheat Board issued Instructions to Trade No. 59 and attached thereto a copy of the statement of policy. These instructions and the attached statement of policy were sent to all members of the trade.

The relevant portions of these instructions are that they became effective midnight March 17, 1947; advance equalization payments were discontinued; support prices were fixed on the basis of No. 1 feed Canada Western barley 90c per bushel, basis Fort William; the maximum price of barley grown in Western Canada was raised to 93c per bushel, basis Fort William; and the export of barley was prohibited except by the Canadian Wheat Board. It also provided for an adjustment payment of 10c per bushel on barley delivered and sold between August 1, 1946, and March 17, 1947, to producers within the "designated area" (briefly defined as western grain growing areas). In para. 5 of these instructions it was provided:

> All western oats and barley in commercial channels in Canada as at midnight March 17, 1947, must be sold to the Canadian Wheat Board basis 51½c per bushel for all grades of oats and 64¾c per bushel for all grades of barley in store Fort William/Port Arthur or Vancouver.

In the foregoing para. 5 the phrase "commercial channels" is used, while in Order-in-Council P.C. 1292, para. 22, the phrase "commercial positions" is used. Nothing turns

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upon this difference in terminology and both may be briefly defined as oats and barley not the property of the producer in storage or transit (Part III, sec. 21(*c*) Western Grain Regulations as enacted by Order-in-Council P.C. 1292).

The policy announced by the Government contained the following:

> In order to avoid the fortuitous profits to commercial holders of oats and barley that would otherwise result from the action that has been described, handlers and dealers will be required to sell to the Wheat Board on the basis of existing ceilings of 64¾c per bushel for barley and 51½c per bushel for oats, all stocks in their possession at midnight tonight, March 17. Under certain conditions these stocks will be returned to the holder for resale. Allowances will be made for the purpose of taking care of such items as carrying charges in terminal positions, special selection premiums, etc. which are considered in the judgment of the Board fair and reasonable.

and it further stated:

> the Government to continue to pay freight on grain for feeding purposes and millfeeds shipped East from Fort William/Port Arthur and West from Calgary and Edmonton into British Columbia until July 31, 1948.

The essentials relative to this discussion are that the maximum price was raised to 93c per bushel, except that the price of barley in commercial positions would remain at 64¾c per bushel and must be sold to the Wheat Board; that, though the price was increased to the producer by appropriate subsidies, those purchasing barley for feeding purposes were "protected against any important increase in costs . . . of barley."

Instructions to Trade No. 59 were generally ignored by holders of oats and barley in commercial positions with the result that oats and barley so held remained in commercial positions and unsold, while the authorities believed that at least a very large portion thereof was necessary for feeding purposes and, therefore, should have been made available in the market.

In these circumstances the Governor in Council was fully justified in taking such steps as he deemed necessary or advisable within the limits of the powers conferred upon him by the *N.E.T.P. Act*, 1945. He deemed it necessary or advisable to enact Order-in-Council P.C. 1292 under sec. 2(1) of the latter *Act*.

> 2. (1) The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations,

as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of

* * *

(c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;

The preamble of the *N.E.T.P. Act*, 1945 recites that the *War Measures Act* provided wide powers to be exercised by the Governor in Council by reason of the existence of the war; that the national emergency arising out of the war still continues and that certain transitional powers should, in the national interest, be continued in the Governor in Council and that "it is preferable that such transitional powers be exercised hereafter under special authority," then, after reciting that certain orders and regulations made under the *War Measures Act* should be continued, it recites:

that it is essential that the Governor in Council be authorized to do and authorize such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance, in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency.

The opening words of sec. 2(1) of the *N.E.T.P. Act* above quoted are identical with the opening words of sec. 3 of the *War Measures Act* and read:

The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of . . .

The foregoing provision was described by Anglin J. (later C.J.) in a judgment concurred in by Sir Charles Fitzpatrick C.J. and Sir Louis Davis J. (later C.J.): "More comprehensive language it would be difficult to find." (*In Re Gray* (1)). In the same case Duff J. (later C.J.) at 166 stated:

The words . . . . . are comprehensive enough to confer authority for the duration of the war to make orders and regulations covering any subject falling within the legislative jurisdiction of Parliament, subject only to the condition that the Governor in Council shall deem such orders and regulations to be, by reason of the existence of real or apprehended war, ... advisable.

(1) (1918) 57 Can. S.C.R. 150. at 178.

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In the *Chemicals Reference* (1) Rinfret J. (now C.J.) at p. 17 stated:

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

The foregoing emphasizes the very wide and comprehensive powers conferred upon the Governor in Council by sec. 3 of the *War Measures Act*. In determining the intent of Parliament in re-enacting the identical language in sec. 2 of the *N.E.T.P. Act*, 1945 regard must be had for the provisions of sec. 21(4) of the *Interpretation Act* (R.S.C. 1927, c. 1):

> 21. 4. Parliament shall not, by re-enacting any Act or enactment, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language.

At common law the re-enactment of a legislative provision already judicially construed raised a presumption that the Legislature adopted that judicial construction. Broom's Legal Maxims, p. 395. The enactment of sec. 21(4) did away with that presumption. Thereafter the identical provision, when re-enacted, remained to be construed by the courts without the assistance of the presumption. Even without that presumption, however, the courts have shown a disposition to conclude that Parliament, having re-enacted the words with knowledge of the judicial construction, in fact, intended that such should be adopted. In *The Canadian Pacific Railway* v. *Albin* (2), sec. 155 of the *Railway Act* (R.S.C. 1906, c. 37) was under consideration. That section, in identical language, was first enacted by Parliament as sec. 92 of the Statute of 1888, had been re-enacted in 1903 and continued in the revision of 1906. Mr. Justice Anglin (later C.J.), with whom the Chief Justice and Mr. Justice Mignault agreed, after pointing out that sec. 21(4) of the *Interpretation Act* has been in force since 1890 (53 Vict., c. 7, sec. 1), continued:

> We cannot assume that the Dominion Legislature when they re-enacted the clause verbatim (in 1903 and again in 1906) were in ignorance of the judicial interpretation which it had received. It must on the

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

(2) (1919) 59 Can. S.C.R. 151.

contrary be assumed that they understood that (s. 92 of the Act of 1888) must have been acted upon in the light of that interpretation. *Casgrain* v. *Atlantic and North West Ry. Co.* (1), at page 300. It is unreasonable to suppose that if Parliament were not satisfied that its intention had been thereby given effect to it would have re-enacted the section in the same terms.

In *Rex* v. *Adkin* (1), Chief Justice Sloan, with whom Smith J.A. agreed, stated, in construing sec. 750(*a*) of the *Criminal Code* at p. 1025:

> However, it seems to me it is a fair inference notwithstanding said sec. 21(4) that if the construction put upon sec. 750(*a*) by the cases decided prior to 1938 was contrary to the intention of Parliament apt language would have been used in the 1938 re-enactment of the section to effectuate its original purpose.

Both the *War Measures Act* and the *N.E.T.P. Act*, 1945 were enacted to deal with an emergency. That provided for in the *War Measures Act* is "the existence of real or apprehended war . . .," while under the *N.E.T.P. Act*, 1945 it is "the continued existence of the national emergency arising out of the war." The latter was never an emergency so wide or great in its scope.

It is not suggested that under the *War Measures Act* the Governor in Council did not possess by virtue of the identical language legislative power to appropriate or vest commodities. It is, however, contended that though Parliament adopted this identical language, it has evidenced an intention that it should not be construed to the same effect. The provisions of the Statute do not appear to support such a contention. That Parliament recognized the narrower or more restricted scope of the emergency and the possibility of its continuing to diminish is very evident. In these circumstances what Parliament did was to restrict the exercise of the powers conferred upon the Governor in Council to matters specified under sub-paragraphs (*a*) to (*e*) inclusive of sec. 2. Parliament, however, could not anticipate all the circumstances with regard to which legislative measures might be necessary to effect the ends and purposes specified in these sub-paragraphs and, therefore, conferred upon the Governor in Council the same wide and comprehensive powers for the attain-

(1) [1948] 2 W.W.R. 1023.

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ment of these specific purposes as it had conferred upon the Governor in Council for the attainment of the more general purposes set out in the *War Measures Act*.

It is particularly contended that the omission of any specified method for the determination of compensation for appropriated or vested property as was contained in sec. 7 of the *War Measures Act* discloses an intention on the part of Parliament that the Governor in Council should not possess the power to appropriate or vest. That Parliament did realize the necessity for appropriation of property on any such scale as during hostilities no longer existed must be conceded. Parliament does not, however, evidence any intention that it might not be sometimes necessary in dealing with the more restricted fields. The mere omission of such a provision is not sufficient to support a conclusion that Parliament intended the identical language so long and so recently construed to include appropriation should here be differently construed and does not rebut the *prima facie* intention that Parliament intended that the same construction should be adopted. Indeed it may well be that Parliament did not carry forward into the *N.E.T.P. Act* any such provision as in sec. 7 of the *War Measures Act* in order that the very difficulty encountered in the *Chemicals Reference* (*supra*) might be avoided. There an Order-in-Council specifying the method of determining compensation was declared to be contrary to sec. 7 of the *War Measures Act* and, therefore, invalid as beyond the powers conferred upon the Governor in Council. Without such a provision the Governor in Council might provide for the determination of compensation in any manner that he might deem appropriate to the particular circumstances he was called upon to deal with. That is, in effect, the position which now exists under the *N.E.T.P. Act*. In this particular case there was no question of compensation. The Wartime Prices and Trade Board had fixed it and there was no suggestion that that price should not be paid.

The appeal should be allowed, the action of the plaintiff Nolan should be dismissed with costs throughout and the action of the Canadian Wheat Board allowed throughout

with costs and judgment directed that the Canadian Wheat Board is entitled to the barley in question and to the documents of title in respect to same.

LOCKE J.:—On April 3, 1947, the respondent Nolan was the owner of 40,000 bushels of No. 3 C.W. Six Row Barley which was then in store with various warehousemen at the head of the Lakes and in respect of which they had issued their warehouse receipts. These were then held by the respondents Hallet and Carey, Limited, on his behalf.

On that date His Excellency the Governor General in Council, assuming to act under the powers conferred by the *National Emergency Transitional Powers Act,* adopted Order-in-Council P.C. 1292 which recited that by reason of the continued existence of the national emergency arising out of the war against Germany and Japan "for the purpose of maintaining, controlling and regulating supplies and prices, to ensure economic stability and an orderly transition to conditions of peace" it was necessary, *inter alia,* to make provision for the vesting in the Canadian Wheat Board of all oats and barley in commercial positions in Canada, the closing out and termination of any open futures contracts relating to such grain outstanding in any futures market in Canada and the prohibition of its export. By this Order Part III of the Western Grain Regulations which had been put into effect by P.C. 3222 of July 31, 1946, was revoked and new Regulations substituted which, in so far as they are relevant to the first question to be considered, declared that all oats and barley in commercial positions in Canada, except such as were acquired by the owner from the Canadian Wheat Board or from the producers thereof on or after March 18, 1947, were thereby vested in the Board. Nolan's barley was in "commercial positions" in Canada, as that expression was defined by the Order: he had acquired the grain in the year 1943 and, by the terms of the Order, the Board was required to pay to him for it the sum of $64\frac{3}{4}$ cents per bushel basis in store Fort William or Port Arthur. This was the maximum price at which barley might have been sold on March 17, 1947, under existing Wartime Prices and Trade Board Regulations. The Board was required to buy all oats and barley

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offered for sale thereafter from time to time at an increased floor price, which in the case of barley was 90 cents for No. 1 feed. The maximum prices had been fixed by the Wheat Board acting under the authority of the Wartime Prices and Trade Board and acting upon the same authority the former Board had on March 17, 1947, in advance of the making of the Order-in-Council, issued instructions to the trade addressed to all dealers in oats and barley increasing that maximum price to 93 cents for barley.

On March 17, when these instructions to the trade were issued by the Board, and on April 3, when the Order-in-Council was made, these maximum prices for barley were very much less than that at which barley was quoted on the Minneapolis and Chicago Grain Exchanges and of the price for which it could have been sold were it not for the continuing price control in Canada. The effect of the Order-in-Council, if lawfully made, was to deprive Nolan of the profit he could have at once realized by selling at the new ceiling prices or, if he elected to hold his grain, of the much larger gain he could have made when price control of barley in Canada was terminated in the following October.

It is contended for the respondent Nolan that the *National Emergency Transitional Powers Act,* 1945, did not authorize the Governor General in Council by enacting Part III of the Western Grain Regulations or otherwise to divest him of title to his barley and, if this contention be right, the other issues raised in this matter which have been so fully argued before us need not be considered.

By the *War Measures Act,* 1914, far reaching powers were vested in the Governor in Council, the exercise of which of necessity would trespass upon the legislative fields assigned to the provinces by section 92 of the *British North America Act.* The validity of that legislation has long since been determined, and the respondents did not contend in the argument addressed to us in the present case that the *National Emergency Transitional Powers Act,* 1945, or the amending statute of 1946 were *ultra vires.*

The *War Measures Act,* by section 3, authorizes the Governor in Council to do and exercise such acts and things and make such orders and regulations:

as he may by reason of the existence of real and apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

The interests of the residents of all of the provinces, the interference with whose property and civil rights was thus authorized, were safeguarded by the terms of section 7 of the statute providing that whenever any property or the use thereof has been appropriated by His Majesty under the provisions of the *Act* or any Order-in-Council, order or regulation made under it and compensation is to be made therefor, the amount, in the absence of agreement, shall be referred by the Minister of Justice to the Exchequer Court or a Superior Court or County Court of the Province within which the claim arises, or to a judge of any such court.

The *National Emergency Transitional Powers Act,* 1945, came into force on January 1, 1946, as of which date the war against Germany and Japan for the purposes of the *War Measures Act* was declared no longer to exist. The preamble to this *Act,* after stating that during the national emergency arising by reason of the war measures had been adopted under the *War Measures Act* for the military requirements and security of Canada and the maintenance of economic stability, that the emergency so arising still continued, that it was essential in the national interest that certain transitional powers should continue to be exercisable by the Governor in Council during the continuation of the exceptional conditions brought about by the war, recites that:

Whereas in the existing circumstances it may be necessary that certain acts and things done and authorized and certain orders and regulations made under the *War Measures Act* be continued in force and that it is essential that the Governor in Council be authorized to do and authorize such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance in an orderly manner, as the emergency permits, of measures adopted during and by reason of the emergency.

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Under the heading "Powers of Governor in Council" section 2(1) provides:

> The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable

for certain defined purposes. The language quoted is an adaptation of the opening phrase of section 3 of the *War Measures Act* with a significant change. In the latter statute the word "advisable" is followed by these words:

> for the security, defence, peace, order and welfare of Canada; and for greater certainty but not so as to restrict the generality of the foregoing terms it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated.

which do not appear in section 2(1) or elsewhere in the *Transitional Powers Act*. The power of "appropriation, forfeiture and disposition of property" given by subsection (*f*) of section 3 of the *War Measures Act* and the method of determining the compensation to be paid to persons whose property had been appropriated by His Majesty under the provisions of that *Act* are also absent.

The purposes for which the powers vested in the Governor in Council by the *Transitional Powers Act* might be exercised are defined by subsection 1 of section 2. Of these, only subsections (*c*) and (*e*) appear relevant to the matter under consideration. These read:

> (*c*) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;
>
> (*e*) continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war.

This language may be contrasted with that of the comparable section of the *War Measures Act* where the text, by the use of the words "but not so as to restrict the generality of the foregoing terms", indicates that the powers to be exercised are not restricted to the defined purposes.

From very early times a petition of right lay when the property of a subject had been converted to the King's use. The history of such proceedings is given in the judg-

ment of Erle, C.J. in *Tobin* v. *The Queen* (1). In *Feather* v. *The Queen* (2), Cockburn C.J., delivering the judgment of the Court of Exchequer said that the only case in which the petition of right was open to the subject was where the lands or goods or money of the subject had found their way into the possession of the Crown and the purpose of the petition was to obtain restitution or, if restitution could no be made, compensation in money. Statutes are not to be construed as taking away or authorizing the taking away of the property rights of the subject, unless their language makes that intention abundantly clear. In *Western County Railway Company* v. *Windsor and Annapolis Railway Company* (3), where it was contended that the rights of the respondents under an existing agreement to operate the Windsor Branch Railway had been extinguished by an Act of the Parliament of Canada (37 Vict. c. 16), Lord Watson in delivering the judgment of the Judicial Committee said (p. 188):

> Neither in the Act 37 Vict. c. 16, nor in the schedules appended to it, is mention made of the agreement of the 22nd of September, 1871, or indeed of any right or interest of the respondent company in the Windsor Branch Railway. The canon of construction applicable to such a statute is that it must not be deemed to take away or extinguish the right of the respondent company, unless it appear, by express words, or by plain implication, that it was the intention of the Legislature to do so. That principle was affirmed in Barrington's case (8 Rep. 138*a*), and was recognized in the recent case of *The River Wear Commissioners* v. *Adamson* (2 A.C. 743). The enunciation of the principle is, no doubt, much easier than its application. Thus far, however, the law appears to be plain—that in order to take away the right it is not sufficient to shew that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right, it must also be shewn that the Legislature have authorized the thing to be done at all events, and irrespective of its possible interference with existing rights.

In *Attorney General* v. *Horner* (4), (affirmed (5)), Brett, M.R. said in part (p. 256):

> It was, however, urged, and very strongly, on the part of the plaintiff, that the result of the Paving Acts of Geo. 3 was to interfere with and take away the rights of the owner of the market franchise. Now it is to be observed that if those Acts have taken away and interfered with such rights they have done so without giving any compensation, and it seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and

(1) (1864) 16 C.B. (N.S.) 312.
(2) (1865) 6 B. & S. 257.
(3) (1882) 7 A.C. 178.
(4) (1884) 14 Q.B.D. 245.
(5) 11 A.C. 66.

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obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so.

The rule is stated to the same effect by Slesser, L.J. in *Consett Iron Company* v. *Clavering* (1). In Maxwell on Statutes, 9th Ed. 290, the effect of the authorities appears to me to be accurately summarized.

This principle was held clearly in mind when the *War Measures Act* was first enacted in 1914. No doubt, any question of *ultra vires* aside, a sovereign Parliament or Legislature in Canada may appropriate to His Majesty's use without compensation property within its legislative jurisdiction. That nothing of this kind was intended when any such property was appropriated, disposed of, or made use of, under the extraordinary powers vested in the Governor in Council under the *War Measures Act* was made clear by section 7 of that statute with its provision that the quantum of compensation should be determined by the courts. In Nolan's case what was attempted was the outright expropriation of his property with the consequent loss above mentioned in return for what was shown to be wholly inadequate compensation. The power to appropriate property was not expressly vested in the Governor in Council by the *National Emergency Transitional Powers Act*, 1945, and the question is as to whether such power is to be implied from the language employed in section 2. If such power is to be implied, then it was not merely a power to appropriate property to His Majesty's use but to do so, if His Excellency the Governor in Council saw fit, without compensation. The fact that partial compensation for the barley to be taken was directed by the terms of the Order-in-Council is aside from the point, since the question is the proper construction of the statute. While the price of barley had been controlled for several years during the war under Wartime Prices and Trade Board Regulations, the commodity had not been appropriated, so that it cannot be said that the Order-in-Council fell within subsection (*e*) of section 2(1). To the contention that the appropriation was a step taken in "maintaining, controlling and regulating supplies and

(1) [1935] 2 K.B. 42 at 65.

prices to ensure economic stability and an orderly transition to conditions of peace" within subsection (*c*), the conclusive answer is, in my opinion, that if, as essential to the exercise of those powers or any of them, it was necessary to trespass upon the property and civil rights of the subject by appropriating his property, either with or without recompense, Parliament would no doubt have vested in the Governor in Council the power to do so in express terms and that it has not done so. Apart from the fact that no such power is given, either in terms or by plain implication, the omission of the provisions dealing with the subject contained in the *War Measures Act* from the *National Emergency Transitional Powers Act,* 1945, is a plain indication that it was not intended that the Governor in Council should be vested with any such power.

Since this is decisive of the matter, I express no opinion on the other questions which were argued before us. I would dismiss this appeal with costs.

CARTWRIGHT J.:—The facts of this case are fully stated in the reasons of other members of the Court and need not be repeated.

I propose to deal with one only of the several questions argued before us; that is as to whether or not those provisions of P.C. 1292 of 3rd April 1947 which purported to vest in the Canadian Wheat Board the barley which was Nolan's property and to fix the compensation to be paid to him therefor were *intra vires* of His Excellency, the Governor General in Council.

The order in question purports to be made under the powers conferred by the *National Emergency Transitional Powers Act,* 1945. The validity of that *Act* was not questioned before us and it is upon its proper construction that the solution of the question under consideration depends.

Mr. Varcoe's able argument satisfies me that the Court cannot say that the Governor in Council did not deem the enactment of P.C. 1292 necessary or advisable for the purposes set out in clauses (*c*) and (*e*) of subsection (1) of section 2 of the *National Emergency Transitional Powers Act.* Assuming then that the order was made for an authorized purpose, it remains to be considered whether

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the statute conferred the power to make it. The words relied upon as conferring the power are the opening words of section 2(1):

> The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of.

It will be observed at once that these words are so wide and general that, if they alone are considered, they would seem to give power to the Governor in Council to enact any order which would be within the competence of Parliament itself provided it is enacted for one or more of the specified purposes.

It is, I think, well settled that words so general must be construed with caution. *"Verba generalia restringuntur ad habilitatem rei vel personae"* (Bac. Mac. Reg. 10; Broom's Legal Maxims 10th Edition 438).

In *Cox* v. *Hakes* (1), Lord Halsbury says:

> From these and similar examples a canon of construction has been arrived at which has often been quoted but which is so important with reference to the question now before your Lordships that I quote it once again:
>
> From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion.

See *Stradling* v. *Morgan* (2).

I am in agreement with the statement in Maxwell on Interpretation of Statutes (9th Edition 1946) at page 63:

> It is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter with reference to which the words are used finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the Legislature intended, they frequently

(1) (1890) 15 App. Cas. 506 at 518. (2) Pl. 205*a*.

express more, in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular; that is, they must be understood as used with reference to the subject-matter in the mind of the Legislature, and limited to it.

By section 14 of the *Interpretation Act* (R.S.C. 1927 c. 1) it is provided:

The preamble of every Act shall be deemed a part thereof, intended to assist in explaining the purport and object of the Act. R.S., c. 1, s. 14.

Quite apart from this statutory provision it has long been held that the preamble may be regarded as part of the statute "for the purpose of explaining, restraining or even extending enacting words, but not for the purpose of qualifying or limiting express provisions couched in clear and unambiguous terms" (vide Halsbury's Laws of England 2nd Edition Vol 31 page 461 section 558, and cases there cited). The preamble to the *National Emergency Transitional Powers Act* reads as follows:

WHEREAS the War Measures Act provides that the Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and whereas during the national emergency arising by reason of the war against Germany and Japan measures have been adopted under the War Measures Act for the military requirements and security of Canada and the maintenance of economic stability; and whereas the national emergency arising out of the war has continued since the unconditional surrender of Germany and Japan and is still continuing; and whereas it is essential in the national interest that certain transitional powers continue to be exercisable by the Governor in Council during the continuation of the exceptional conditions brought about by the war and it is preferable that such transitional powers be exercised hereafter under special authority in that behalf conferred by Parliament instead of being exercised under the War Measures Act; and whereas in the existing circumstances it may be necessary that certain acts and things done and authorized and certain orders and regulations made under the War Measures Act be continued in force and that it is essential that the Governor in Council be authorized to do and authorize such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance, in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency.

The *War Measures Act* and the *National Emergency Transitional Powers Act* are *in pari materia* and the com-

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parison of their terms is a proper aid in the construction of the latter statute. When the two statutes are read together and due consideration is given to the preamble to the latter, it appears to me that, at the time of passing the *National Emergency Transitional Powers Act*, Parliament envisaged a gradual and orderly discontinuance of the measures which had been enacted by the Governor General in Council during the emergency arising by reason of the war and an immediate reduction of the powers which during that emergency had been delegated to the executive.

It will be observed that section 3 of the *War Measures Act* expressly declares, albeit for greater certainty only, that the powers of the Governor in Council shall extend to all matters coming within certain enumerated classes of subjects of which one is "(*f*) appropriation, control, forfeiture and disposition of property and of the use thereof." The exercise of this express power is however subject to the terms of section 7 of the *Act* reading as follows:

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

It was held by this Court in the *Chemicals Reference* case (1) that section 4 of the order in council there under consideration, providing that if the controller took possession of any chemicals (as by other sections of the order he was empowered to do) the compensation to be paid in respect thereof should be such as was prescribed and determined by the controller with the approval of the Minister, was *ultra vires* of the Governor in Council as conflicting with section 7 of the *War Measures Act* quoted above.

The *National Emergency Transitional Powers Act* makes no express reference to appropriation of property and contains no provision similar to section 7 of the *War Measures Act*. The appellant cannot succeed unless the general words of the *National Emergency Transitional Powers Act*

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

are construed as delegating to the Governor in Council a wider power than was conferred upon him under the *War Measures Act,* that is to say power not only to take over property but to fix the compensation to be paid therefor. I cannot think that such a construction would be in accord with the intention of Parliament. Had Parliament wished to confer upon the executive by the *National Emergency Transitional Powers Act* a power more sweeping than it had seen fit to delegate in the midst of actual war it appears to me that it would have used express words declaring that intention.

For these reasons I am of opinion that the provisions of P.C. 1292 which purported to vest the title to Nolan's barley in the Board and to fix the compensation to be paid to him were *ultra vires* of the Governor in Council.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *F. P. Varcoe and H. B. Monk.*

Solicitors for Hallet and Carey Ltd.: *Filmore, Riley and Watson.*

Solicitors for Nolan: *Aikins, Macaulay and Company.*

ROGER LIZOTTE .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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*Nov. 9, 10, 13.
*Dec. 18

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

Criminal law—Murder—Evidence—Defence of denial and of alibi—Charge of trial judge—Misdirection—Non-direction—Substantial wrong or miscarriage of justice—Accomplices—Corroboration—Evidence of previous offence—Interference with cross-examination of witness—Circumstantial evidence—Reasonable doubt—Jurisdiction—Whether this Court can review decision stating that there was no substantial wrong or miscarriage of justice—Criminal Code, ss. 259, 263, 1014(1) (2), 1023, 1025.

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

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Appellant was convicted of murder after a trial by jury. His defence was a denial that he had anything whatever to do with the matter. He testified that he was not at the time of the crime with the deceased and the three principal Crown witnesses as to all of whom it was open to the jury to take the view that they were accomplices. His conviction was affirmed by the Court of Appeal.

The Crown called evidence in rebuttal of statements made by a defence witness in the absence of the accused contradictory of the evidence given by such witness at the trial. The trial judge not only failed to explain to the jury that such contradictory statements were no evidence of the truth of the facts stated therein and must be considered solely as a test of the credibility of such witness, but gave the jury to understand that this rebuttal evidence had evidentiary value and might be regarded by them as corroborative of the evidence of the alleged accomplices. *Held:* that, particularly as the trial judge had failed to instruct the jury that before evidence can be considered as corroborative within the meaning of the rule requiring corroboration of the evidence of an accomplice it must tend to show not merely that the crime has been committed but that the accused committed it, such non-direction and misdirection were fatal to the validity of the conviction.

Crown counsel, in re-examination of a Crown witness, for the purpose of refreshing his memory, read to him from the transcript of his evidence at the preliminary hearing and elicited evidence that the accused had made a threat to such witness including a statement which would lead the jury to believe that on another occasion the accused had shot another person. *Held:* that, following the *King* v. *Laurin,* the deposition should not have been read to the jury. *Quaere:* Whether under the circumstances of the case it was permissible to refer to the deposition at all for the purpose of refreshing the memory of the witness. *Held further:* The trial judge should have, in this case, in the exercise of his discretion, excluded any evidence indicating that the accused had made such a statement, even though it might have been relevant to the issue of the guilt or innocence of the accused as being evidence of an attempt, on his part, to suppress evidence by means of a threat; it was wrong to admit such evidence which was highly prejudicial to the accused and in this case had substantially no probative value. (*Noor Mohamed* v. *The King; Maxwell* v. *Director of Public Prosecutions* and *Rex* v. *Shellaker referred to.*)

Held: The interference of the trial judge with the right of the defence to cross-examine one of the Crown witnesses (a right included in the right to make full answer and defence any improper interference with which will usually be a sufficient ground for quashing a conviction) did not produce any substantial wrong or miscarriage of justice in the particular circumstances of this case.

Held: The trial judge should have followed the usual practice of indicating to the jury the nature of the evidence in support of the alibi and telling them that, even if they were not satisfied that the alibi had been proved, if the evidence in support of it raised in their minds a reasonable doubt of the accused's guilt it was their duty to acquit him.

Held: The evidence as to the cause of the victim's death being largely circumstantial, the jury should have been directed that if and in so far as they based their verdict on circumstantial evidence, they must be satisfied not only that those circumstances were consistent with the accused having killed him but also that they were inconsistent with any other rational conclusion. (*Hodge's* case).

Held: Once this Court reaches the conclusion, on one or more of the points properly before it, that there has been error in law below, it is unfettered in deciding what order should be made by the views expressed in the Court of Appeal. Therefore, the argument, that the jurisdiction of this Court in criminal matters being limited to questions of law and the court appealed from having held that notwithstanding certain errors in law at the trial there was no substantial wrong or miscarriage of justice, such decision being on a question of fact or of mixed fact and law cannot be reviewed in this Court, is not entitled to prevail. (*Brooks* v. *The King; Stein* v. *The King; Bouliane* v. *The King; Schmidt* v. *The King* and *Chapdelaine* v. *The King* referred to).

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the conviction of the appellant, before a judge and jury, upon a charge of murder.

Alexandre Chevalier K.C. for the appellant.

Noel Dorion K.C. and *Paul Miquelon K.C.* for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec (1), pronounced on the 5th day of May, 1950, affirming the conviction of the appellant upon a charge of having "in the night of the 14th to the 15th of June, 1947, with other persons to be later identified killed and murdered Gérard Beaumont."

The appeal comes before us pursuant to an order of the Chief Justice of Canada pronounced on the 22nd day of May, 1950, granting the appellant leave to appeal to this court upon the following grounds.

(1) the illegal admission of rebuttal evidence presented by the Crown for the alleged sole purpose of attacking the credibility of a defence witness by the name of Hamel which rebuttal evidence consisted in proof

(1) Q.R. [1950] K.B. 484.

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of a previous contradictory statement made by the witness Hamel in the presence of the witnesses heard in rebuttal but in the absence of the Petitioner Lizotte and the failure of the trial Judge to explain to the jury that the said rebuttal evidence purported to be exclusively a test of the credibility of the said witness Hamel;

(2) the illegal admission of a proof of character of the Petitioner by the illegal introduction in the evidence before the jury in the re-examination of one Maurice Légaré of the previous testimony of the said Légaré at the time of the preliminary inquiry which previous testimony included an alleged statement in the presence of Légaré that the Petitioner had previously shot somebody and would be able to shoot another person;

(3) the illegal refusal by the trial Judge to permit the defence to establish in cross-examination of Mrs. René Boivin that the said Mrs. Boivin was greatly antagonistic and entertained a spirit of revenge against the Petitioner on account of previous testimonies by the Petitioner against the husband of the said Mrs. René Boivin in some previous cases before the Courts;

(4) the error of the trial judge in his instructions to the jury in failing to direct the jury relatively to the proof of alibi and to the question of the benefit of the doubt in connection with this defence;

(5) the failure of the trial judge to instruct the jury that the Crown must prove not only the death of the victim but also that the death was caused by the accused considering that there was in the record no scientific or other proof of the cause of the death of Gérard Beaumont nor of the time of the said death;

(6) the failure of the trial judge to instruct the jury concerning circumstantial evidence that such evidence must be not only compatible with the guilt of the accused but incompatible with his innocence.

On the afternoon of the 14th of June, 1947, Gérard Beaumont left his home at St-Gérard Majella intending to

go by motor-bus to the City of Quebec. He was apparently in good health and sober and was said to have with him approximately forty dollars (although it is questionable whether this last mentioned fact was proved by any admissible evidence).

On the 22nd of June, 1947, the body of Beaumont was observed floating in the St. Charles River. A police officer brought the body to shore by the use of a rope with a brick attached. An inquest was held but there was no autopsy. The body was already in a state of decomposition. It was said by some of the witnesses that there were marks on the forehead of the victim. A verdict of death from drowning was returned.

The accused was arrested on the 26th of November, 1948. At the trial three witnesses Maurice Légaré, Vallières and Demers gave evidence which, while containing a number of contradictions and differences in matters of detail some of which were of importance and some comparatively trifling, was in substantial agreement as to the broad outlines of the case on which the Crown relied. Their account of what occurred may be briefly summarized as follows.

At about eleven o'clock on the night of June 14, Légaré, Vallières and Demers were together at or near a bus terminal in Quebec and were intending to return to the place where they were working at Rivière aux Pins in a taxicab driven by the accused. Before leaving they were in conversation with the deceased who said that he was going to return by motor-bus. The witness, Demers, says that Lizotte said to the deceased "No, you are coming with us" and that some of them pushed him into the car. Before leaving the city they stopped and Légaré purchased some bottles of beer. They continued on their way and drank some of the beer in the car. Légaré and the deceased, who had had some of the beer, began to quarrel in the back seat. Légaré said to the chauffeur "arrête, on va régler cette affaire-là drette icitte." The chauffeur stopped the car. Légaré and Beaumont got out of the car. After getting out of the car, Légaré struck Beaumont twice on the head with a beer bottle and Vallières struck him once. Beaumont fell to the ground. At this point Lizotte is said

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to have taken hold of Beaumont by the hair, to have struck him in the face with his fist and to have kicked him in the face. Thereafter they put Beaumont back into the rear of the car on the floor and drove off. They stopped for gasoline at the garage of Jean Paul Hamel at St. Gérard Majella as to which a little more must be said later. They then drove away towards Quebec on the Forty Arpents road. At a lonely spot on the road they stopped, took Beaumont out of the car, removed most of his clothes, took the money from his pockets and divided it amongst the accused, Légaré and Vallières. They put Beaumont back in the car and then drove on and stopped at a point near le Remous des Hirondelles on the St. Charles River. At that point Lizotte is said by Vallières and Légaré to have taken Beaumont out of the car and dragged him away in the direction of the river. According to Demers, Lizotte, Vallières and Légaré went away together dragging Beaumont. Demers says that at this point Lizotte threatened him, seizing his neck-tie and saying:—"Ti-blond, tu vas m'aider ou tu vas mourir, la même chose, toi aussi." Demers says that he refused to help saying he would as soon die. Demers says that when Lizotte, Vallières and Légaré returned to the car he asked what they had done with Beaumont and Lizotte, Vallières and Légaré said "Il recommence à revenir, il reprend sa connaissance, que le diable l'emporte, il s'en ira tout seul."

It is said that the accused then drove Demers, Vallières and Légaré back to Rivière aux Pins arriving there about five o'clock in the morning of Sunday, June 15, 1947.

It should be emphasized that the above is but a brief outline of the main points of the narrative contained in the evidence of Demers, Vallières and Légaré which occupied some hundreds of pages in the transcript and contains numerous points of disagreement.

Evidence was given that the accused did not return the taxi to the garage of his employer, Madame Boivin, until the morning of Tuesday, June 17, that the seat-covers had then been removed and that he told Madame Boivin that he had removed them because they were dirty.

The theory of the Crown appears to be that Beaumont died either as a result of the blows or kicks given to him by the accused or as a result of being thrown into the river by the accused, while still alive.

The defence is a denial that the accused had anything whatever to do with the matter. The accused gave evidence. He denied that he was with the deceased, Légaré, Vallières or Demers on the night in question. Evidence was given by his wife and sister-in-law that during the month of June, 1947, which his wife claims to remember particularly well as she was expecting shortly to give birth to a child, the accused never came into the house at night later than midnight except on one occasion when he came in about 1.30 a.m.

The first ground of appeal arises out of the following circumstances. The Crown witnesses, Demers, Vallières and Légaré stated, as mentioned above, that after Beaumont had been assaulted and put back in the car, the accused remarked that he was running short of gasoline and drove to the gas station of Jean Paul Hamel at St-Gérard Majella, arriving there about 2 o'clock in the morning, that they had to wait for some little time but that Hamel finally came down and supplied them with some gasoline and that they then drove away.

Hamel, called as a witness for the defence, testified that he had not served Lizotte or any of the other witnesses with gasoline on the night in question and he went on to state that he could not have done so as he did not have any gasoline during the month of June. The defence called one Georges Marchand an employee of the Imperial Oil Company who said that that company had supplied Hamel with gasoline in the years 1946 and 1947 but had not supplied him with any between the month of November, 1946 and the 28th of June, 1947. In rebuttal the Crown called one Joseph Légaré who testified that he had supplied Hamel with a total of ten barrels of gasoline containing 45 gallons each during the months of May, June and July, 1947. During Hamel's cross-examination he was asked whether he had had conversations with three persons, Eugene Rivard, Lucien Falardeau and Germaine Beaumont (Dame Lucien Falardeau). Hamel was asked

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whether Rivard had come to his store during the night of the 15th to the 16th of June, 1947, apparently to get gasoline. Hamel said that Rivard had come but he thought that it was on the previous night, and that he had not come out nor had he served Rivard with gasoline. He was asked whether he had had a conversation with Rivard a few days later and had said to him, referring to his visit just mentioned: "Pourquoi ne vous êtes-vous pas nommé des fois qu'il vient des jeunes qui sont chauds, qui font du train", ou encore "généralement des jeunes qui viennent la nuit, qui font du train la nuit, j'aime pas ça et si vous vous étiez nommé je vous aurais servi?" Hamel admitted having had a conversation with Rivard but denied having used the words mentioned. Rivard was called in rebuttal and deposed to the words which Hamel had used. These words were identical in meaning with those which had been put to Hamel. Hamel was asked in cross-examination whether on or about the 22nd of June, 1947, he had had a conversation with Lucien Falardeau, a brother-in-law of Beaumont. The question was then put to him: "Quelques jours après la disparition de celui qui serait son beau-frère aujourd'hui et que vous lui aviez dit ceci: 'Que vous trouviez ça effrayant la disparition de Gérard et que dans la nuit du samedi, samedi en question, 14 au 15 juin, vous lui aviez dit qu'il était venu en taxi, vous aviez cru entendre sa voix, la voix de Gérard?' " Hamel denied having made any such statement. In rebuttal Lucien Falardeau deposed that Hamel had said to him speaking of the deceased: "Bien, il m'a dit qu'il était allé un char, le samedi qu'il était disparu, pour avoir du gaz. Il m'a dit 'J'ai cru que Gérard était dans le char'." Hamel was asked in cross-examination in regard to Madame Falardeau: "Vous rappelez-vous d'avoir rencontré madame Falardeau, soeur de Gérard Beaumont, quelques jours après la disparition de son frère ou après qu'on eut repêché le cadavre de son frère et lui avoir dit à peu près ceci, et je cite: 'Je sais qu'il est venu un taxi pour avoir du gaz, ils ont cogné pas mal longtemps, j'ai vu que c'était des gars pour avoir du gaz, j'ai descendu et je leur en ai donné. J'ai jeté un coup d'oeil dans la machine puis j'ai cru que c'était Gérard qui était étendu dans le fond de la machine, à terre,

puis il y avait du sang dans la machine, oui ou non avez-vous dit ça à madame Falardeau?" Hamel denied having made such a statement. Madame Falardeau was called in rebuttal but just after the question had been put to her as to what statement, if any, Hamel had made to her, she was apparently taken ill in the witness box and the matter was not further pursued.

What is here complained of is not the admission of the evidence of Rivard and Lucien Falardeau as to the statements contradictory of his evidence in chief which Hamel is alleged to have made to them or of the evidence of the witness Jos. Légaré as to his having supplied gasoline to Hamel but the complete failure of the learned trial judge to explain to the jury that the contradictory statements were no evidence of the truth of the facts stated therein but must be considered solely as a test of the credibility of the witness Hamel. It is said that, far from giving the jury any such direction, the learned judge gave them to understand that this rebuttal evidence had evidentiary value and could be regarded by the jury as corroboration of the evidence of Légaré and Vallières, whose evidence was clearly that of accomplices, and of the evidence of Demers as to which the learned trial judge, in my opinion properly, told the jury that they might or might not regard it as being that of an accomplice.

At the conclusion of the argument, in the absence of the jury, upon the trial judge ruling that the rebuttal evidence tendered was admissible, counsel for the accused said: "Alors, je croirais qu'il faudrait que vous expliquiez aux jurés qu'il s'agit de la crédibilité d'Hamel," and the learned trial judge replied "Absolument." and after a short further discussion counsel for the accused said, "Je fais application pour que, dans votre charge, vous l'expliquiez bien."

In charging the jury the learned trial judge dealt fully with the danger of convicting an accused upon the uncorroborated evidence of an accomplice or accomplices. His charge in this regard is not a subject of complaint before us but the directions given in regard to the rebuttal evidence must be considered in the light of what had been said on the matter of corroboration and it is important to

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note that there was a complete failure to instruct the jury that before evidence can be considered as corroborative within the rule it must be evidence which tends to implicate the accused, or, as it is often put, it must be evidence which tends to show not merely that the crime charged has been committed but that the accused committed it.

The effect of this rebuttal evidence was dealt with by the learned trial judge in the following passages in his charge to the jury:

Il y a aussi le fait du voyage du retour et de ce qui s'est passé à Québec, vous vous demanderez s'il n'y a pas certains faits que ces trois témoins rapportent qui ne sont pas corroborés par des témoins étrangers. Vous vous demanderez ensuite ce qui s'est passé chez Hamel dans la nuit, et là, vous aurez à examiner si ce témoin dit la vérité, et si vous en venez à la conclusion que réellement il y a eu arrêt chez Hamel, vous aurez là une corroboration d'une partie importante des témoignages de Légaré, Vallières et Demers.

* * *

C'est un incident assez important, c'est un fait matériel, que s'il était prouvé, et c'est à vous à décider s'il est prouvé, servirait à corroborer pour partie la version des trois témoins de la Couronne.

* * *

Si vous en venez à la conclusion que Hamel n'a pas dit vrai, vous avez là une corroboration du témoignage des trois témoins de la Couronne, pour ce fait qui se serait passé entre le prétendu assaut et entre le temps ou à Québec où le corps aurait été jeté à l'eau. Car lorsqu'on aurait pris de la gazoline chez Hamel, la victime dans ce temps-là aurait été assaillie et aurait été dans le fond de la voiture.

In my view there was both non-direction and misdirection as to the purpose and effect of the rebuttal evidence.

In dealing with the second ground of appeal mentioned above, it is first necessary to state briefly what occurred at the trial. Towards the end of the examination in chief, by counsel for the Crown, the witness, Maurice Légaré was asked the following questions and made the following answers.

Q. Maintenant, monsieur Légaré, après que ça a été fait, avez-vous recontré Roger Lizotte dans la suite?
R. Oui.
Q. Combien de temps après et où l'avez-vous rencontré?
R. Quinze jours, trois semaines après.
Q. A quel endroit?
R. Chez Omer Daigle.
Q. A-t-il été question de cette affaire-là?
R. Oui.
Q. Qu'est-ce qui s'est dit à ce propos-là?
R. Je m'en rappelle pas.

Q. Vous en a-t-il parlé, lui?
R. Je sais qu'il m'a dit de fermer ma gueule.
Q. A-t-il ajouté d'autre chose?
R. Il dit: si tu fermes pas ta gueule, il y a de quoi qui est dangereux.
Q. Y a-t-il eu d'autre chose de dit?
R. Je m'en rappelle pas.

The examination in chief concluded shortly after this and was followed by a lengthy cross-examination in which the witness was asked nothing whatever in regard to this particular incident. At the conclusion of the cross-examination counsel for the Crown re-examined the witness on certain matters which had arisen in the course of the cross-examination, and when he had reached the end of this re-examination asked the court's permission to examine on a matter which did not arise out of the cross-examination. Counsel indicated that he wished to refer the witness to certain statements made by him at the preliminary enquiry for the purpose of refreshing his memory. Counsel for the defence objected on the ground that the evidence proposed to be given would be inadmissible as constituting evidence of the bad character of the accused. After some argument, the learned trial judge decided to permit the re-examination. His grounds for so doing are stated in the following words:

Il n'est pas question d'un fait; il est question d'un aveu, d'une déclaration de l'accusé. C'est différent entre prouver un fait et une déclaration. Il y a une grosse différence. Je vais permettre la question, mais seulement M. Dorion, complétez, s'il y a lieu, la déclaration d'aveu que vous entendez établir, jusqu'à preuve du contraire.

The jury was brought back into the court room and the transcript continues as follows:

Q. Monsieur Légaré, pour revenir à ces propos qu'aurait tenus Lizotte chez Daigle, auxquels vous avez référé hier dans votre examen en chef, vous rappelez-vous qu'il en a été question également à l'enquête préliminaire devant l'Honorable Juge Pettigrew, alors que je vous interrogeais?

R. Oui, monsier.

Q. Vous rappelez-vous que je vous ai posé la question, à la page 115 . . .

LA COUR: Avant, demandez lui ce qu'il a déclaré.

Me NOEL DORION, c.r.

Q. Quelle est la déclaration que vous avez faite à l'enquête prélimique j'ai ici à la page 115 de l'enquête préliminaire.

R. Je ne me rappelle pas.

Q. Si vous ne vous en souvenez pas, je vais vous lire la déclaration que j'ai ici à la page 115 de l'enquête préliminaire.

Q. Qu'est-ce que Lizotte a dit? racontez çà à la Cour?

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R. Il a dit: "Si tu fermes pas ta gueule, je vais faire comme j'ai déjà fait à un autre." avez-vous dit cela à l'enquête préliminaire?

R. Oui, monsieur.

Q. Et ce que vous avez dit à l'enquête préliminaire, était-ce exact?

R. Oui, monsieur.

Q. Alors, est-ce qu'il a dit cela, oui ou non?

R. Oui, monsieur.

LA COUR:

Q. Vous vous en rappelez maintenant?

Oui, monsieur.

Me NOEL DORION, c.r.

Q. Qu'est-ce qu'il a dit qu'il ferait? Je vous posais la question—et vous avez répondu: d'après l'enquête préliminaire: "il a dit: 'J'en ai déjà tiré un, je suis capable d'en tirer un autre'; vous rappelez-vous avoir dit cela à l'enquête préliminaire?

R. Oui, monsieur.

Q. Ce que vous avez dit à l'enquête préliminaire était-il exact là-dessus?

R. Oui, monsieur.

Q. Alors, est-ce vrai qu'il vous a dit celà à cette occasion-là?

R. Oui.

It appears to me that the evidence quoted above offends the well settled rule stated in the following words in the judgment of the Judicial Committee in *Noor Mohamed* v. *The King* (1).

In *Makin* v. *Attorney General for New South Wales* (1894) A.C. 57, 65, Lord Herschell L.C. delivering the judgment of the Board, laid down two principles which must be observed in a case of this character. Of these the first was that "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried." In 1934 this principle was said by Lord Sankey L.C., with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted and jealously guarded principles of our criminal law" and to be "fundamental in the law of evidence as conceived in this country." (*Maxwell* v. *The Director of Public Prosecutions* (2)).

The rule just stated, is subject to the qualification also stated in Makin's case that the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury. It is urged that the evidence in question was legally admissible and was relevant to the issue of the guilt or innocence of the accused as being evidence of an attempt, on his part, to suppress evidence by means of a

(1) [1949] A.C. 182 at 190. (2) [1935] A.C. 309, 317, 320.

threat. The Crown relies upon such statements as the following: "The presence or absence of facts showing (the accused's) consciousness of having done the act may also be proved—e.g.,—the fabrication or suppression of evidence." Phipson on Evidence, 8th Edition at page 127. There is a similar statement in Wigmore on Evidence, 3rd Edition, vol. 2, section 278. The principle on which such evidence is admitted is stated by Phillimore J. in *Rex* v. *Watt* (1). It may be taken, I think, to be the general rule that evidence may be given against a party in either a civil or criminal case to show that he attempted to suppress evidence. It is true that in the English cases cited in support of the rule proceedings were actually pending at the time of the alleged suppression but there seems to be no reason, in principle, for refusing to apply the rule to cases of attempts to suppress evidence before any proceedings have been commenced. It is argued by the Crown that had the witness Légaré given the evidence objected to when he was first asked about his conversation with the accused it would have been admissible under the principle just stated. It might be sufficient for the disposition of this argument to point out that this did not happen and that we are not concerned to discuss a situation which did not, in fact, arise; but, since, in my view, there should be a new trial, I think it desirable to state that, in my opinion, this is eminently a case in which the learned judge presiding at the trial should, in the exercise of his discretion, exclude any evidence indicating that Lizotte had made a statement which would lead the jury to believe that on another occasion he had shot another person. The rule which I think should guide the trial judge in regard to this matter is referred to in the judgment of Isaacs C.J. giving the unanimous judgment of the Court of Criminal Appeal, the other members of which were Channell, Bray, Avory and Lush, JJ., in *Rex* v. *Shellaker* (2). At page 418, the learned Chief Justice refers to the class of cases "in which, though in strictness the evidence is admissible, the judge may be of opinion that it is of so little real value and yet indirectly so prejudicial to the prisoner, or that it

(1) (1905) 20 Cox C.C. 852. (2) [1914] 1 K.B. 414.

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is so remote, that it ought not to be given." In *Noor Mohamed* v. *The King* (*supra*) the matter is put as follows at page 192.

> It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

I refer also to the same case at page 195.

> . . . Their Lordships think that a passage from the judgment of Kennedy J. in the well known case of *Rex* v. *Bond,* (1906) 2 K.B. 389, 398, may well be quoted in this connection: "If, as is plain, we have to recognize the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which (to the credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions." Their Lordships respectfully approve this statement, which seems to them to be completely in accord with the later statement of the Lord Chancellor in Maxwell's case (1935) A.C. 309, 320, when he said "It is of the utmost importance for a fair trial that the evidence should be prima facie limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined." They would regret the adoption of any doctrine which made the general rule subordinate to its exceptions.

My reason for thinking that this evidence should have been excluded, no matter when tendered, is that the statement, while calculated to create a prejudice against the accused the extent of which could scarcely be overestimated, has in the particular circumstances of this case substantially no probative value. Evidence of a threat made by the accused for the purpose of suppressing evidence, given by some independent witness, might, in a greater or less degree, go to strengthen the jury's belief in Légaré's story or to lessen their belief in that of the accused, but when the alleged incident comes only out of the mouth of Légaré who had already deposed to all the

facts on which the Crown relied as establishing the guilt of the appellant, its probative value seems to me to be very slight.

No permission to cross-examine Légaré was obtained nor was he declared an adverse witness so that his statement made at the preliminary hearing might be proved pursuant to the provisions of section 9 of the Canada Evidence Act; and there is nothing in the record to suggest that either of these courses could properly have been followed. The sole ground on which counsel for the Crown sought permission to show the deposition to the witness was for the purpose of refreshing his memory and it is on that ground that it was argued before us that the course followed was not unlawful.

At the trial while counsel for the defence objected throughout to the re-examination of Légaré on this subject-matter he did not expressly raise the objection that under the circumstances of this particular case Légaré ought not to be allowed to refer to the transcript of his evidence at the preliminary hearing for the purpose of refreshing his memory on the grounds that such evidence had been given more than seventeen months after the alleged conversation and that Légaré had repeatedly stated in the course of his cross-examination that statements made by him at the preliminary hearing were inaccurate. I do not think that the question whether such objection if made should have been maintained is before us on this appeal. Had it been otherwise it might have been necessary to consider whether the view expressed in Phipson on Evidence, 8th Edition at page 461 and in Halsbury's Laws of England, 2nd Edition, Volume 13, pages 753 et seq., section 829, or that in Wigmore on Evidence, 3rd Edition at pages 100 et seq., sections 758 to 765, is to be preferred and whether if the former view is accepted the principles which guide the court in determining whether a witness may look at a writing to refresh his memory differ in the case of a deposition from those applicable in the case of other writings. Assuming, but not deciding, that the circumstances of this case were such that the witness might have been permitted to refer to his deposition for the purpose of refreshing his memory, I agree with Barclay J.

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that the whole incident was illegal. I think it was rightly held in *The King* v. *Laurin* (1), that the deposition must not be read to the jury as was done in the case at bar. I think that the evidence in question was wrongly admitted and that it cannot be said that it did not cause the gravest prejudice to the accused.

As to the third ground of appeal, the court indicated to Counsel for the Crown that it did not require him to address any argument in regard to this ground. It was, I think, made clear at the time that the reason for so doing was that in the particular circumstances of this case it was the opinion of the court that the interference by the learned trial judge with the cross-examination could not be said to have produced any substantial wrong or miscarriage of justice. The purpose of the cross-examination of Madame Boivin which was stopped was to elicit an admission that she entertained ill feelings towards the accused because of evidence which he had given against her husband in criminal proceedings in which her husband had been convicted. The facts which the defence sought to establish were brought out in the cross-examination of the witness Boivin in the witness box. I am in agreement with Bertrand J. (2) where he says in his judgment:

> C'était le droit de la défense de pouvoir transquestionner le témoin sur ces raisons, et le juge aurait dû permettre ces questions.

The ruling of the court on this point was not intended to cast any doubt on the well established rule that the right to make full answer and defence includes the right to cross-examine the Crown witnesses with freedom and that any improper interference by the trial judge with this right will usually be a sufficient ground for quashing a conviction.

As to the fourth ground of appeal, the learned trial judge made only passing reference to the evidence given in support of the defence of an alibi. I do not find it necessary to consider whether, in view of the repeated and eminently proper direction given by the learned trial judge to the jury that they must consider all the evidence whether given by the Crown or the defence and if having done so they entertained a reasonable doubt as to the guilt of the accused they should acquit him, it could be

(1) 6 Can. Cr. Cas. 135. (2) Q.R. [1950] K.B. 484.

said that there was error in the charge in this regard; but I do respectfully venture to suggest that in this case it would have been well to follow the usual practice of indicating to the jury the nature of the evidence put forward in support of the alibi and telling them that, even if they are not satisfied that the alibi has been proved, if the evidence in support of it raises in their minds a reasonable doubt of the appellant's guilt it is their duty to acquit him.

It is obvious that where an accused is not charged until some seventeen months after the alleged commission of an offence, although he be in fact innocent, it will only be in the rarest of cases that he is able to establish an alibi beyond peradventure. While the evidence of the witness Savard tendered in support of the alibi appeared to relate not to the week-end of the 15th of June, 1947, but rather to the following week-end, the evidence of the accused's wife, if believed, showed that he could not have committed the crime and it was supported by the evidence of the accused's sister-in-law.

The fifth and sixth grounds of appeal may well be considered together. It is argued on behalf of the appellant that the learned trial judge failed to instruct the jury that before they could convict the accused of the murder of Beaumont they must find on the evidence that it was proved beyond a reasonable doubt not only that the victim was killed but that he was killed by the accused. In my respectful opinion the learned trial judge failed to charge the jury adequately on this point.

On the theory of the Crown as set out in the factum of counsel for the respondent, the death of Beaumont was caused by Lizotte by striking and kicking the victim in the face or by throwing him into the river when he was still alive. If there was evidence on which the jury could properly find beyond a reasonable doubt that the victim's death must have been caused by one or other of these means, it would not be necessary that such evidence should be of what is commonly referred to as a scientific nature but it was essential to the verdict that there should be such evidence.

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In a case, such as this, where the defence is that the accused had nothing to do with the matter whatever, it is obvious that the defense will be unable to furnish any explanation as to how the victim met his death and the onus rests upon the Crown to bring home to the accused, beyond a reasonable doubt, the killing of the victim by him. This being so, and the evidence upon which the jury might have come to the conclusion that the accused killed Beaumont being largely circumstantial, it was, in my opinion essential that they should be directed that if and in so far as they based their verdict on circumstantial evidence, they must, in the words of Alderson B. in *Hodge's* case (1), be satisfied not only that those circumstances were consistent with his having committed the act but also that such circumstances were inconsistent with any other rational conclusion than that it was the prisoner who in fact killed Beaumont.

In the factum of the respondent it is submitted that it matters not whether Beaumont was actually killed by the accused, by Légaré or by Vallières or by the combined actions of the three of them. This submission is based on the ground that each was responsible for the acts of the others by reason of the provisions of section 69, subsection 2 of the *Criminal Code*. The addresses of counsel to the jury do not appear in the record before us but I find nothing in the charge of the learned trial judge to the jury to indicate that the theory of the Crown depended upon invoking the terms of section 69(2). In my opinion the evidence falls short of disclosing the formation by the accused, Vallières and Légaré of a common intention to prosecute any unlawful purpose and to assist each other therein, which preceded the alleged striking of the victim with a beer bottle by Légaré and Vallières. Certainly there was no adequate instruction to the jury as to the necessity of their being satisfied beyond a reasonable doubt that the accused, Légaré and Vallières had formed a common intention to prosecute an unlawful purpose and to assist each other therein and that the killing of Beaumont was or ought to have been known to be a probable consequence of the prosecution of such common purpose before they

(1) 2 Lewin C.C. 227 at 228.

could properly convict Lizotte, if, in their view, the evidence was consistent with the view that the victim was killed by Légaré and Vallières.

Our jurisdiction is limited to dealing with the points of law upon which leave to appeal has been granted and these points do not include a submission that there was no evidence upon which a jury could have found that Lizotte, in fact, killed Beaumont, and I, therefore, do not consider whether such an argument could have been supported. I am, however, of opinion that a verdict of guilty cannot be supported in the absence of a clear direction to the jury that they could not find the accused guilty unless they were satisfied beyond a reasonable doubt that it was he who actually killed Beaumont. If, for example, the jury were of the opinion that, consistently with the evidence, the death of Beaumont may have been caused by the blows on the head with bottles said to have been struck by Légaré and Vallières and were not satisfied beyond a reasonable doubt that his death was caused by blows struck by the accused or that the accused took part in throwing him into the river while still alive they could not find him guilty of murder; I cannot find that they were properly instructed in this regard.

The importance of what I respectfully consider to be non-direction in regard to the effect to be given by the jury to circumstantial evidence arises chiefly in regard to the matter of the actual cause of death. *Hodge's* case was a case where all the evidence against the accused was circumstantial. It is argued that the direction there prescribed is not necessary in a case where there is direct evidence against the accused as well as circumstantial evidence. However that may be, it is my opinion that where the proof of any essential ingredient of the offence charged depends upon circumstantial evidence it is necessary that the direction be given.

One further argument requires consideration. At the conclusion of his able argument Mr. Dorion submitted that the jurisdiction of this court in criminal matters being limited to questions of law and the court appealed from having held that notwithstanding certain errors in law at the trial there was no substantial wrong or miscarriage

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of justice and that the appeal should be dismissed under the provisions of section 1014(2) of the *Criminal Code*, such decision cannot be reviewed in this court. It is argued that in reaching the decision to apply section 1014(2) the Court of Appeal must of necessity have examined and weighed the evidence and that consequently such decision is one of fact or of mixed fact and law and, therefore, not subject to review in this court. It is urged that the appeal must be dismissed even if this court should be of opinion that any or all of the points of law argued before us are well taken.

I do not think that this argument is entitled to prevail. In the case at bar it might perhaps be disposed of by pointing out that in my opinion there were serious errors in matters of law at the trial which the Court of Appeal did not regard as being errors at all; but even had the Court of Appeal found the existence of all the errors in law which in my view did occur and nonetheless dismissed the appeal pursuant to section 1014(2), I do not think that this court would be without jurisdiction.

Counsel were not able to refer us to any reported case in which the argument put forward by Mr. Dorion appears to have been considered. Its importance is obvious. If given effect it would have the result that in any case in which a Court of Appeal dismisses an appeal because in its view, in spite of error in law at the trial, no substantial wrong or miscarriage of justice has actually occurred this court could not entertain, or at all events could not allow, an appeal from such judgment no matter how grave, in the view of this court, was the error complained of.

The solution of this question depends, in the first instance, on the wording of the relevant sections of the *Criminal Code*. It will be observed that the jurisdiction of this court is conferred by a form of wording different from that which confers jurisdiction on the Court of Appeal. As has already been mentioned, the jurisdiction of this court is confined to considering questions of law while the Court of Appeal has jurisdiction to deal not only with questions of law but with questions of mixed law and

fact and with questions of fact alone. Under section 1014(1) the Court of Appeal shall allow the appeal if it is of opinion:

(a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

(b) that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law; or

(c) that on any ground there was a miscarriage of justice;

and in any other case shall dismiss the appeal. Then follows subsection 2, reading as follows:

The court may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

The jurisdiction of this court is limited to hearing and determining appeals on:

(i) any question of law on which there has been dissent in the Court of Appeal.

(1023), or

(ii) any question of law, if leave to appeal, is granted by a judge of this court.

(1025).

In my view it is the duty of this court, in the first instance, to examine the point or points of law properly brought before it either under (i) or (ii) above or, as may sometimes happen, under both (i) and (ii). If the court comes to the conclusion that there has been no error in law it follows that the appeal will be dismissed. If, on the other hand, this court is of opinion that there has been error in law in regard to any one or more of the points properly before it, then I think, there devolves upon it the duty, in disposing of the appeal, to "make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires." (section 1024).

In my opinion once this court reaches the conclusion, on one or more of the points properly before it, that there has been error in law below it is unfettered in deciding what order should be made by the views expressed in the Court of Appeal. This would be my view if the point were devoid of authority. It is I think supported by the practice followed for many years. While numerous cases

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might be cited it seems to me to be sufficient to refer to: *Brooks* v. *The King* (1) and *Stein* v. *The King* (2). In *Brooks* v. *The King* this court allowed the appeal and directed a new trial on the ground that the learned trial judge had misdirected the jury as to the consideration which they should give to certain evidence given by the defence. In the Court of Appeal for Ontario (3), Masten J.A. dissented, taking the view that because of this particular misdirection the conviction should be quashed. The judgment of the majority of the Court of Appeal (3) was delivered by Grant J.A. After discussing the misdirection complained of that learned judge continued:

> We are of opinion that upon this ground no substantial wrong or miscarriage of justice can have occurred.

This court (1), after holding that there was misdirection, continued:

> . . . That it may seem probable to an appellate court perusing the record that the jury would have reached that conclusion, does not warrant affirming the conviction. That would, in effect, be to substitute the verdict of the court for that of a jury properly instructed, to which the appellant was entitled. Misdirection in a material matter having been shewn, the onus was upon the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty. *Gouin* v. *The King* (1926) S.C.R. 539, at p. 543; *Allen* v. *The King* (1911) 44 Can. S.C.R. 331, at p. 339; *Makin* v. *Att.-Gen. for New South Wales* (1894) A.C. 57, at p. 70. That burden the Crown, in the view of the majority of the Court, has not discharged. There was non-direction by the learned trial judge in a vital matter, tantamount in the circumstances of this case to misdirection, and constituting a miscarriage of justice within subs. 1(*c*) of s. 1014 of the Criminal Code. Upon the whole case, and taking into consideration the entire charge, the majority of the Court, with respect, finds itself unable to accept the view expressed by the learned judge who delivered the majority judgment in the Appellate Division that "no substantial wrong or miscarriage of justice can have occurred" at the trial. (*Criminal Code*, s. 1014(2)).

Stein v. *The King, supra,* was an appeal from a judgment of the Court of Appeal for Manitoba (4). The court consisted of Perdue, C.J.M., Fullerton, Dennistoun, Prendergast and Trueman J.J.A. Fullerton J.A. dissented on the ground that statements made by persons other than the accused were wrongly admitted in evidence. Prendergast J.A. held that this evidence had been wrongly admit-

(1) [1927] S.C.R. 633.
(2) [1928] S.C.R. 553.
(3) 61 O.L.R. 147 at 164.
(4) 37 Man. R. 367.

ted but that the appeal should be dismissed as there was no substantial wrong or miscarriage of justice. (See the report at page 379). Trueman J.A. held that at least one of the statements admitted should have been refused and continued,—"independently altogether of the statements made by Paulin and Webster in the presence of Stein, the Crown's case was conclusively made out. The jury must inevitably have arrived at the same verdict had the impeached evidence not been admitted." (See report at page 388). The Chief Justice and Dennistoun J.A. simply agreed that the appeal should be dismissed. It seems clear that the *ratio decidendi* of the majority of the Court of Appeal for Manitoba was that although an error in law had been made no substantial wrong or miscarriage of justice had occurred. This court also held that the error in law complained of had occurred but, differing from the Court of Appeal, held that it could not be said that no substantial wrong or miscarriage of justice had actually occurred, and allowed the appeal.

The view that this court exercises its own judgment as to whether or not it can be said that no substantial wrong or miscarriage of justice has occurred, I think, appears not only from the two cases last cited but also from *Boulianne* v. *The King* (1) and *Schmidt* v. *The King* (2), in both of which this court gave effect to the argument that no substantial wrong or miscarriage of justice had occurred, and dismissed the appeals, and from *Chapdelaine* v. *The King* (3) in which this court allowed the appeal, refusing to give effect to the argument that no substantial wrong or miscarriage of justice had occurred.

I have no difficulty in reaching the conclusion that this is not a case in which it can be said that no substantial wrong or miscarriage of justice has occurred by reason of the errors in law made at the trial which have been pointed out above. The test to be applied is found in the words of Kerwin J., giving the judgment of the court in *Schmidt* v. *The King* (*supra*).

> . . . The meaning of these words has been considered in this Court in several cases, one of which is *Gouin* v. *The King* (1926) S.C.R. 539, from all of which it is clear that the onus rests on the Crown to satisfy

(1) [1931] S.C.R. 621.
(2) [1945] S.C.R. 438.
(3) [1934] S.C.R. 53.

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the Court that the verdict would necessarily have been the same if the charge had been correct or if no evidence had been improperly admitted. The principles therein set forth do not differ from the rules set forth in a recent decision of the House of Lords in *Stirland* v. *Director of Public Prosecutions* (1944) A.C. 315, i.e., that the proviso that the Court of Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.

As, in my view, there should be a new trial, it is not desirable that the evidence should be discussed at any length. I do not think it can be said that a properly instructed jury acting honestly and reasonably might not have acquitted the appellant.

For the reasons stated above and particularly because of error in regard to the matters set out in the first, second, fifth and sixth grounds of appeal, I am of opinion that the appeal should be allowed, the conviction quashed and a new trial ordered.

Appeal allowed; new trial ordered.

Solicitors for the appellant: *Alexandre Chevalier and G. Levesque.*

Solicitor for the respondent: *Noël Dorion.*

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*May 15, 16
*Oct. 3

LETHBRIDGE COLLIERIES LTD. (*Suppliant*) ..... APPELLANT;

AND

HIS MAJESTY THE KING (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Crown—Coal Subsidy—Emergency Coal Production Board—Whether notice to producers an offer—acceptable by performance—Regulations having force of law—Whether powers conferred upon Board exercised.

The Emergency Coal Production Board, in view of the national emergency existing in respect of the production of coal, was under the authority of the *War Measures Act*, created by Order-in-Council P.C. 10674, November 23, 1942. The Board, under the direction of the Minister, was authorized to take measures necessary to maintain and stimulate

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

the production of Canadian coal, among others, the rendering of financial assistance to such mines as it deemed proper to ensure their maximum or more efficient operation provided that in no case should it render such assistance where the net profits exceeded standard profits within the meaning of the *Excess Profits Tax Act*.

Prior to April 1, 1944, the Board restricted payment of subsidies to mines being operated at a loss to an amount which in its opinion would permit a profit of 15 cents a ton. Then because of the increased wages and the cost of living bonus the operators had been called upon to pay, it by Circular Letter "C.C. 152" notified operators in the domestic fields of Alberta that it had approved payment of a flat production subsidy conditioned on an operator satisfying the Board that it was unable to absorb the increased costs and submitting specified data in support of its claim. The maximum subsidy for the Lethbridge area it fixed at 35 cents per ton and reserved to itself determination of the rate of subsidy to be advanced in each case.

The appellant claimed payment on the basis of 35 cents per ton instead of at the rate of 12 cents and 16 cents paid by the Board.

Held: the claim that the Board's Circular Letter C.C. 152 and the minutes of its meeting of April 18, 1944, constituted an offer to pay a subsidy of 35 cents per ton which appellant by extending its operations and increasing production accepted fails because the documents relied on do not constitute an offer in such terms.

Held, also that the evidence did not establish an intention on the part of the Board to make an offer which could be accepted by performance.

Held, that as to the plea the appellant had established its claim by reason of its compliance with regulations having the force of law—P.C. 10674 had the force of law, but there was nothing in it, standing by itself, upon which the appellant's claim could be founded. Assuming, without deciding, that it empowered the Board to pass a general order of the nature contended, nothing in the record indicated that the Board had attempted to exercise such power.

APPEAL from a judgment of the Exchequer Court (1), dismissing a claim for the payment of additional subsidies on coal produced by it.

G. H. Steer K.C. and *James McCaig K.C.* for the appellant.

H. W. Riley K.C. and *K. E. Eaton* for the respondent.

The judgment of the Court was delivered by:

CARTWRIGHT J.:—This is an appeal from the judgment of the late Mr. Justice O'Connor dismissing the claim of the appellant for additional subsidies on coal produced by it between April 1, 1944 and March 31, 1946.

(1) [1950] Ex. C.R. 1.

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From April 1, 1944 to March 31, 1945 the appellant was paid a subsidy of 12 cents per net ton of marketable coal produced by it and from April 1, 1945 to March 31, 1946 a subsidy of 16 cents per ton. An additional 17½ cents per ton was claimed for the first of these periods and an additional 19 cents for the second.

The appellant's claim is put forward on two alternative grounds. The first is that by contract between the Suppliant and His Majesty, represented by the Emergency Coal Production Board, (hereinafter referred to as the Board) the Suppliant is entitled to the payments claimed. The alternative ground is that by virtue of the Order-in-Council creating the Board and certain actions of the Board taken thereunder the Suppliant has a statutory right to be paid the amounts claimed.

Under the authority of the *War Measures Act*, Order-in-Council P.C. 10674 dated November 23, 1942 was passed. This Order recites the existence of a national emergency in respect of the production of coal and the necessity of stimulating production. It creates the Board and provides *inter alia*:

3. (1) The Board shall be responsible, under the direction of the Minister, for taking all such measures as are necessary or expedient for maintaining and stimulating the production of Canadian Coal and for ensuring an adequate and continuous supply thereof for all essential purposes and without restricting the generality of the foregoing, the Board shall have the power and duty, under the direction of the Minister, of

* * *

(*e*) rendering or procuring such financial assistance in such manner to such coal mine as the Board deems proper, for the purpose of ensuring the maximum or more efficient operation of such mine; provided that the Board shall not render or procure any financial assistance, except capital assistance, in any case where the net profits of operation exceed standard profits within the meaning of the Excise Profits Tax Act.

(*m*) doing such acts and things as are ancillary or incidental to exercise or discharge of any of the foregoing powers or duties.

4. (2) The Board may hold its meetings and conduct its business and proceedings in such manner as the Board may from time to time determine.

(4) The Board may exercise its powers and duties by order.

10. The Board shall report to the Minister as and when required to do so by the Minister, shall keep the Minister advised of the principles it is following in exercising the powers and duties conferred or imposed upon it by this order and shall refrain from doing all such things as the Minister may, in writing, from time to time direct.

Section 7 provides that any person who contravenes or fails to observe any order shall be guilty of an offence and liable to fine or imprisonment.

Section 1(*d*) defines order as follows:

"Order" means and includes any general or specific order, requirement, instruction, prescription, prohibition, restriction or limitation made or issued in writing by or on behalf of or under authority of the Board in pursuance of any power conferred by or under this order.

By other clauses of section 3, very wide powers are given to the Board including power to cause mines to be opened and operated, to prohibit the operation of mines where production is insufficient to justify the employment of the labour and equipment involved, to direct methods of operation, to suspend laws as to conditions of employment and to take possession of coal, lands, buildings and other property.

Prior to the 1st of April, 1944, the Board pursued a policy as to the payment of subsidies, referred to in the argument before us as "The form F4 Policy" under which payment of subsidy was restricted to mines which were being operated at a loss and the subsidy consisted of such amount as, in the opinion of the Board, would permit such mines to make a profit of 15 cents per ton.

In the last quarter of 1943 an increase in the wages payable to coal miners had been authorized and the cost-of-living bonus, which had theretofore been paid by the Government, had been added to the wages payable by the operators. To compensate the operators for these increased labour costs an increase in the price of coal had been authorized, but it appears to have been the view of the Board that in some cases this increase in price would not amount to a sufficient compensation.

It appears that by March 1944, in the area in which the Suppliant operated, the coal fields were in surplus production and the Board decided upon a new policy which was set out in a Minute No. 2A made at a meeting of the Board on March 23, 1944 which reads as follows:

Minute No. 2(a): Proposed New Form of Subsidy Western Domestic Fields.

The Chairman advised that since the last meeting considerable work had been done to determine a fair basis of subsidy to cover the increased costs incurred by operators over which they had no control due to wage

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increases and absorption of the cost of living bonus in the basic wage rate. Independent calculations by different methods resulted in the following tentative basis of subsidy:

(i) Approved coal mine operators in the fields indicated to be entitled to a maximum production subsidy as follows:

District	Subsidy per Net Ton of Marketable Coal Produced
Edmonton	65c
Drumheller	30c
Camrose (Shaft only)	30c
Lethbridge	35c
Coalspur (Shaft only)	35c
Saunders	35c
Saskatchewan Field (Shaft only)	15c

(ii) Alternatively, subsidy may be computed based on the average subsidy approved for payment on Form F-4A for the months of October, November and December, 1943, plus the uncompensated proportion of Cost of Living Bonus.

Subsidy payable to be whichever is the less of (i) and (ii).

In discussion, it was agreed that this scheme should have the effect of keeping efficient mines in operation and should encourage less efficient operations to reduce costs sufficiently to enable them to maintain operations at the flat rates of subsidy set.

The members approved putting the scheme into force for the fiscal year April 1, 1944, to March 31, 1945, operators to be required to submit cost returns on a similar basis to form F-4A on a quarterly basis and rates of subsidy to be subject to review at the end of every three months.

Subsidy may be reduced if upon review the profit is greater than that allowed under the company's Standard Profits.

This Minute was not communicated to the Suppliant, and the Suppliant did not know of its existence until the examination for discovery of an officer of the Respondent in February 1947.

The appellant had not been in receipt of any subsidy under the Form F-4 policy and had not made any application for subsidy prior to April 1944. On April 8, 1944 the appellant addressed a letter to the Coal Controller, who was chairman of the Board, reading as follows:

Will you please give us all information on the payment of the recently announced coal subsidy to be paid to coal operators. It is our understanding that a subsidy of 35 cents per ton will be paid on Lethbridge coal but no doubt there will be some governing factors that we wish to acquaint ourselves with so that our monthly statements can be kept in line. An early reply will be much appreciated.

In reply to this the appellant received a telegram dated April 12, 1944 saying "(Reference your letter April eighth) Re. Production subsidy, the following letter being air-

mailed to-day to Coal mine operators in the Domestic Fields of Alberta" * * * the telegram then quoted in full the following letter C.C. 152 which was in due course received by the appellant.

C.C. 152 When Replying Refer to File.....

CANADA
EMERGENCY COAL PRODUCTION BOARD

Ottawa, Ontario,
April 11, 1944.

Via Air Mail
To Coal Mine Operators in the Domestic Fields of Alberta
Gentlemen,

Re: Production Subsidy

The Board has approved payment of a flat rate production subsidy as from April 1, 1944, on coal production of approved operators in the "domestic" fields of Alberta, such subsidy being based upon wage increases authorized by Government and not compensated by authorized price increases, plus the previously compensated portion of the cost of living bonus now incorporated in the wage scale. The subsidy is payable as an amount per net ton of coal production.

The conditions under which the subsidy will be provided are as follows:

1. An operator to be eligible for subsidy must show, to the satisfaction of the Board, that he is unable to absorb the wage increases and cost of living bonus referred to above. Operators who, on March 31, 1944, were in receipt of subsidy in accordance with Form F-4A need not make fresh submissions other than a direct application to be placed on the new basis of subsidy.

2. Operators applying for subsidy for the first time must submit such data as is available in support of the claim, including a recent audited financial statement, and statement of costs. (This will not be necessary if already filed with the Board or the Coal Controller.)

3. Operators approved for this subsidy will be required to submit, in duplicate, monthly, a sworn statement showing the net tons (of 2,000 lbs.) of marketable coal produced from their mining operation for the period. This may include coal used under colliery boilers and employee's coal. Coal purchased for resale must not be included in such claims, except as provided in (4). In addition, operators under subsidy will be required to submit, for information, a quarterly statement of costs and revenues on a form which will be supplied later.

Claims must be submitted not later than the 15th of the following month.

4. Operators may include tonnages of coal produced by others under contract from leases owned by the operator. Operators will be held responsible for notifying any such contractors that they (the operators) are claiming subsidy on such production. The Board will not entertain claims for subsidy from the contractors, who must look to the operator for any recompense.

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5. Subsidy will be discontinued if it is found that it is being employed to enable the operator to cut prices below those which have been established as fair and reasonable for the grade of coal produced.

6. No subsidy will be paid until the operator has supplied supporting data in a form satisfactory to the Board, and has been approved for subsidy.

7. In the case of those operators who were in receipt of subsidy in accordance with Form F-4A during the last three months of the calendar year 1943, the subsidy applicable as from April 1, 1944, will be the lesser of items (i) and (ii) hereunder:

(i) A maximum flat rate subsidy applicable to underground mines only, as follows:

Area	Subsidy Per Net Ton of Marketable Coal Produced
Edmonton	65 cents
Drumheller	30 "
Camrose	30 "
Lethbridge	35 "
Coalspur	35 "
Saunders	35 "

Operators in districts not mentioned above will take the rate of subsidy applicable to the area mentioned with which they are most closely related by reason of operating conditions, grade of coal and market areas served, or

(ii) The average of subsidy approved (after adjustments) for payment, per net ton of marketable coal produced, under Form F-4A for October, November and December, 1943, plus the previously compensated portion of the cost of living bonus now incorporated in the wage scale. The Board will determine the rate of subsidy to be advanced.

Approved operators not on F-4A subsidy during the last quarter of 1943 will receive subsidy at the rates indicated in subsection (i) or such lesser rate as the Board may determine.

8. The Board further directs that in no case will subsidy be provided which will result in net profits of operation exceeding Standard Profits within the meaning of the Excess Profits Tax Act, consequently all interim payments of subsidy will be considered as accountable advances subject to final adjustments after receipt and consideration of the operator's audited financial statement for his full financial year.

9. The new flat rate subsidy will replace any subsidies paid prior to April 1, 1944.

Yours very truly,
E. J. Brunning,
Chairman

On April 13, 1944, a copy of C.C. 152 was sent by the Chairman of the Board to the Minister, together with a memorandum dated April 13, 1944. These were stated to be for the information of the Minister in anticipation of a meeting to be held on the following Monday, at which

the Alberta Coal Committee was to present a brief to members of the Cabinet. The last mentioned memorandum reads as follows:

DEPARTMENT OF MUNITIONS AND SUPPLY
OTTAWA, CANADA

April 13, 1944.

Memorandum re Production Subsidies

The reasons for withdrawing the previous type of subsidy, reported on Form F-4, are as follows:

(1) The Western domestic coal fields are now in surplus production. In other words, the coal emergency no longer exists in these areas.

(2) To continue paying to operators all their losses, plus fifteen cents a ton profit, would result in keeping the high cost mines in operation, thus depriving the efficient low cost mines of sales, which in turn would result in bringing these mines down to a loss position, as there is insufficient demand for coal to keep all mines operating steadily throughout the year. In other words, to continue this form of subsidy would be subsidizing inefficiency.

(3) An analysis of the profit or loss position of the individual mines in the domestic field show that they range from a profit of nearly one dollar per ton to a loss position requiring Government assistance amounting to $2.50 per ton.

(4) Great difficulty has been experienced in administrating F-4 form of subsidy due to the continual controversy with operators on questions of fair and reasonable depreciation, depletion and the inclusion of excessive future development costs in current cost of production.

(5) The payment of losses plus a profit to operators provides no incentive to either the owners or to labour to reduce costs.

The new flat rate subsidy plan obviates the above weaknesses by

(i) Placing each operator in the same relatively competitive position as existed prior to the payment of production subsidies. This has been accomplished by basing the flat rate subsidy on the amount of assistance required per ton of coal produced to reimburse the operator for the increases in labour rates brought about by direction of the War Labour Board, also an item to offset the increase of cost due to the operator being required to absorb the cost-of-living bonus as of February 15, 1944. This bonus was previously paid by The Government.

(ii) As the flat rate subsidy is calculated on the average tons per man day produced in the respective fields, it will be necessary for excessively high cost producers either to reduce their cost or close down.

(iii) The new subsidy should provide the necessary incentive to operators to reduce costs as they can retain all profits that accrued from the operation including the subsidy up to an amount not exceeding standard profits within the meaning of the Excess Profits Tax Act.

Coal Controller.

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It appears that at the meeting with the members of the Cabinet a further meeting was arranged which was held in the office of the Coal Controller at Ottawa on the following day, April 18, 1944, between representatives of the Alberta Coal Committee and the Coal Controller. The Alberta Coal Committee represented the United Mineworkers of Alberta and the coal operators of Alberta, including the appellant.

The Minutes of this meeting, which are very lengthy, were filed as Exhibit 6 at the trial. A copy of the memorandum of April 13, 1944, quoted above, was read to the meeting and was copied in full into the minutes. A copy of these minutes was shortly thereafter sent to the appellant. In July 1944 the appellant made application for subsidy supported by statements of its operations during the last three months of 1943, and in the minutes of a meeting of the Board held on July 27, 1944 there is the following entry:

> Applications supported by the necessary data as per terms and conditions set out in Circulars C.C. 151, 152 and 175 had been received from various operations and it was agreed that subsidy payments be made as accountable advances pending receipt of auditors' statements, covering the three-month basic periods used to determine rate of subsidy applicable to each operation.
>
> | Company | Rate Per Ton |
> |---|---|
> | 1. Lethbridge Collieries Ltd. ..... | ·12 |

By letter of August 7, 1944 the Board notified the appellant that its application to be placed on Flat Rate Subsidy as from 1st April 1944 was provisionally approved, that the rate so approved was determined to be 12 cents per ton, that payments would be made on that basis and would be treated as accountable advances until an auditors certified statement covering the last quarter of 1943 had been received and reviewed by the Board. The Appellant replied on September 1, 1944 pointing out that other operators in the Lethbridge Field were receiving amounts "varying up to 35 cents per ton". The letter continues:

> It seems to us that wage increases not compensated for applies to all operations alike, and as 35 cents per ton had been decided upon as the rate applicable in the Lethbridge field, we set up our books in April, the beginning of our financial year, on this basis and on the advice of our chartered accountant, but have since made an adjustment to correct this mistake.

Will you please define for us the items covered by the 12 cents per ton and advise if there is liable to be any change in this figure depending upon our entire year's operations.

The Board replied on September 13, 1944 as follows:

This will acknowledge receipt of your letter dated September 1, 1944.

The rate of 35 cents per ton was established for the Lethbridge field as the maximum amount required to cover wage increases authorized by the National War Labour Board and not compensated by price increases, plus the previously compensated portion of the Cost of Living Bonus, now incorporated in the wage scale.

However, due to the fact that conditions under which different mines operate, vary considerably, operating costs therefore also vary and not necessarily as a result of inefficiency. Therefore it is necessary for this Board to examine each operator's position and determine what rate of flat rate subsidy is required to help him meet the above-mentioned costs, but in no case will such subsidy exceed the maximum rate set for the field.

Further, it is the policy of this Board that in no case will subsidy be provided which will result in net profits of operation exceeding Standard Profits within the meaning of the Excess Profits Tax Act, consequently, all interim payments of subsidy will be considered as accountable advances subject to final adjustment after receipt and consideration of the operator's audited financial statement for his full financial year.

In your case the rate of 12 cents per ton was established from the data you submitted covering the basic three-month period ending December 31, 1943.

The appellant telegraphed to the Board on September 18, 1944 as follows:

Re your letter thirteenth paragraph three does this mean if the rate of twelve cents established fails to bring our years operation to show standard profit will the rate be increased to provide for this or until the thirty-five cents is reached.

The Board replied on September 19, 1944 as follows:

Replying to your telegram of the 18th instant, I would refer you to my letter of September 13 and also Circular C.C. 152 dated April 11, 1944, both of which should clarify the basis on which the present flat rate subsidy assistance is payable.

The present rate of 12 cents payable to your operation which has been approved by this Board is not subject to revision. However, if at the end of your fiscal year, it is found that revenue has not been sufficient to meet the costs as outlined in C.C. 152, it will be in order for your Company to make a submission to this Board for its consideration.

There was further correspondence which does not materially affect the matters in dispute. In July 1945 the rate of subsidy was changed from 12 cents to 16 cents, the change to be effective from April 1, 1945.

In support of the appellant's claim in contract it is said that an offer made by the Board is to be found in Circular Letter C.C. 152 and in the statements made by the Chair-

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man of the Board at the meeting of April 18, 1944, that this offer was addressed to all, and capable of acceptance by any, of the Coal Mine Operators in the Domestic Fields of Alberta, that the offer was to pay a definitely ascertainable sum to any of such operators who performed specified conditions and that the appellant performed the conditions thereby accepting the offer.

The appellant seeks to interpret C.C. 152 and the statements made at the meeting of April 18th as an offer made to the appellant, in common with other coal mine operators in the same area, to pay a subsidy of 35 cents per ton subject only to the proviso that if as a result of such payment the profits of the operator receiving it would exceed its standard profits as determined for the purpose of Excess Profits Tax, the subsidy payment should be reduced to such figure as would permit the operator to make its standard profits but no more.

The appellant takes the position that the consideration which was required of it was that it should continue to mine coal and to endeavour to increase its production, that it did this, and that this was a performance of the condition prescribed in the offer and constituted an acceptance of the offer and that this performance coupled with the making of a claim for subsidy was a sufficient notification to the Board of the acceptance of its offer by the appellant. The appellant contends that not only did it continue to mine coal, but that it extended its operations and increased its production at considerable additional cost per ton to itself.

The appellant emphasizes the fact that it employed a number of inexperienced miners which necessitated the employment of a fire boss for every ten men instead of every sixty men, and that, instead of driving to the boundaries, it reversed this and took the coal in advance instead of in retreat. It is said that all this was done to increase production, but that it added substantially to the cost per ton. The learned trial Judge found it to be a fact that this was done and there is ample evidence to support his finding. It may be observed that this method of procedure on the part of the appellant appears to have brought about a result different from that which the Board

hoped to accomplish by its change in policy as to the payment of subsidy. The Board's intention as reported to the Minister was to increase the efficiency of operation in the various mines, whereas the course pursued by the appellant tended to decrease its efficiency of operation and to increase its production cost per ton.

In my view, it nowhere appears in the evidence that the Board made to the appellant any such offer as that for which the appellant contends. It is first necessary to examine the circular letter C.C. 152. The letter opens with a statement that the subsidy is based upon wage increases authorized by the Government, and not compensated by authorized price increases, plus the previously compensated portion of the cost-of-living bonus now incorporated in the wage scale. It provides that an operator to be eligible for subsidy must show to the satisfaction of the Board that it is unable to absorb such wage increases and cost-of-living bonus. It provides that the *maximum* flat rate subsidy in the Lethbridge area shall be 35 cents per ton and that "the Board will determine the rate of subsidy to be advanced." The concluding words of paragraph 7 are:

> Approved operators not on F-4A subsidy during the last quarter of 1943 will receive subsidy at the rates indicated in subsection (i) *or such lesser rate as the Board may determine.*

The appellant was one of the operators referred to.

I do not think that C.C. 152 is susceptible of the interpretation for which the appellant contends. Had it been the intention of the Board to say that it offered to pay to all operators in the Lethbridge area whichever should be the lesser of either (*a*) 35 cents per ton, or (*b*) such amount as would bring the profits of such operator up to the amount of its standard profits; it would have been easy to do so. The purpose of the subsidy is not indicated as being to raise the operator's profits to its standard profits, but to compensate it for the difference between the wage increases including the cost-of-living bonus and the permitted increase in the price of coal.

While C.C. 152 can not be said to be expressed in terms of perfect clarity its meaning appears to me to be as follows: In the case of each of the operators to whom the

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letter is addressed the Board will calculate, from the information supplied by such operator, the amount per ton of coal produced which, in the opinion of the Board, is necessary to compensate such operator for the difference between the increased costs of labour, including the cost of living bonus, and the authorized advance in the price of coal and will pay such amount by way of subsidy to the operator, always provided that such amount does not exceed the maximum per ton for the area in which the operator is located. The amount so paid is to be regarded as an accountable advance and if it appears from audited financial statements at the end of the operator's financial year that the operator has, as a result of the payment of subsidy, earned more than its standard profits the excess over such standard profits is to be repaid to the Board. The intention of the Board to reserve to itself the right to determine the rate of subsidy, if any, to be paid in each individual case is, I think, clearly expressed. In the case of the appellant the Board determined to pay and did pay subsidies at the rates of 12 cents and 16 cents respectively.

Even if the minutes of the meeting of April 18th could be regarded as setting out an offer by the Board I can not find in them any offer in the terms claimed by the appellant.

If I am right in my construction of C.C. 152 and of the minutes of April 18, 1944, the appellant's claim, in so far as it is based upon contract, would fail because the documents relied upon do not contain an offer in the terms for which the appellant contends. There is, I think, a further difficulty in the way of a claim based upon contract.

I agree with the learned trial Judge that the evidence does not establish an intention on the part of the Board to make an offer which could be accepted by performance. It is the factual basis which is lacking. No doubt, as was said by Pickford L.J. in *Davies* v. *Rhondda District Urban Council* (1), "If one person says to another 'If you will do so-and-so I will pay you so much money' and the man does it that constitutes a contract." But I do not think that on the record in this case it could be found that the Board was ever in the position of saying to the appellant

(1) [1918] 87 L.J. K.B. 166 at 168.

"If you will go on mining coal I will pay you so much money". Rather, I think, the Board went no further than to indicate that it proposed to follow a certain policy as to payment of subsidies but reserved to itself throughout the right to say what amount, if any, it would pay from time to time to any operator.

I have not overlooked the appellant's argument based on estoppel but I can not find in the minutes of April 18, 1944 or in any of the other documents upon which reliance was placed any representation by the Respondent that the meaning of C.C. 152 was to make an offer in the terms for which the appellant contends. It therefore becomes unnecessary to examine the authorities to which Mr. Eaton referred us in support of his argument that the plea of estoppel could not succeed because the alleged representations did not relate to presently existing facts and were not sufficiently clear and unambiguous.

It is next necessary to examine the alternative basis on which the appellant's claim is put forward. It is said that, by orders having the force of law, the Board provided that the appellant, upon performing the condition of continuing to mine coal, should be entitled to the payments for which it makes claim.

There is no doubt that P.C. 10674 was in force throughout the relevant periods, and that it had the force of law, but there is nothing in this Order-in-Council, standing by itself, upon which the appellant's claim could be founded.

The judgment of this Court in *Reference as to the Validity of the Regulations in relation to Chemicals* (1), and particularly at page 19 shows that the Governor General in Council has power to delegate the powers conferred upon him by the *War Measures Act*. At page 19, Rinfret J., as he then was, in whose judgment Taschereau J. concurred states:

> That Act conferred on the Governor in Council subordinate legislative powers; and it is conceded that it was within the legislative jurisdiction of Parliament so to do. In fact, delegation to other agencies is, in itself, one of the things that the Governor in Council may, under the Act, deem "advisable for the security, defence, peace, order and welfare of Canada" in the conduct of the war. The advisability of the delegation is in the

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

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discretion of the Governor in Council; and once the discretion is exercised, the resulting enactment is a law by which every court is bound in the same manner and to the same extent as if Parliament had enacted it, or as if it were part of the common law—subject always to the conditions already stated.

If it could be shown that by P.C. 10674 the Governor-in-Council had delegated to the Board the power to make, and the Board in turn had made, an order providing that during the period in question, the appellant was entitled to receive a subsidy of 35 cents per ton on the coal which it produced or such lesser subsidy as would bring its profits up to its standard profits but no more; then the appellant would appear to have a right to payment which would be enforceable by Petition of Right under Section 19(*d*) of the *Exchequer Court Act.*

It is necessary, therefore, first to examine Order-in-Council 10674 to ascertain what powers have been delegated to the Board. It will be observed that the word "Order" is defined as including any general or specific order made or issued in writing by or on behalf of or under authority of the Board in pursuance of any power conferred by or under P.C. 10674. The Board is given the power and duty under the direction of the Minister of:

3. (*e*) rendering or procuring such financial assistance in such manner to such coal mine as the Board deems proper, for the purpose of ensuring the maximum or more efficient operation of such mine; provided that the Board shall not render or procure any financial assistance, except capital assistance, in any case where the net profits of operation exceed standard profits within the meaning of the Excise Profits Tax Act.

(*m*) doing such acts and things as are ancillary or incidental to exercise or discharge of any of the foregoing powers or duties.

Subsection 4 of Section 4 provides that the Board may exercise its powers and duties by order. Section 7 makes it an offence to contravene or fail to observe any order.

I think it very doubtful whether on a proper construction P.C. 10674 empowers the Board to pass a general order having the force of law providing that a subsidy of so much per ton should be paid to all operators in a certain area. The wording of Section 3(*e*) seems rather to contemplate that the Board shall consider the situation of individual mines. The power and duty given to the Board is that of rendering "such financial assistance in

such manner to such coal mine as the Board deems proper for the purpose of ensuring the maximum or more efficient operation of such mine." The Board has, I think, rightly interpreted its duties as requiring it to pass upon the amount of subsidy to be paid to each individual mine, and while it announced the policy which it proposed to follow in various areas, it seems to me to have retained to itself the power and indeed the duty of passing upon each individual case.

Assuming for the moment that P.C. 10674 does confer upon the Board a jurisdiction to pass a general order providing for the payment of subsidies as above suggested, I cannot find anything in the record to indicate that the Board attempted to exercise such power. The documents relied upon by the appellant on this branch of the argument appear to be the Minute of the 23rd of March, 1944, the memorandum to the Minister of April 13, 1944 and Circular letter C.C. 152.

I do not think that the Minute of 23rd March, 1944 can be properly regarded as being intended by the Board to be, or as being, an order having the force of law. It does not appear that a copy of it was sent to the Minister, or that it was published in the Gazette or elsewhere. It was not communicated to those upon whom the appellant argues it conferred rights. It does not purport to be in the form of an order. I cannot think that a document of this sort and in this form can be regarded as having the force of law and being effective, without more, to authorize and require payments to be made out of the public treasury.

The memorandum to the Minister of April 13, 1944 is simply a communication for the information of the Minister which does not purport to be in the form or to have the effect of an order.

Circular letter C.C. 152 does not appear to be intended to have the effect of an order, but even if it were otherwise, it is my opinion, for the reasons set out at length above, that properly construed it does not provide for payment of subsidies beyond those which the appellant has received.

In my view assuming, without deciding, that the Board had power under P.C. 10674 to enact an order of the

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sort for which the appellant contends, it has not attempted to do so. I think therefore that the appellant's alternative claim cannot succeed.

For the above reasons, in my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Milner, Steer, Dyde, Poirier, Martland and Layton.*

Solicitor for the respondent: *F. P. Varcoe.*

WILLIAM H. COTTER (PLAINTIFF).....APPELLANT;

AND

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*May 17, 18
*Oct 3

GENERAL PETROLEUMS LIMITED and SUPERIOR OILS, LIMITED (DEFENDANTS) ..... RESPONDENTS.

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

Contract—Conflicting Terms—Agreement providing option exercisable within specified time followed by covenant failure to exercise option rendered optionee liable—Rule of Construction—Measure of Damages for Breach of Covenant.

An option agreement on petroleum and natural gas in certain lands declared by clause one, that the optionor granted the optionees an option exercisable within the time and in the manner thereinafter set forth. Clause two provided that the option might be exercised within a specified time by the optionees erecting the necessary machinery on the said lands, commencing the drilling of a well, and delivering to the optionor notice in writing of the exercise of the option. In clause three the optionees covenanted to exercise the option within the period prescribed in clause two and it was provided that on their failure so to do the optionor, despite the lapse of the option, would be entitled to exercise any remedies legally available for breach of the covenant, which the parties agreed, was given and entered into by the optionees as the substantial consideration for the granting of the said option.

Held: (Locke J. dissenting), that there was no repugnancy between clauses one and three of the agreement. Clause three did not destroy clause one, the two were to be read together. *Forbes* v. *Git* [1922] A.C. 256 at 259.

*PRESENT: Rinfret C.J. and Kerwin, Locke, Cartwright and Fauteux JJ.

Held: also that the appellant was entitled to more than nominal damages —the proper measure was the sum necessary to place him in the same position he would have been in if the covenant had been performed. *Wertheim* v. *Chicoutimi Pulp Co.,* [1911] A.C. 301 at 307. In this case, the payment of the $1,000 the appellant was compelled to pay for a further renewal of the head lease, resulted from the respondents' breach of the covenant. *Hadley* v. *Baxendale,* (1854) 156 E.R. 145, applied. *Cunningham* v. *Insinger,* [1924] S.C.R. 8, distinguished.

Per: Locke J., dissenting—The earlier clause, expressed in the terms of a grant to the optionees, gave them the option to acquire the sub-lease if they wished to do so, while the subsequent clauses purported to deprive them entirely of this right and render it obligatory upon them both to exercise the option and to execute the sub-lease. The right granted and the obligations imposed being totally inconsistent, the former should prevail and the latter be rejected. *Forbes* v. *Git,* [1922] 1 A.C. 256 at 259; *Git* v. *Forbes,* [1921] 62 Can. S.C.R. 1 at 9; *Bateson* v. *Gosling,* (1871) L.R. 7 C.P. 9 at 12.

Where the language employed in an agreement is free from ambiguity the Court must give effect to it even though the result may not be that which both parties contemplated. *Directors of Great Western Ry. Co.* v. *Rous,* (1870) L.R. 4 H.L.C., 650 at 660.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, (1), reversing the judgment of McLaurin J. (2), awarding damages to the appellant for breach of contract in the sum of $54,550.

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

Geo. H. Steer K.C. and *D. Rae Fisher* for the respondents.

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

KERWIN J.:—On April 21, 1948, the appellant as optionor entered into an agreement with the respondents as optionees and it is upon the covenant contained in clause 3 of this agreement that the present action is brought by the former against the latter. The relevant parts of the agreement read as follows:

WHEREAS by Indenture of Lease dated the 6th day of February, 1948, John Konstantin Witiuk of Red Deer, in the Province of Alberta, granted and leased unto Albert Edward Silliker all petroleum and natural gas and related hydrocarbons (hereinafter called "the leased substances") within, upon or under the North East Quarter of Section Thirty-one (31), in Township Forty-nine (49), Range Twenty-six (26), West of the Fourth

(1) [1949] 2 W.W.R. 136; 1949 3 D.L.R. 634.

(2) [1949] 1 W.W.R. 193.

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Meridian, in the Province of Alberta, reserving unto Canadian Pacific Railway Company all coal (hereinafter called "the demised lands"), for a term of Twenty-one (21) years from the date of the said lease and so long thereafter as the leased substances are produced from the leased lands of the Lessee shall conduct operations thereon for the discovery and/or recovery of the leased substances;

AND WHEREAS by Assignment in writing dated the 23rd day of February, 1948, the said Albert Edward Silliker granted, assigned, conveyed and set over unto the Optionor the said Lease and all his rights and interests thereunder and in and to the leased substances and all benefits and advantages of him, the said Silliker, derived or to be derived from the said lease, together with the unexpired term of the said lease;

AND WHEREAS the Optionor has agreed to grant to the Optionees an option to acquire a sub-lease of the leased substances within, upon and under that part of the demised lands consisting of Legal Subdivisions Nine (9) and Ten (10) thereof upon the terms and conditions hereinafter set forth.

NOW THIS AGREEMENT WITNESSETH that in consideration of the premises and of the sum of One ($1.00) Dollar, now paid by the Optionees to the Optionor (receipt of which is hereby by the Optionor acknowledged) and of the covenants of the Optionees herein contained, IT IS HEREBY MUTUALLY COVENANTED AND AGREED by and between the parties hereto as follows:

1. THE Optionor hereby grants to the Optionees an option exercisable within the time and in the manner hereinafter set forth to acquire a sub-lease of the leased substances within, upon and under the following lands, namely:

Legal Subdivisions Nine (9) and Ten (10), of Section Thirty-one (31), in Township Forty-nine (49), Range Twenty-six (26), West of the Fourth Meridian, in the Province of Alberta, reserving unto Canadian Pacific Railway Company all coal (hereinafter called "the sub-demised lands").

2. THE said option may be exercised on or before the 1st day of August, 1948, and may be exercised within the said time by the Optionees erecting upon the sub-demised lands the necessary derrick complete with rig irons, boiler and engine, and installing all drilling machinery, and actually spudding in and commencing the work of drilling a well for the discovery of petroleum on the sub-demised lands, and delivering or mailing to the optionor notice in writing of such exercise of the said option.

3. THE Optionees covenant to exercise the option within the said period, in the manner aforesaid, and in the event of their neglect or failure so to do, the Optionor shall, despite the lapse of the said option, be entitled to exercise any remedies which may be legally available to him for the breach by the Optionees of this covenant, which the parties hereto agree is given and entered into by the Optionees as the substantial consideration for the granting of the said option.

4. IN the event of the exercise of the said option, the Optionor shall grant to the Optionees a sub-lease of the sub-demised lands in the form set forth in Schedule "A" hereto attached, and each of the parties shall forthwith after the exercise of the option execute and deliver the said sub-lease.

The head lease from Witiuk to Silliker, referred to in the first recital, was really taken by the latter as agent and trustee for the appellant and associates, and the consideration therefor was the sum of $70,000 paid in cash, the reservation of certain royalties, and the covenant on behalf of the lessee to commence within six months from February 7, 1948, the drilling of a well for the leased substances and the carrying on of such drilling operations until such well should have reached the depth of 5,500 feet or the limestone should have been penetrated to a reasonable depth having regard to the geological situation, whichever should first occur, unless commercial production be sooner obtained; with a provision that upon payment of another $1,000 the time for drilling should be extended for another six months. As stated in the second recital, Silliker assigned the head lease to the appellant on February 23, 1948, and the record shows that this assignment was consented to by the original lessor. The third recital is of importance as it is there stated that the appellant has agreed to grant the respondents "an option to acquire a sub-lease of the leased substances within, upon and under" the described part of the lands "upon the terms and conditions hereinafter set forth." The next paragraph gives the consideration as not merely the sum of $1.00 but also "the covenants of the optionees herein contained."

By clause numbered 1, the option is granted to acquire the sublease within the time and in the manner thereinafter in the agreement set forth. Clause 2 fixes the time as on or before August 1, 1948, and the manner is "by the optionees erecting upon the subdemised lands the necessary derrick complete with rig irons, boiler and engine, and installing all drilling machinery, and actually spudding in and commencing the work of drilling a well." It will be noted that the optionees are merely to erect the derrick, etc., spud in, and *commence* the work of drilling a well. That is, so far as the exercise of the option is concerned, there is no obligation to continue drilling. Notice in writing of such exercise of the option is to be given. Clause 3 contains the covenant sued upon, which is stated to be the substantial consideration for the granting of the option.

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The covenant is by the optionees to exercise the option within the period and in the manner aforesaid, and "in the event of their neglect or failure so to do, the optionor shall, despite the lapse of the said option, be entitled to exercise any remedies which may be legally available to him for the breach by the optionees of this covenant." It is to be noted that by clause 4 it is only in the event of the exercise of the option that the sublease according to Schedule "A" is to be executed and delivered by the parties.

Much was made on the argument of the use of the terms "optionor" and "optionee" in the agreement but this is but one circumstance bearing upon the proper construction of the document. The Appellate Division concluded that the case fell to be decided upon the principle of repugnancy, which was not raised until the oral argument of the appeal before the Appellate Division. The late Chief Justice Harvey, on behalf of the Court, adopted as binding the following statement of the principle by Lord Wrenbury for the Judicial Committee in *Forbes* v. *Git* (1).

> If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. * * * But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole.

The foundation of the rule is explained in the dissenting judgment of Duff J. (concurred in by Sir Louis Davies) in this Court (2), and a number of the decided cases are referred to. Applying the statement of the principle by the Judicial Committee to the case at bar, in my opinion there is no repugnancy between clauses 1 and 3 of the agreement. Nothing is to be gained by comparing the provisions of the agreement before us with other documents in other cases. and the respondents' case could not be put higher than Mr. Steer's argument that clause 3 deprived the optionees of the choice previously given by clause 1. Now, not only was there no obligation previously imposed, but the promise of the optionees was explicit and it was further provided that the optionor should be entitled to his remedies although the option had lapsed. Clause 3 does

(1) [1922] 1 A.C. 256 at 259. (2) [1921] 62 Can. S.C.R. 1.

not destroy clause 1, and the two are to be read together. It is apparent from the evidence that, holding a lease of the leased substances in the northeast quarter of section 31, comprising 160 acres, for which, on February 6, 1948, the sum of $70,000 had been paid, the optionor, while willing to give the optionees six months to exercise the option with relation to 80 acres by commencing the work of drilling and giving the specified notice, had included in the agreement a term whereby the optionees covenanted to do these very things.

Having notified the appellant that they would not fulfil their covenant, the respondents have breached it and are liable in damages. The trial judge awarded the sum of $54,550, being $53,550, the admitted cost of drilling a well to a depth of 5,500 feet (although the form of lease attached as Schedule "A" to the agreement required a depth of 6,000 feet), and an additional $1,000, being the sum paid by the appellant to the head lessor for an extension of six months in accordance with the provisions of the head lease. In addition to paying $1,000, the appellant negotiated with others to drill but, according to him, he had to deal with the 160 acres and not merely the 80 acres referred to in the agreement sued on. The evidence does not disclose the result of these negotiations or what else, if anything, the appellant did. The allowance by the trial judge was made on the basis of reading together the head lease, the agreement in question, and the form of lease attached thereto and construing the covenant sued upon as one to dig a well. I am unable to agree that this is the proper way of approaching the matter. Clause 4 of the agreement provides that the optionor shall grant to the optionees the sublease "in the event of the exercise of the said option" and I cannot read the document as equivalent to a simple agreement for a lease. Such a result could follow only if the option had in fact been exercised. It appears to me that clause 3 was drawn having in mind that the option might not be exercised and provided that, if the optionees neglected or failed to exercise it, certain results should follow. It was only if the option was exercised that the lease was to be entered into.

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Notwithstanding that the appellant's case was put as if the respondents' covenant was to dig a well, which as I have indicated is not in my view its proper construction, the appellant is entitled to more than nominal damages. The proper measure is not the cost of performance to the respondents but the value of performance to the appellant: *Erie County Natural Gas and Fuel Co.* v. *Carroll* (1). Adapting Lord Atkinson's language at the foot of page 118, it was the appellant's business to show the damages and he cannot be permitted to recover damages on guesswork or surmise. The evidence discloses, and the trial judge finds, that the chance of obtaining oil on drilling is remote although it cannot be completely ruled out. However, it was on the basis of the covenant being to drill a well that the trial judge assessed the damages, and the substratum for that allowance being absent, there is nothing in the record to warrant fixing the damages at more than the $1,000 paid by the appellant. It is true that this payment kept in force the head lease for another six months and, the respondents having no further rights, the entire benefit of that payment enured to the advantage only of the appellant, but it was a reasonable step for the latter to take, and it should be held that the amount of that payment is the sum necessary to place the appellant in the same position as he would have been in if the covenant had been performed: *Wertheim* v. *Chicoutimi Pulp Co.* (2).

The special circumstance of the appellant being compelled to pay $1,000 for a further renewal of six months of the head lease was known to the respondents. That payment naturally resulted from the respondents' breach of their covenant and since they contemplated, or ought to have contemplated, the consequences which proximately followed the breach, they are liable to pay damages according to the rule in *Hadley* v. *Baxendale* (3). To put the matter in another way, the $1,000 damages are such as are the natural and probable result of the breach. In view of the breach found to have been committed in this

(1) [1911] A.C. 105.
(2) [1911] A.C. 301 at 307.
(3) (1854) 9 Ex. 341; 156 E.R. 145.

case, *Cunningham* v. *Insinger* (1) and the decisions referred to in *Kinkel* v. *Hyman* (2) are quite distinguishable.

The appeal should, therefore, be allowed and judgment directed to be entered for the appellant for the sum of $1,000. He is entitled to his costs of the action and of the appeal to this Court but the respondents should have their costs in the Appellate Division of the Supreme Court of Alberta.

LOCKE J. (dissenting):—By the agreement of April 21, 1948, made between the parties to this action wherein the appellant is described as the optionor and the respondents the optionees, after reciting the grant of the head lease by Witiuk to Silliker and its subsequent assignment by the latter to the appellant, it is said that:

> The optionor has agreed to grant to the optionees an option to acquire a sublease of the leased substances

under part of the lands referred to in that lease. This is followed by a statement that in consideration "of the premises and of the sum of $1.00 now paid by the optionees to the optionor and of the covenants of the optionees herein contained, it is hereby mutually covenanted and agreed by and between the parties hereto as follows:

> 1. The optionor hereby grants to the Optionees an option exercisable within the time and in the manner hereinafter set forth to acquire a sub-lease of the leased substances within, upon and under.

the lands referred to and by paragraph 2 it is provided that:

> 2. The said option may be exercised on or before the 1st day of August, 1948, and may be exercised within the said time by the optionees erecting upon the sub-demised lands.

the necessary drilling equipment and commencing the drilling of a well for the discovery of petroleum:

> and delivering or mailing to the optionor notice in writing of such exercise of the said option.

As a schedule to this agreement there is the form of the sub-lease to be granted by the appellant to the respondents in the event of the exercise by them of the option, and in this document it is said that the appellant has granted to the respondents "an option to acquire a sub-lease of the sub-demised lands" and that the respondents have

(1) [1924] S.C.R. 8. (2) [1939] S.C.R. 364.

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exercised the said option by, *inter alia*, the spudding in and commencing the work of drilling a well for the discovery of petroleum upon the said sub-demised lands and are entitled to the grant of the sub-lease aforesaid.

Having granted to the respondents the right to acquire a sub-lease of the premises which might be exercised at any time between the date of the instrument and August 1, 1948, in the prescribed manner at their will, the agreement further provided:

> 3. The Optionees covenant to exercise the option within the said period, in the manner aforesaid, and in the event of their neglect or failure so to do, the optionor shall, despite the lapse of the said option, be entitled to exercise any remedies which may be legally available to him for the breach by the optionees of this covenant, which the parties hereto agree is given and entered into by the optionees as the substantial consideration for the granting of the said option.
>
> 4. In the event of the exercise of the said option, the optionor shall grant to the optionees a sub-lease of the sub-demised lands in the form set forth in Schedule "A" hereto attached, and each of the parties shall forthwith after the exercise of the option execute and deliver the said sub-lease.

Thus, while for a valuable consideration vesting in the respondents the right of acquiring a sub-lease within a limited time if they desired to do so, the agreement purported to impose upon them an absolute obligation to exercise that right within the defined period, declared that they would be liable to the appellant for any failure to do so and obligated them to execute and deliver the form of sub-lease forthwith after the exercise of the option. The last mentioned covenant was not merely an agreement to enter into an agreement any of the material terms of which remained to be negotiated, but an obligation to execute and deliver an agreement, all the terms of which were settled, as to which in the event of default the appellant might resort to the remedy of specific performance or claim damages.

The question as to whether in construing the agreement paragraphs 3 and 4 are to be rejected as repugnant to the clauses granting the option which precede them was not raised before the learned trial judge and, accordingly, not considered by him. The judgment at the trial awarded damages against the respondents for their failure to exercise the option as required by paragraph 3 and to drill the well,

which they would have been obligated to do under the terms of the sub-lease which they had covenanted to execute and deliver. By the unanimous judgment of the Court of Appeal delivered by the late Chief Justice of the Appellate Division this judgment has been set aside on the ground that paragraphs 3 and 4, being repugnant to the clause granting the option within the principle stated in *Forbes* v. *Git* (1), were to be rejected.

There is no ambiguity to be found in the terms of this agreement, in my opinion. Among the meanings assigned to the word "option" in the Oxford English Dictionary is "the privilege (acquired on some consideration) of executing or relinquishing, as one may choose, within a specified period a commercial transaction on terms now fixed" and it is in that sense that the word is used in transactions of the nature in question here. The language of the instrument is that in common use in granting such a right and is incapable of any meaning other than that the optionee may contract or refrain from doing so at will. The language of paragraphs 3 and 4 is equally clear that the optionees were bound to exercise the option within the defined period and in the prescribed manner and, having done so, to execute and deliver the sub-lease. In *Forbes* v. *Git, supra* at 259, Lord Wrenbury states the rule of construction as being that if in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. Mr. Nolan, in his able argument for the appellant, contended that the rule so stated was inapplicable unless the repugnancy was to be found in covenants by the same person or persons and that accordingly in the present case where the inconsistency, if there is such, is between the grant by the optionor of the option and the covenant of the optionees to exercise it, it did not apply. The authorities do not, in my opinion, support this contention, nor do I think it was intended in the passage referred to in *Forbes* v. *Git* to state the rule in a manner inconsistent with the earlier authorities, but rather merely to state its application to the facts

(1) [1922] 1 A.C. 256 at 259.

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of that case. In the passage from Sheppard's Touchstone, 7th Ed. p. 88, referred to by Duff J. (as he then was) in *Git* v. *Forbes* (1), the rule is stated thus:

> That in a deed if there be two clauses so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected: wherein it differs from a will; for there of two such repugnant clauses the latter shall stand.

A marginal note to this statement refers to Hardres' Reports at p. 94, where in the action of *Cother* v. *Merrick* (1657) Baron Nicholas is reported as saying:

> Where there are two clauses in a deed of which the latter is contradictory to the former there the former shall stand.

In Blackstone's Commentaries (Lewis' Ed.) Book 2 p. 841, the law is stated in the terms employed in Sheppard's Touchstone. In *Doe dem. Leicester* v. *Biggs* (2), Mansfield C.J. states the rule as being that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail.

In *Bateson* v. *Gosling* (3), Willes J. said:

> The rule of law is clear, that, if there be two clauses or parts of a deed repugnant the one to the other, the first shall be received and the latter rejected, except there be some special reason for the contrary.

Here the earlier clause which is expressed in the terms of a grant to the optionees gives them the option to acquire the sub-lease if they wish to do so, while the subsequent clauses purport to deprive them entirely of this right and render it obligatory upon them both to exercise the option and to execute the sub-lease. The right granted and the obligations imposed appear to me to be totally inconsistent and, in my view, the former must prevail and the latter be rejected.

It is said for the appellant that despite the language employed the dominant intention of the parties is apparent, this being to obligate the respondents to commence to drill the well within the prescribed period and to execute and deliver the sub-lease forthwith thereafter and to discharge their obligations under that document. To so interpret the agreement, however, involves rejecting the language of the preamble and of paragraph 1 above quoted and for

(1) (1921) 62 Can. S.C.R. 1 at 9.
(2) (1809) 2 Taunt. 109 at 112; 127 E.R. 1017 at 1019.
(3) (1871) L.R. 7 C.P. 9 at 12.

this there is, in my opinion, no warrant. I am by no means satisfied that the interpretation which I think should be placed upon this agreement is in accordance with what was intended by the parties. Where, however, the language employed is free from ambiguity, we must give effect to it even though the result may not be that which both parties contemplated (*Directors of Great Western Railway Co.* v. *Rous* (1), per Lord Westbury at 660).

I would dismiss this appeal with costs.

The judgment of Cartwright and Fauteux JJ. was delivered by:

CARTWRIGHT J.:—By lease dated February 6, 1948, one Witiuk granted and leased to an agent of the appellant, who duly assigned the lease to the appellant,

All the petroleum and natural gas and related hydrocarbons the exclusive right and privilege of prospecting and drilling for, taking, removing and selling the leased substances within, upon or under the said lands and of laying pipelines and building tanks, stations and structures necessary and convenient to take care of the said products or any of them, within, upon or under the following lands, namely:

The North East quarter of Section Thirty-one (31), Township Forty-nine (49), Range Twenty-Six (26), West of the Fourth Meridian, in the Province of Alberta, containing One Hundred and Sixty (160) acres more or less, reserving unto the Canadian Pacific Railway Company all coal.

TO HAVE AND ENJOY the same for the term of twenty-one years from the date of acceptance hereof, and so long thereafter as the leased substances are produced from the leased lands or the Lessee shall conduct operations thereon for the discovery and/or recovery of such leased substances.

This lease contains a covenant on the part of the lessee to commence the drilling of a well for the leased substances on the said lands within six months from the date of the lease and to diligently carry on such drilling operations until such well shall have reached a depth of 5,500 feet, or the limestone has been penetrated to a reasonable depth having regard to the geological situation, whichever should first occur, unless commercial production should be sooner obtained. There is a proviso permitting the lessee to obtain a six months' extension on payment to the lessor of $1000. The lease contains a right of re-entry for breach of the

(1) (1870) L.R. 4 H.L. App. 650.

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above convenant, subject to the provisions of paragraph 14 which reads as follows:

PROVIDED HOWEVER and notwithstanding anything herein contained, the Lessee shall not be deemed to be in default on account of any delays in the commencement or interruption of drilling operations as provided under the terms of this agreement in the event such delay is caused directly or indirectly by reason of acts of King's enemies, acts of God, inclement weather, shortage of materials and labor due to military exigencies, Governmental priorities, inability of manufacturers to deliver materials, regulations or any other cause beyond the reasonable control of the Lessee.

The lease contains a covenant by the lessee to pay a royalty of 12½% of the current market value of the leased substances produced and marketed and other covenants which are not relevant to the questions raised on this appeal. It appears that the sum of $70,000 was paid to Witiuk for the lease and a further $2,500 was paid by the appellant to his agent for the assignment of the lease. The appellant also agreed to observe all the lessee's covenants.

The document on which this action is brought is dated April 21, 1948. It is called a "Memorandum of Agreement" and is made between the appellant, called "the optionor" of the first part, and the respondents, called "the optionees" of the second part. It recites the lease of February 6, 1948 and the assignment thereof to the appellant and continues:

AND WHEREAS the Optionor has agreed to grant to the Optionees an option to acquire a sub-lease of the leased substances within, upon and under that part of the demised lands consisting of Legal Subdivisions Nine (9) and Ten (10) thereof upon the terms and conditions hereinafter set forth.

NOW THIS AGREEMENT WITNESSETH that in consideration of the premises and of the sum of One ($1.00) Dollar, now paid by the Optionees to the Optionor (receipt of which is hereby by the Optionor acknowledged) and of the covenants of the Optionees herein contained, IT IS HEREBY MUTUALLY COVENANTED AND AGREED by and between the parties hereto as follows:

1. THE Optionor hereby grants to the Optionees an option exercisable within the time and in the manner hereinafter set forth to acquire a sub-lease of the leased substances within, upon and under the following lands, namely:

Legal Subdivisions Nine (9) and Ten (10), of Section Thirty-one (31), in Township Forty-nine (49), Range Twenty-six (26), West of the Fourth Meridian, in the Province of Alberta, reserving unto Canadian Pacific Railway Company all coal (hereinafter called "the sub-demised lands").

2. THE said option may be exercised on or before the 1st day of August, 1948, and may be exercised within the said time by the Optionees erecting upon the sub-demised lands the necessary derrick complete with rig irons, boiler and engine, and installing all drilling machinery, and actually spudding in and commencing the work of drilling a well for the discovery of petroleum on the sub-demised lands, and delivering or mailing to the Optionor notice in writing of such exercise of the said option.

3. THE Optionees covenant to exercise the option within the said period, in the manner aforesaid, and in the event of their neglect or failure so to do, the Optionor shall, despite the lapse of the said option, be entitled to exercise any remedies which may be legally available to him for the breach by the Optionees of this covenant, which the parties hereto agree is given and entered into by the Optionees as the substantial consideration for the granting of the said option.

4. IN the event of the exercise of the said option, the Optionor shall grant to the Optionees a sub-lease of the sub-demised lands in the form set forth in Schedule "A" hereto attached, and each of the parties shall forthwith after the exercise of the option execute and deliver the said sub-lease.

5. ANY notice required to be delivered by the Optionees to the Optionor pursuant to the provisions hereof may be delivered by mailing the same in a prepaid envelope addressed to "W. H. Cotter, Esq., c/o Messrs. A. L. Smith, Egbert & Smith, 500 Lancaster Building, Calgary, Alberta," and shall be deemed to have been received by the Optionor on the day next following the date of mailing thereof.

6. TIME shall be of the essence hereof.

THIS AGREEMENT shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF the Optionor has hereunto his hand and seal subscribed and set and the Optionees have caused these presents to be executed and their corporate seals to be hereunto affixed witnessed by the hands of their proper officers duly authorized in that behalf, the day and year first hereinbefore written.

It is duly signed and sealed by all the parties. Attached as Schedule "A" is the form of sub-lease referred to in paragraph 4. This form is complete in the sense that it leaves no material term to be agreed upon between the parties. It is made between the Appellant as sub-lessor and the Respondents as sub-lessees. It recites the lease of February 6, 1948, referred to as the head lease (a copy whereof is attached as a schedule to the sub-lease) and the assignment thereof to the appellant and contains the following recitals:

AND WHEREAS by Agreement in writing dated the day of April, 1948, the Sub-Lessor granted to the Sub-Lessees an option to acquire a sub-lease of the sub-demised lands hereinafter described upon the terms and conditions in the said Agreement set forth;

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AND WHEREAS the Sub-Lessees have exercised the said Option by, *inter alia* the spudding in and commencing the work of drilling a well for the discovery of petroleum upon the said sub-demised lands, and are entitled to the grant of the sub-lease aforesaid;

The sub-lessor grants and sub-leases to the sub-lessees all the leased substances within, upon or under the lands described in paragraph 1 of the Agreement of April 21, 1948, for the term of the head-lease and any renewals thereof. The sub-lessees assume payment of the 12½% royalty to the head-lessor and agree to pay a royalty of 2½% to the sub-lessor. There are elaborate provisions for the division of the proceeds of the sale of the products produced. Briefly summarized these provide that the net proceeds after payment of taxes, costs of production and costs of marketing shall be divided proportionately between the sub-lessor and sub-lessees until the former has received $75,000 and the latter have received the proper cost of drilling the well, and that thereafter the proceeds of net production shall be divided equally between the sub-lessor and sub-lessees. The form contains the following paragraph:

THE Sub-Lessees shall hereafter diligently and continuously carry on the drilling operations at the said well heretofore commenced by them until such well shall have reached a depth of Six Thousand (6,000') feet, or the limestone has been penetrated to a reasonable depth having regard to the geological situation, whichever shall first occur, unless commercial production is sooner obtained.

It also contains a provision similar to paragraph 14 of the lease of February 6, 1948 quoted above. It should be mentioned that the area of the lands described in the lease of February 6, 1948 is 160 acres and that of the lands described in the form of sub-lease is 80 acres.

On May 12, 1948 a well lying about three-quarters of a mile north east of the lands with which we are concerned was abandoned after reaching a depth of 5,424 feet and on June 3, 1948 a well lying about a mile and a quarter west by south of such lands was abandoned at a depth of 5,601 feet. These failures led the respondents to believe that it would be useless to drill on the lands described, and in the month of June, 1948 they decided that they would not commence the drilling of a well and so advised the appellant. Some correspondence ensued. The appellant

through his solicitors took the position that the respondents were bound to drill a well and that he would seek damages if they failed to do so. The respondents took the position that, in view of the location of the lands in question between the two wells referred to above which had proved failures, it would be a needless waste of money to drill. The respondents persisted in their refusal and on August 31, 1948 the appellant commenced this action claiming $100,000 damages.

The action was tried by McLaurin J. on December 3, 1948. That learned judge held (1), that the agreement of April 21, 1948, the sub-lease attached thereto and the head lease must be read together, that on their proper construction the respondents were obliged to commence drilling by August 1, 1948 and to drill a well to completion as provided in the sub-lease, that in breach of the contract they had refused to do so and were accordingly liable to pay damages. After a full and careful review of a number of decisions some in our own courts and some in the courts of the United States he concluded that the proper measure of damages was the amount which it would have cost to drill the well, which was admitted to be $53,500, plus $1,000 which the appellant had paid to Witiuk for a six months' extension of the time set for commencing to drill. In the result judgment was given for the appellant for $54,500 and costs. Three geologists gave evidence as to the chance of obtaining production by drilling on the lands in question and the learned judge finds as a fact that such chances are far from favourable but that the possibility of production cannot be completely ruled out. This finding is supported by the evidence.

The Court of Appeal in a unanimous judgment allowed the appeal and dismissed the action with costs (2). In the judgment of the Court written by the late Chief Justice Harvey it is held that the case falls to be decided on the principle of repugnancy, which, it is stated, was not raised until the oral argument in the Court of Appeal, and that paragraph 3 of the agreement of April 21, 1948 is void for repugnancy and must be rejected as "destructive of

(1) [1949] 1 W.W.R. 194. (2) [1949] 3 D.L.R. 634.

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the object of the instrument". The ratio of the decision of the Court of Appeal is summed up in the following paragraphs:

> The agreement sued on herein is clearly an option agreement. It recites the agreement to grant an option and then expressly grants the option and the statement of claim alleges that an option was granted. Clearly the object of the agreement was to grant an option. What could be, in the words of Duff J. above quoted, (*Git* v. *Forbes* (1)) more "destructive of the object of the instrument" than a covenant completely nullifying the choice given by the instrument,—a covenant that he will exercise the option,—in other words, will have no choice?
>
> As the *Forbes* case decides this covenant is "repugnant and void" and as the action is founded on it, the action fails.

The first point that arises for determination is whether or not there was a binding contract between the parties and if so the extent of the obligation imposed upon the respondents. The appellant supports the view of the learned trial judge and contends that the respondents were bound on or before August 1, 1948, to erect upon the lands in question the necessary derrick and other equipment and machinery and to actually spud in and commence to drill a well and to diligently and continuously carry on such drilling until the depth prescribed in the form of sub-lease was reached. The respondents contend, first, that the decision of the Court of Appeal is right; secondly, that, if this is not so, the only obligation which fell upon them was to commence to drill a well and that for a breach of such obligation the appellant could not recover more than nominal damages; thirdly, that if the learned trial judge was right in holding that they were bound by the contract to drill a well he assessed the damages on a wrong principle and that the damages are excessive.

The extent of the respondents' obligation, if any, depends upon the construction of the written contract. There appeared to be no disagreement between counsel as to the principles to be applied, but in their application to the terms of a particular document considerable difference of opinion may arise.

It is settled that, "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be

rejected and the earlier clause prevails." *Forbes* v. *Git* (1). But as was said by Duff J., as he then was, in the same case "The rule as to repugnancy, therefore, is obviously a rule to be applied only in the last resort and when there is no reasonable way of reconciling the two passages and bringing them into harmony with some intention to be collected from the deed as a whole." *Git* v. *Forbes* (2).

A rule of universal application in the construction of deeds was stated in *Mill* v. *Hill* (3), as follows: "The general rule of construction is, that the Courts, in construing the deeds of parties, look much more to the intent to be collected from the whole deed, than from the language of any particular portion of it."

In *Hillas and Co. Ltd.* v. *Arcos Ltd.* (4), Lord Tomlin, in whose judgment Lord Warrington and Lord MacMillan concurred, said: "The problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains."

In my view there is no such repugnancy between the provisions of the contract here in question as requires the rejection of any of them. In paragraphs 1 and 2 the optionor grants an option and prescribes the time within which and the manner in which it may be accepted. I am unable to agree with the view of the Court of Appeal that paragraph 3 nullifies the choice given in paragraph 1, except in the sense that every right to choose by its nature ends with the making of a choice. Paragraph 3 is, I think, not the destruction of the right to choose but rather its exercise. Had paragraph 3 been omitted from the instrument altogether, it would have been open to the parties immediately after the execution of such instrument to enter into a further contract having the effect of paragraph 3 and I do not think that the whole transaction is destroyed by reason of the fact that what might have been more artistically accomplished by the use of two documents was

(1) [1922] 1 A.C. 256 at 259.
(2) (1921) 62 Can. S.C.R. 1 at 10.
(3) (1852) 3 H.L. Cas. 828 at 847; 10 E.R. 330.
(4) (1932) 147 L.T. 503 at 512.

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sought to be effected in one. The method employed by the draftsman is new to me and we were not referred to any reported case in which a similar means of expression has been adopted, but in principle I can see no reason why parties may not combine in one instrument an offer open for some months and an immediate acceptance of that offer.

I think that, read as a whole, the agreement of April 21, 1948 with its schedules discloses the intention of the parties to agree that on or before August 1, 1948 the respondents would commence to drill a well in the manner set out in paragraph 2 of the agreement, that forthwith on such commencement the parties would execute the sub-lease and that the respondents would carry on the drilling of the well to completion in the manner set out in the sub-lease. I think that the respondents were bound in contract not only to commence but to complete the drilling of the well within the time and in the manner prescribed, and that such obligations bound them from the moment that the agreement of April 21, 1948 was executed.

I think that the principle applicable is accurately expressed in the following passage from Pollock on Contracts 13th Ed. (1950) at page 35. "It has been said that 'there cannot be a contract to make a contract' but this is a misleading epigram, for it is inaccurate in so far as it goes beyond the rule that, if parties to an agreement leave essential terms in it undetermined and therefore to be settled by subsequent contract, their agreement is not an enforceable contract. On the other hand, as Lord Wright said in *Hillas and Co., Ltd.* v. *Arcos, Ltd.* (*Supra*) at 515, 'A contract *de præsenti* to enter into what, in law, is an enforceable contract is simply that enforceable contract, and no more and no less; and if what may not very accurately be called the second contract is not to take effect till some future date but is otherwise an enforceable contract, the position is as in the preceding illustration, save that the operation of the contract is postponed. But in each case there is *eo instanti* a complete obligation.' "

What I have said as to my view of the proper construction of the contract will indicate that I cannot accede to the respondents' argument that their only obligation

was to commence to drill a well. It may be observed in passing that it would have been of no advantage to the appellant to have the respondents merely commence the drilling of a well on or before August 1, 1948. The terms of the head lease required that once having been commenced such drilling operation must be diligently carried on to the prescribed depth. Commencement of drilling coupled with failure to carry on (unless such failure were excused under paragraph 14 quoted above) would result not in any benefit to the appellant but in forfeiture of the head lease.

There is no suggestion that the appellant was not at all times ready and willing to perform his side of the bargain. Before the time arrived at which the first act of performance was due from the respondents they definitely repudiated the agreement and the appellant became entitled to bring this action for damages for breach of the contract.

For the above reasons, I respectfully agree with the learned trial judge that the respondents are liable in damages to the appellant for failure to drill a well to the prescribed depth. It is to be observed that this conclusion appears to be in harmony with the view the parties themselves entertained as disclosed in the correspondence at the time of, and following, the repudiation of the contract by the respondents. Quite apart from this correspondence and proceeding only upon a consideration of the terms of the written instrument I find myself in agreement with the view of the learned trial judge; but the view expressed in the correspondence is entitled, I think, to some weight in reaching a decision. In *Foley* v. *Classique Coaches Ltd* (1), Lord Hewart C.J. is reported to have said: "There is no doubt that the parties intended to make a binding contract and thought that they had done so, and that is a circumstance which, according to the judgments of Lord Tomlin, Lord Thankerton and Lord Wright in *Hillas & Co.* v. *Arcos* (2), ought to be taken into consideration in deciding whether there is a concluded contract or not." The Court of Appeal affirmed Lord Hewart's judgment and Maugham L.J. said, at page 13: "In the later case, *Hillas and Co.* v. *Arcos* (1), some weight, although not too much, is to be

(1) [1934] 2 K.B. 1 at 5. (2) 147 L.T. 503.

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attached to the fact that the parties conceived that they were entering into a binding contract, and the old maxim applies that the document should, if possible, be so interpreted *ut res magis valeat quam pereat.*"

It remains to be considered on what principle and at what amount the damages should be assessed.

The underlying principle is expressed by Lord Atkinson in *Wertheim* v. *Chicoutimi Pulp Co.* (1): "And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed * * * That is a ruling principle. It is a just principle." In the case at bar if the respondents had carried out the contract the appellant would not have had to pay the $1,000 for a six months' extension which he did in fact pay to the head-lessor. The circumstances as to the necessity of making such payment were known to the parties and I agree with the learned trial judge that that sum is recoverable. What further benefits would have resulted to the appellant from the performance of the contract? If the respondents had drilled the well to the prescribed depth and it had proved a producer, the appellant would have received, (*a*) his share of the proceeds and, (*b*) the benefit of having the head lease validated, by the performance of the lessee's covenant to drill, not only as to the 80 acres described in the sub-lease but as to the whole 160 acres described in the head lease. If on the other hand, as, from the evidence of the geologists, would seem much more probable, the well had proved a failure the appellant would not have received benefit (*a*) but would have received benefit (*b*). It must be remembered however that as a result of the respondents' breach the appellant holds the whole 160 acres free from any claim of the respondents. No part of the consideration which under the contract would have passed to the respondents has passed, except that from April 21, 1948 until some time in June 1948, when they repudiated the agreement, the respondents had rights in the 80 acres and the appellant was not free to deal therewith. Under these circum-

(1) [1911] A.C. 301 at 3097.

stances, I do not think that the cost of drilling is the proper measure of damages. Suppose that instead of the consideration set out in the contract the appellant had agreed to pay the respondents $53,500 to drill the well and the respondents had repudiated the contract before the date set for the commencement of the work and before any moneys had been paid to them. In such a case by analogy to the rule in the case of building contracts the measure of damages would seem to be the difference (if any) between the price of the work agreed upon and the cost to which the appellant was actually put in its completion. I think it will be found that those cases in which it has been held that the cost of drilling is the proper measure of damages are cases where the consideration to be given for the drilling had actually passed to the defendant. Examples of such cases are *Cunningham* v. *Insinger* (1), and *Pell* v. *Shearman* (2) (a contract to sink a shaft).

The appellant did not seek to put his case on the ground that by reason of the breach he stood to lose the head lease, but rather that he intended to make and was in process of making other arrangements to have a well drilled. In my view, the proper measure of his damages under the circumstances of this case is the difference between the value to him of the consideration for which the respondents agreed to drill the well and the value to him of the consideration which, acting reasonably, he should find it necessary to give to have the well drilled by others. I am unable to find in the record evidence on which the damages can be assessed on this basis. It is well settled that the mere fact that damages are difficult to estimate and cannot be assessed with certainty does not relieve the party in default of the necessity of paying damages and is no ground for awarding only nominal damages, but the onus of proving his damages still rests upon the plaintiff. The evidence of the appellant given at the trial on December 3, 1948 was to the effect that he and his associates had been and still were in negotiation with an oil company but that they had found themselves forced to deal with the whole 160 acres instead of 80 acres. As Mr. Steer pointed out there is no evidence as to the terms offered by such com-

(1) [1924] S.C.R. 8. 156 E.R. 650.

(2) (1855) 10 Ex 766;

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pany and such terms may have been more or less advantageous to the appellant than those contained in the contract sued on. It would have been open to the appellant to have delayed bringing his action until the completion of his arrangements to have the well drilled by which time the damages, if any, would have been more easily ascertained. But the appellant, as he had a right to do, brought his action to trial before that date. There is no complaint that any evidence he wished to tender in support of his claim for damages was rejected, nor was there any request made for a reference to fix the damages and the case must be decided upon the evidence in the record. In my view, there is no evidence to support an award of damages other than the $1,000 paid for the extension of the time for drilling. If the evidence shewed that the appellant had suffered or must of necessity suffer substantial damages, over and above the $1,000 already mentioned, by reason of the respondents' breach, the Court should, I think, seek some means of arriving at a proper assessment, but in my view the most that the evidence can be said to indicate is a probability of some loss. It is possible that there has been no loss at all.

For the above reasons, I would dispose of the appeal in the manner proposed by my brother Kerwin.

Appeal allowed.

Solicitors for the appellant: *Nolan, Chambers, Might, Saucier, & Peacock.*

Solicitors for the respondents: *Fisher, McDonald & Fisher.*

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* May 18, 19
* Oct. 3

RALPH NEWCOMBE BARRICK and THERESA MAY FLORELLA BARRICK, EXECUTORS OF THE ESTATE OF ELI JAMES BARRICK, deceased, and WILLIAM HOHMANN (*Defendants*) ..... APPELLANTS;

AND

FRANK J. CLARK (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN

Contract by correspondence—Sale of Farm Land—Offer by Post—Acceptance—Reasonable Time.

In negotiations for a sale conducted by correspondence an offer unlimited by its terms as to time must be accepted within a reasonable time.

Held: In the circumstances of this case the acceptance made on December 10 of the offer contained in the letter of November 15, was not made within a reasonable time.

Per: Estey J.—What will constitute a reasonable time depends upon the nature and character of the subject matter and the normal or usual course of business in negotiations leading to a sale thereof, as well as the circumstances of the offer including the conduct of the parties in the course of the negotiations. *Manning* v. *Carrique*, (1915) 54 O.L.R. 453.

APPEAL from a judgment of the Court of Appeal of Saskatchewan, (1) reversing the judgment of McKercher J. who dismissed the respondent's (plaintiff's) action for specific performance of an alleged contract for the sale of farm land. The facts of the case are fully stated in the reasons for judgment which follow.

H. F. Parkinson, K.C., and *W. J. Anderson* for the appellants, Barrick.

F. E. Jaenicke, K.C., for the appellant, Hohmann.

G. H. Yule, K.C., for the respondent.

The judgment of the Chief Justice and of Kellock J. was delivered by

KELLOCK J.:—The first question which arises in this appeal is as to whether or not, treating the appellant Barrick's letter of the 15th of November, 1947, as an

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

(1) [1949] 2 W.W.R. 1009; [1950] 1 D.L.R. 260.

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offer, the purported acceptance of the respondent was in time. The learned trial judge held that, having regard to the circumstances, it would be unreasonable for the respondent to expect that the appellant's offer was still open for acceptance on December 10th. In the view of the Court of Appeal, (1) the offer was still open for acceptance on the above date. This view was based on two grounds, first that in the correspondence which preceded the offer of November 15th no haste was shown, and therefore December 10th was a reasonable time for acceptance, and second that, as a matter of law, the offer continued in effect until it was actually received by the respondent on the day upon which he purported to accept it.

The letter of November 15th, 1947, reads as follows:

166 Briar Hill Ave.,
Toronto, Ont.,
November 15th/47.

Mr. F. J. Clark,
Luseland, Sask.

Dear Sir:

In reply to your recent letter, in which you offer $14,500 cash for the ¾ sections W½ of 9 and SW¼ of 16-37-24 W of 3rd. I have delayed answering in order to consult with those interested in the Estate and thereby be in a position to give something concrete.

We are prepared to sell this land for $15,000 cash. If this price is satisfactory to you, the deal could be closed immediately, by preparing an agreement for sale to be given you on receipt of initial payment of $2,000—transfer of clear title to be given you on Jan. 1st, 1948, on receipt of balance of purchase price, $13,000. The present tenant Kostresky's lease expires March 1st, 1948.

Trusting to hear from you as soon as possible.

Yours truly,
(Sgd.) R. M. Barrick.

Treating this letter as an offer, there are, I think, three indications in the letter itself which show that December 10th was beyond a reasonable time for acceptance. In the first place, the appellant states that if respondent were satisfied with the price, the transaction could be *immediately* closed by the preparation and delivery of an agreement of sale in exchange for $2,000 to be paid by the respondent. It is true that the word "immediately" does not directly relate to the acceptance of the offer, but it indicates that, as regards the closing of the transaction which would follow acceptance of the offer, there should be no delay.

(1) [1949] 2 W.W.R. 1009.

In the second place, the respondent is asked to give his answer "as soon as possible." It is true that this phrase is not an unusual one, but it is a circumstance indicating that promptness and not dilatoriness was expected.

The clearest indication in the letter, however, as to the time for acceptance is the provision that after acceptance of the offer, a formal agreement of sale would be executed and exchanged for a payment of $2,000, and that the balance of the purchase price would be paid on the 1st of January, 1948, when a conveyance would be given. I think it would be absurd to say that the appellant expected that the respondent could accept the offer as late as December 10th (of which the appellant would not learn until the 13th or 15th) and that thereafter an agreement would be prepared and sent out to the respondent to be exchanged for the $2,000 payment. This would use up most of the little more than two weeks intervening between the receipt of the acceptance by the appellant and the 1st of January. In my opinion, the letter clearly indicates by its own terms that acceptance was to be made promptly if at all, and that December 10th was entirely outside the contemplation of the offerer. The only reason the offer was not in fact dealt with promptly was because the respondent was absent on a hunting expedition.

This view of the matter is borne out by the letter of the respondent's wife of the 20th of November, 1947, which acknowledges receipt that day of the appellant's letter. In her letter Mrs. Clark states that her husband was then out of town but was expected back in about ten days. She says that she will endeavour to locate him "in the meantime" and asks that the appellant "hold the deal open" until he hears from the respondent. It is clear, I think, that in the view of Mrs. Clark at least, unless the deal were so held open, the offer would expire of its own force within the ten days. Her letter was adopted by the respondent in his later correspondence.

The appellant in his letter of the 12th of December, 1947, states that he "held the deal open for you until December 6th when I received an offer from William Hohmann." This is in error for December 3rd, as Hohmann's offer was received and accepted by the appellant

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on that date. In his oral evidence Barrick said he had held the deal open from day to day, but I see no reason why he could not equally, from day to day, take the position that he would not continue to do so.

I see nothing in the earlier correspondence which is inconsistent with the view just expressed. The appellant was obtaining information as to the proper value of the farm in question, and he also had to consult his beneficiaries before he was in a position either to make or accept an offer. He was pursuing both lines of enquiry between September 8, 1947, and November 15, when he made the offer in question. In my opinion, the learned trial judge came to the correct conclusion.

Nor can I agree with the proposition laid down in the Court of Appeal that the offer must be considered as a matter of law as remaining open until the respondent actually received it on his return from his hunting trip. The authorities relied on do not establish such a proposition.

I would allow the appeal and restore the judgment of the learned trial judge. The appellants should have their costs in this court and in the Court of Appeal.

TASCHEREAU J.:—The plaintiff-respondent's claim is for specific performance. The action was dismissed by Mr. Justice McKercher, but the Court of Appeal for the Province of Saskatchewan, unanimously allowed the appeal, and ordered the appellants to execute and deliver to the respondent, a transfer of the land which is the subject of the present litigation.

On the 15th of November, 1947, the appellant, R. N. Barrick, acting also on behalf of Theresa May Florella Barrick, his co-executor of the estate of James Barrick, addressed the following letter to F. J. Clark of Luseland, Sask.:

166 Briar Hill Ave.,
Toronto, Ont.
Nov. 15, 1947.

Mr. F. J. Clark,
Luseland, Sask.

Dear Sir:

In reply to your recent letter, in which you offer $14,500 cash for the ¾ sections W½ of 9 and SW¼ of 16-37-24 W of 3rd. I have delayed answering in order to consult with those interested in the Estate and thereby be in a position to give something concrete.

We are prepared to sell this land for $15,000 cash. If this price is satisfactory to you, the deal could be closed immediately, by preparing an agreement for sale to be given you on receipt of initial payment of $2,000—transfer of clear title to be given you on Jan. 1st, 1948, on receipt of balance of purchase price $13,000. The present tenant Kostrosky's lease expires March 1st, 1948.

Trusting to hear from you as soon as possible.

Yours truly,

(Sgd.) R. N. Barrick

The letter which was sent from Toronto, Ont. reached Luseland a few days later, at a time when Clark was away on a hunting trip, but the letter having been opened by Mrs. Clark, Barrick received the following answer dated November 20th:—

Lake & Clark

Luseland, Sask.
November 20, 1947.

R. N. Barrick, Esq.,
TORONTO, Ont.

Dear Sir: Re W½ 9 and S.W. 16-37-24 W 3rd

Your letter of the 15th was delivered today and in reply would say that Mr. Clark is out of town at present but expects to be home in about ten days; in the meantime I shall endeavour to locate him and request that you hold the deal open until you hear from him.

Yours respectfully,

(Mrs. F. J. Clark) (Sgd.) M. M. Clark

Upon his return to Luseland on December the 10th, Clark accepted to pay the sum of $15,000 for the land, forwarded a cheque for $2,000, and he agreed to pay the balance of the purchase price, namely, $13,000 on or before January 1, 1948, upon production of a clear title and a properly completed transfer.

The appellant then informed Clark that upon receipt of Mrs. Clark's letter, he understood that Clark would be away for about ten days, and he therefore kept the offer open until December the 6th, (should be 3rd) date on which he sold the land to a Mr. Hohmann from whom he had received an offer of $15,000, and returned the cheque for $2,000. I do not think that the other correspondence exchanged between the parties previously to the letters above referred to, have any bearing on the case.

I have reached the conclusion that the appellants are not bound to give effect to Clark's acceptance of their offer, and that they were within their right to sell the land to Hohmann. The offer to sell at $15,000 contained in

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the letter of November the 15th, was subject to a prompt acceptance by Clark. The words in the offer "the deal could be closed immediately" and "trusting to hear from you as soon as possible", clearly imply Barrick's desire to receive an answer without delay. More than a reasonable time had elapsed when the appellants sold to Hohmann. Moreover, Mrs. Clark's letter written on November the 20th, saying that she expected her husband "in about ten days", justified Barrick to dispose of the land on the 3rd of December as he did.

In view of my conclusion, I think that the *caveat* which has been registered by the respondent should be vacated.

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

ESTEY J.:—This is an appeal from a judgment of the Court of Appeal in Saskatchewan reversing a judgment at trial and directing specific performance of an agreement for sale against the appellant estate, as vendors, in favour of respondent Clark, as purchaser, and further directing that the appellant Hohmann may assess damages against the appellant estate for breach of contract to sell to him the same land.

The appellant executors of the estate of Eli James Barrick, deceased, at all times material hereto have been the registered owners of the three quarter sections here in question described as W½ of 9 and SW¼ of 16, both in Township 37, Range 24, West of the Third Meridian. The executors of this estate reside in Toronto and throughout the negotiations for sale on their behalf have been conducted by R. N. Barrick of Toronto.

On September 8, 1947, respondent Clark, who resides at Luseland, Saskatchewan, by letter addressed to R. N. Barrick, Toronto, inquired if the estate would be interested in a sale of these three quarter sections. Barrick, under date of October 10, 1947, acknowledged Clark's letter, apologized for his delay in answering and, in turn, inquired what this land would be worth. Clark, in his reply of October 16, 1947, did not answer Barrick's inquiry. He made it clear that cash was available if the price was reasonable and asked "what the price would be." On October 24,

1947, Barrick replied that he would recommend for acceptance any satisfactory cash offer and that Kostrosky, a very satisfactory tenant over a period of years, was anxious to buy this land upon terms. He then intimated that he was endeavouring to ascertain "what a fair cash price would be," but, if, in the meantime, Clark would care to make an offer he would see that it "got immediate attention." Clark, on October 30, 1947, offered $14,500, possession any time between January 1 and March 1, 1948. In making this offer Clark requested that if Barrick decided to recommend it he wire to that effect and estimate how long would be required to obtain a final decision. Barrick did not decide to recommend this offer but, under date of November 15, 1947, made a counter offer which read:

> We are prepared to sell this land for $15,000 cash. If this price is satisfactory to you, the deal could be closed immediately, by preparing an agreement for sale to be given you on receipt of initial payment of $2,000—transfer of clear title to be given you on Jan. 1st, 1948, on receipt of balance of purchase price $13,000. The present tenant Kostrosky's lease expires March 1st, 1948.

This letter was delivered in Luseland November 20, when Clark was absent. Mrs. Clark opened the letter and wrote Barrick that her husband was out of town, but expected back in about ten days, that she would "endeavour to locate him," and requested "that you hold the deal open until you hear from him." Barrick made no reply to this letter from Mrs. Clark.

Clark returned on December 10, when he wrote in part:

> Owing to various circumstances I am not going to ask the Estate to split the difference between my offer and their figure though I think $14,750 would be a fair compromise. I am enclosing a cheque for $2,000 drawn on my account at the National Trust Co. Edmonton. The transfer and necessary papers I wish made out in the name of Frank J. Clark. I agree to pay the balance of the purchase price on or before Jan. 1st upon production by the Estate of evidence of a clear title and a properly completed transfer. It may be inconvenient for you to secure a Sask. transfer form and if so I would be glad to prepare the necessary transfer on the proper Sask. form upon receipt of your request.
>
> I presume you have a written lease with Kostrosky and note it expires on Mar. 1st next. Is there the customary cancellation clause providing for notice of cancellation after Dec. 1st? If there is I would expect the Estate to serve the necessary notice of cancellation on Kostrosky. If there is no such cancellation clause I am prepared to assume the lease upon or under assignment from the Estate.
>
> Kindly acknowledge receipt of this letter by return mail.

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In the meantime the appellant William Hohmann, also of Luseland, but without knowledge of Clark's correspondence, under date of November 28, inquired of Barrick with regard to this land and Barrick, on November 30, offered him the land for $15,000 cash. Hohmann accepted this offer on December 3 and both Hohmann and Barrick desire that this contract be carried out.

The day after writing his letter of December 10 respondent Clark heard of Hohmann's purchase and on that date wired Barrick as follows:

RETURNED HERE YESTERDAY MORNING FROM BIG GAME HUNTING TRIP AIRMAILED LETTER TO YOU LAST NIGHT ENCLOSING TWO THOUSAND DOLLARS THIS MORNING TOWN GOSSIP CLAIMS WILLIAM HOHMAN HAS BOUGHT THE THREE QUARTERS PRESUME YOU RECEIVED MRS CLARKS LETTER NOVEMBER TWENTIETH TRUST THAT REPORT IS NOT CORRECT WOULD APPRECIATE REPLY BY WIRE

Barrick received this wire on December 12 and on that date wrote Clark as follows:

I received your wire today. I received Mrs. Clark letter of Nov. 20th in reply to mine of Nov. 15. Mrs. Clark informed me that as you would be away for ten days and requested me to hold the deal open until your return. I held the deal open for you until Dec. 6th when I received an offer from Wm. Hohmann of $15,000 all cash which I accepted having had no reply from you. My solicitor is preparing Transfer of title to Mr. Hohmann and if he comes across with $15,000 he will be given same. If he fails to do so, I shall be at liberty to sell to some one else.

I am very sorry this hitch has occurred and I shall return your $2,000 immediately on receipt of same.

Upon the assumption that Clark's letter of December 10 otherwise constituted an acceptance of Barrick's counter offer of November 15, the question arises: was it within a reasonable time? The parties had throughout conducted their negotiations by letters and, as Barrick's counter offer did not specify a time for an acceptance other than a suggestion of a reply as soon as possible, Clark had a reasonable time within which to make his acceptance by the posting of a letter to that effect. *Adams* v. *Lindsell* (1); *Household Fire Insurance Company* v. *Grant* (2). What will constitute a reasonable time depends upon the nature and character of the subject matter and the normal or usual course of business in negotiations leading to a sale thereof, as well as the circumstances of the offer including

(1) (1818) 1 B. & A 681. (2) (1879) 4 Ex. D. 216.

the conduct of the parties in the course of negotiations. *Dunlop* v. *Higgins* (1); *Manning* v. *Carrique* (2) and 7 Hals. 2nd ed., p. 93, par. 129.

Farm lands, apart from evidence to the contrary (not here adduced), are not subject to frequent or sudden changes or fluctuations in price and, therefore, in the ordinary course of business a reasonable time for the acceptance of an offer would be longer than that with respect to such commodities as shares of stock upon an established trading market. It would also be longer than in respect to goods of a perishable character. With this in mind the fact, therefore, that it was land would tend to lengthen what would be concluded as a reasonable time, which, however, must be determined in relation to the other circumstances.

While the correspondence between Clark and Barrick commenced with the letter of September 8, much of the time was spent by Barrick in ascertaining the current selling value of the land. Even in his letter which induced Clark to make his offer of October 30, Barrick indicated that he had not satisfied himself as to that current selling value. Clark himself, in his offer of October 30, asked "for the estate's decision as fast as possible" and, if Barrick had decided to recommend his offer, to wire accordingly. Barrick, apparently appreciating Clark's desire to conclude this matter, as he explained in his counter offer, consulted with those interested in the estate and made a concrete reply in the nature of a counter offer. Clark had obviously made up his mind at least on October 30 as to the current selling value of the land. This is not only evidenced by his offer of that date, but when he returned upon December 10 he immediately accepted the counter offer.

Under the circumstances of this case, the offer must be taken to have been received by Clark on November 20. It was addressed to him and received at his usual address and opened by his wife who, though she did not care to take the responsibility to deal with the counter offer, had been appraised of these negotiations and, upon his own

(1) (1848) 1 H.L.C. 381; 9 E.R. 805.

(2) (1915) 34 O.L.R. 453.

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evidence, she had at least authority to receive the offer, if not to deal therewith. Clark was asked in reply:

> Q. When you went away on this hunting trip, expecting this reply from Mr. Barrick any moment, and you not knowing how long you were going to be away exactly, why didn't you speak to Mr. McKenzie, and give him instructions as to what he should do in the event of your offer being accepted or rejected, or a counter-offer being received? A. It was not necessary. I had done that with my wife.

The offer of Barrick remained open for acceptance and in that sense as being renewed every moment until a reasonable time elapsed. While this time may be expressly enlarged by an act on the part of the offeror, a letter to him asking that the offer be kept open does not enlarge this reasonable time if the offeror elects, as he did, to not make reply. In that event the rights of the parties remain unchanged.

The offeree has the right, within a reasonable time, to accept and it is only by such an acceptance that he is given any rights against the offeror. What Barrick did or intended to do does not alter that time. If, when he accepted Hohmann's offer, a reasonable time had not elapsed, it would only be in the event that Clark's acceptance was within a reasonable time that the latter would have any right to take exception thereto.

It was particularly pointed out that there had been no sale for this land over a period of years. Possession could not be had until March 1 and, in any event, no farming operations could take place until spring conditions permitted. These are factors to be considered. However, there was, at the time material to these negotiations, a demand for this land. The owner, desiring to sell, would wish to avail himself of these conditions and those negotiating, other than the successful purchaser, would, no doubt, desire to consider other land or other possible courses that might be open to them. Clark, by his offer of October 30, because of his insistence upon reply by wire, must have had these latter considerations in mind rather than the date of possession or spring operations on the farm. Barrick, while he did not perhaps evidence as much concern as to the date of concluding the transaction, did, in his offer of November 15, in appreciation of Clark's desire, intimate that "the deal could be closed immediately" and concluded

with what might be accepted as the expression of a hope that Clark would reply "as soon as possible." A review of all the authorities submitted as well as others reviewed leads me to conclude, with great respect to those learned Judges who hold a contrary opinion, that Clark did not accept Barrick's offer within a reasonable time.

The appeal should be allowed with costs throughout.

LOCKE J.:—The letters which passed between the appellant R. N. Barrick and the respondent appear in the reasons for the judgment from which this appeal is taken and it is unnecessary to repeat them. It was the opinion of the learned trial judge that the offer made by the said Barrick on behalf of the executors of the estate of Eli James Barrick by the letter of November 15, 1947, had lapsed prior to December 10th of that year, when the respondent assumed to accept it. This finding has been reversed by the unanimous judgment of the Court of Appeal.

The offer did not state a time within which it might be accepted and the matter to be determined is as to whether the respondent accepted it within a reasonable time, having regard to the nature and circumstances of the offer. After the preliminary letters of September 8th and October 10th and 16th the appellant R. N. Barrick by his letter of October 24th advised the respondent that he was prepared to recommend the executors of the estate to accept any satisfactory offer to buy the land for cash, saying that the tenant of the property was anxious to buy but only upon terms, and concluded: "If in the meantime you would care to make an offer I would see that it got *immediate* attention." To this the respondent replied in writing on October 30th by making a cash offer of $14,500, asking for the estate's decision "as fast as possible" and that Barrick wire him if he decided to recommend acceptance of the offer by the estate. It was in answer to this letter that R. N. Barrick made the offer of November 15th saying that if the price of $15,000 was satisfactory the deal could be closed immediately and concluded by saying: "Trusting to hear from you as soon as possible." In my view, this correspondence indicates, as found by the learned trial judge, that it was proposed and that both parties intended

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that the matter should be dealt with promptly. It was on November 20th that Mrs. Clark in her husband's absence wrote the letter saying that the latter was out of town but expected to be home in about ten days and asked that the deal be held open until Barrick should hear from him. Apparently this letter was received in Toronto on November 23rd and it was not until seventeen days afterwards that Clark mailed from Luseland the letter which was intended as an acceptance of the offer.

In reversing the judgment at the trial MacDonald J.A., who delivered the judgment of the Court, finding that the offer had been accepted within a reasonable time lays stress on the evidence given by the respondent R. N. Barrick at the trial, that upon receipt of Mrs. Clark's letter he had let the matter go from day to day and that he "was not in such a hurry as he admitted (sic) in his previous correspondence", that he had sold to Hohman instead of Clark because the former was the first man who "accepted my proposition" and that he had decided to leave the offer open from day to day. With great respect, I think this evidence does not affect the question to be determined. An intention not expressed or communicated to the other party is immaterial in deciding the question as to whether there was an agreement. The law appears to me to be accurately summarized in Leake (8th Ed.) p. 2, where it is said that the law judges the intention of a person by outward expressions only and judges of an agreement between two persons exclusively from those expressions of their intention which are communicated between them unless there is a duty to speak, in which event a party may become bound by his silence. Unless the appellant's position is altered by the fact that R. N. Barrick made no response to the letter of November 20th received from Mrs. Clark, the question should, in my opinion, be determined by considering only the communications which passed between the parties. It is fairly arguable on behalf of the respondent that by his silence Barrick should be held to have consented to the offer being treated as being made at the expiration of a ten day period from November 20th, but I think this contention cannot be sustained. There was, I think, no duty resting upon Barrick to say or do anything

upon receipt of the letter and the appellant's right to insist that the acceptance was not made within a reasonable time after the offer was received at Luseland on November 20th is not impaired. The passage referred to from the judgment of Lord Cottenham L.C. in *Dunlop* v. *Higgins* (1), is a quotation from the judgment of the Court in *Adams* v. *Lindsell* (2), and appears to have been made merely in reference to the facts of that case and not as a general statement of the law. It cannot have been intended to qualify what had been said by Lord Eldon L.C. in *Kennedy* v. *Lee* (3), that the acceptance of an offer unlimited by its terms as to time must be within a reasonable time after the offer is made.

I think the proper construction has been placed upon this correspondence by the learned trial judge and I agree with his conclusion and would allow this appeal with costs.

Appeal allowed and the judgment at trial restored. Costs in this Court and the Court of Appeal in favour of the appellants.

Solicitor for the appellants, Barrick: *Howard McConnell.*

Solicitors for the appellant, Hohmann: *Makaroff, Carter and Carter.*

Solicitor for the respondent: *Gilbert H. Yule.*

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(1) (1848) 1 H.L.C. 381 at 400.
(2) (1818) 1 B. & A. 681.
(3) (1817) 3 Mer. 441 at 454.

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* Mar. 8, 9, 10, 13, 14.
* Nov. 20.

CANADIAN PACIFIC RAILWAY COMPANY ..... APPELLANT;

AND

THE ATTORNEY GENERAL FOR SASKATCHEWAN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law—Railways—Taxation of C.P.R. in respect of its branch lines in Saskatchewan—"Canadian Pacific Railway"—Effect of clauses 16 and 14 of contract between Dominion and C.P.R. in schedule to chapter 1 of S. of C. 1881—Saskatchewan Act, S. of C. 1905, c. 42, s. 24—Act respecting the Canadian Pacific Railway, S. of C. 1881, c. 1—Constitutional Questions Act, R.S.S. 1940, c. 72.

The *Saskatchewan Act* (S. of C. 1905, c. 42) which constituted the Province of Saskatchewan provides that the powers granted to that province shall be exercised subject to the provisions of clause 16 of the contract set forth in the schedule to Chapter 1 of the Statutes of 1881 (Canada), being an *Act respecting the Canadian Pacific Railway,* by which statute the contract was approved and ratified. Clause 16 provides that: "The Canadian Pacific, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any province hereafter to be established, or by any municipal corporation therein . . ." Clause 14 gave to the Company the right to construct and work branch lines of railway from any point along its main line to any point or points within the territory of the Dominion.

The appellant company contended that the exemption extended to all municipal taxation upon and in respect to properties both upon its main line and upon branch lines constructed under the powers conferred by clause 14.

Held: (Affirming the Court of Appeal) that the exemption from taxation provided by clause 16 of the contract does not apply to the stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances situate on the branch lines built in Saskatchewan under the authority of clause 14 of that contract, except as to such of these properties as are also required and used for the working of the main line, as described in ss. 1, 2 and 3 of 37 Victoria, c. 14.

Held: (Reversing the Court of Appeal) Estey J. dissenting, that the exemption extends to the so-called business taxes referred to in the questions submitted to the Court in respect of the business carried on as a railway upon, or in connection with, the railway as described

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

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in the said sections 1, 2 and 3 of 37 Victoria, c. 14, and upon such other properties situate upon its branch lines in Saskatchewan as are entitled to the benefit of the exemption from taxation under clause 16 as being required and used for the construction and working of that portion of the line referred to in the said sections.

APPEAL from the decision of the Court of Appeal for Saskatchewan (1) answering certain questions referred to the Court by His Honour the Lieutenant Governor of Saskatchewan respecting the extent of exemption from taxation provided for the Canadian Pacific Railway by clause 16 of the contract between the Government of Canada and certain parties acting on behalf of the Company, dated October 21, 1880, and approved in 1881 by 44 Victoria, c. 1 (Canada).

The legislature of the Province of Saskatchewan having enacted in 1946 and 1947 certain municipal statutes to provide for (*a*) the assessment and taxation of the railway roadway and other lands owned by the railway companies in the province, and (*b*) the assessment and taxation in respect of their business carried on as a railway within the province, and certain disputes having arisen between various municipalities and the C.P.R. with respect to this legislation, the Executive Council of the Province of Saskatchewan, acting under the *Constitutional Questions Act* (R.S.S. 1940, c. 72), referred to the Court of Appeal for Saskatchewan the following questions for hearing and consideration:

Question 1. Does clause 16 of the contract set forth in the Schedule to Chapter 1 of the Statutes of Canada, 44 Victoria (1881), being an Act respecting the Canadian Pacific Railway, exempt and free from taxation the stations and station grounds, work shops, buildings, yards, and other property, used for the working of the branch lines of the Canadian Pacific Railway Company situated in Saskatchewan?

Question 2. Does clause 16 of the contract aforesaid exempt and free the Canadian Pacific Railway Company from taxation in Saskatchewan in respect of the business carried on as a railway

(*a*) based on the area of the land or the floor space of buildings used for the purposes of such business,

(*b*) based on the rental value of the land and buildings used for the purposes of such business,

(*c*) based on the assessed value of the land and buildings used for the purposes of such business,

but not made a charge upon such land or buildings?

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Question 3. Are the provisions of the said *The Village Act, 1946, The Rural Municipalities Act, 1946, The Local Improvement Districts Act, 1946, The City Act, 1947, and The Town Act, 1947,* all as amended, relating to the assessment and taxation of the real estate of railway companies, operative in respect of branch lines of Canadian Pacific Railway Company in the Province of Saskatchewan constructed pursuant to clause 14 of the said contract?

Question 4. Are the provisions of the said *The Village Act, 1946, The Rural Municipalities Act, 1946, The Local Improvement Districts Act, 1946, The City Act, 1947, and The Town Act, 1947,* all as amended, relating to the assessment and taxation of railway companies in respect of the business carried on as a railway, operative with respect to Canadian Pacific Railway Company in respect of the stations, workshops, and other buildings, used for the working of

(*a*) the main line of its railway in Saskatchewan, and

(*b*) its branch lines in Saskatchewan?

The Court of Appeal (declining to answer Questions 2(*b*) and 2(*c*)) answered Questions 1 and 2(*a*) in the negative and Questions 3, 4(*a*) and 4(*b*) in the affirmative (Gordon J.A. dissenting as to Questions 1 and 3).

This Court (Estey J. dissenting as to Questions 2 and 4), answered as follows:

Question 1. No, except such properties, if any, real or personal, enumerated in clause 16, situate upon the branch lines in Saskatchewan as are entitled to the benefit of the exemption from taxation as being required and used for the construction and working of the railway described in sections 1, 2 and 3 of the Act 37 Victoria, c. 14.

Question 2. Yes, as to the business carried on as a railway upon or in connection with the railway as described in sections 1, 2 and 3 of the Act 37 Victoria, c. 14, and upon such other properties, if any, real or personal, of the Company situate upon its branch lines in Saskatchewan as are entitled to the benefit of exemption from taxation under clause 16 as being required and used for the construction and working of that portion of the line referred to in the said sections of the statute.

Question 3. Yes, except in respect of such real estate, if any, situate upon branch lines constructed pursuant to clause 14 of the contract as is entitled to the benefit of the exemption from taxation under clause 16 as being required and used for the construction and working of the railway as described in sections 1, 2 and 3 of the Act 37 Victoria, c. 14.

Question 4.

(*a*) No.

(*b*) Yes, subject to the limitation stated in the answer to Question 2.

C. F. H. Carson, K.C., H. A. V. Green, K.C. and *A. Findlay* for the appellant.

E. C. Leslie, K.C. and *R. S. Meldrum, K.C.* for the respondent.

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The judgment of the Chief Justice and of Taschereau J. was delivered by

THE CHIEF JUSTICE: The Province of Saskatchewan was established in 1905 by Statutes of Canada, 4-5, Edw. VII, c. 42.

By force of that Statute (Section 3), the provisions of the *British North America Acts*, 1867 to 1886, apply to that Province "in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion as if the said Province of Saskatchewan had been one of the provinces originally united", except insofar as varied by that Statute or except such provisions as are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more and not the whole of the said provinces.

Section 24 of the *Saskatchewan Act* provides that the powers granted to the said Province shall be exercised subject to the provisions of Section 16 of the contract set forth in the Schedule to Chapter 1 of the Statutes of 1881, being *An Act Respecting the Canadian Pacific Railway Company.*

Clause 16 of that contract provides:

16. The Canadian Pacific Railway, and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion or by any province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the Crown.

Clause 1 of the contract provides:

1. For the better interpretation of this contract, it is hereby declared that the portion of railway hereinafter called the Eastern section, shall comprise that part of the Canadian Pacific Railway to be constructed, extending from the Western terminus of the Canada Central Railway, near the East end of Lake Nipissing, known as Callander Station, to a point of junction with that portion of the said Canadian Pacific Railway now in course of construction extending from Lake Superior to Selkirk on the East side of Red River; which latter portion is hereinafter called the Lake Superior section. That the portion of said railway, now partially in course of construction, extending from Selkirk to Kamloops, is hereinafter called the Central section; and the portion of said railway now in course of construction, extending from Kamloops to Port Moody, is hereinafter called the Western section. And that the words "The Canadian Pacific Railway", are intended to mean the entire railway, as

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described in the Act 37th Victoria, chap. 14. The individual parties hereto, are hereinafter described as the Company; and the Government of Canada is hereinafter called the Government.

The description referred to in the Act 37th Vict. c. 14, is contained in Sections 1 to 4 of that Statute and reads as follows:

1. A railway to be called the "Canadian Pacific Railway" shall be made from some point near to and south of Lake Nipissing to some point in British Columbia on the Pacific Ocean, both the said points to be determined and the course and line of the said railway to be approved of by the Governor in Council.

2. The whole line of the said railway, for the purpose of its construction, shall be divided into four sections: the first section to begin at a point near to and south of Lake Nipissing, and to extend towards the upper or western end of Lake Superior, to a point where it shall intersect the second section hereinafter mentioned; the second section to begin at some point on Lake Superior to be determined by the Governor in Council, and connecting with the first section, and to extend to Red River, in the Province of Manitoba; the third section to extend from Red River, in the Province of Manitoba, to some point between Fort Edmonton and the foot of the Rocky Mountains, to be determined by the Governor in Council; the fourth section to extend from the western terminus of the third section to some point in British Columbia on the Pacific Ocean.

3. Branches of the said railway shall also be constructed as follows; that is to say:

First—A branch from the point indicated as the proposed eastern terminus of the said railway to some point on the Georgian Bay, both the said points to be determined by the Governor in Council.

Secondly—a branch from the main line near Fort Garry, in the Province of Manitoba, to some point near Pembina on the southern boundary thereof.

4. The branch railways above mentioned shall, for all intents and purposes, be considered as forming part of the Canadian Pacific Railway, and as so many distinct sections of the said railway, and shall be subject to all the provisions hereinafter made with respect to the said Canadian Pacific Railway, except in so far as it may be otherwise provided for by this Act.

The Canadian Pacific Railway Company was constituted pursuant to Statutes of Canada, 44 Vict., c. 1, assented to on the 15th of February, 1881, by Letters Patent granted by His Excellency the Governor-General under the Great Seal of Canada, under date 16th February, 1881.

The contract which the Court is called upon to construe was executed between the Crown, in the right of the Dominion of Canada, and George Stephen and others relating to the Canadian Pacific Railway and was dated October 21, 1880. It was appended as a Schedule to the Statute 44 Vict. c. 1, and it was ratified by that Statute; the wording

of the contract being incorporated in the Letters Patent.

Section 4 of the Schedule to the said contract provides that

> All the franchises and powers necessary or useful to the Company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the Company.

The contract provides for the incorporation of Canadian Pacific Railway Company and the construction by it of a main line of railway from Callendar Station, near Lake Nipissing, in the Province of Ontario, the western terminus of the existing railway system of Canada, to Port Moody located on the seaboard of British Columbia.

The contract provided for the construction of branch lines by Clause 14 as follows:

> 14. The Company shall have the right from time to time, to lay out, construct, equip, maintain, and work branch lines of railway from any point or points along their main line of railway, to any point or points within the territory of the Dominion. Provided always, that before commencing any branch they shall first deposit a map and plan of such branch in the Department of Railways. And the Government shall grant to the Company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands are vested in the Government.

The area through which the Canadian Pacific Railway was to be constructed between the western boundary of Manitoba, as then constituted, and the eastern boundary of British Columbia was then part of the North-West Territories and was administered by the Dominion Government.

The Province of Saskatchewan, having been established as aforesaid in 1905, certain municipal statutes were subsequently passed in the years 1946 and 1947, which provided:

(*a*) That the railway roadway and other land within the province owned by railway companies shall be assessed and taxed, and

(*b*) That railway companies, whether their property is liable to assessment and taxation or not, shall be liable to assessment and taxation in respect of the business carried on as a railway within the Province at a rate per square foot of the floor space of each building or part thereof used for business purposes.

Disputes having arisen between various municipalities and the Canadian Pacific Railway with respect to the latter legislation, the Executive Council of the Province

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of Saskatchewan, on the recommendation of the Attorney-General and pursuant to the provisions of the *Constitutional Questions Act,* being c. 72 of the Revised Statutes of Saskatchewan, 1940, was pleased to refer to the Court of Appeal for Saskatchewan (1) the following questions for hearing and consideration (see *ante,* p. 191).

The Court of Appeal of Saskatchewan by a majority answered "No" to Questions Nos. 1 and 2(*a*); "Yes" to Questions Nos. 3, 4(*a*) and 4(*b*); but declined to answer Questions Nos. 2(*b*) and 2(*c*). Mr. Justice Gordon dissented as to the answer given by the majority of the Court to Questions Nos. 1 and 3.

From that judgment the Canadian Pacific Railway Company appeals to this Court and we heard counsel for the Company and for the Attorney-General for Saskatchewan.

It is apparent that the answers to be given to the several questions submitted to the Court depend upon the construction to be put on the contract between the Crown and George Stephen and others already referred to, and, more particularly, on Sections 1, 14, 16 and 22 thereof.

Sections 1, 14 and 16 form part of the Order of Reference and have been above reproduced.

Section 22 reads as follows:

> 22. The Railway Act of 1879, in so far as the provisions of the same are applicable to the undertaking referred to in this contract, and in so far as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of incorporation to be granted to the Company, shall apply to the Canadian Pacific Railway.

By Questions 1 and 3 the Court of Appeal was asked, in effect, whether the freedom from taxation in Clause 16 applies to branch lines constructed under the authority of Clause 14 of the contract.

By Questions 2 and 4 the Court of Appeal was asked, in effect, whether the freedom from taxation in Clause 16 applies to business taxes provided for in certain Statutes of the Province of Saskatchewan.

It will be observed that Question No. 1 is so worded as to apply to all branch lines of the Appellant in Saskatchewan. In the Court of Appeal, however, only branch lines constructed under the authority of the contract were in issue and the Appellant stated in this Court that it did not

(1) [1949] 2 D.L.R. 240; 1 W.W.R. 353.

contend that the freedom from taxation in Clause 16 of the contract extends to branch lines other than those constructed under the authority of Clause 14.

The same observation should not be made of Question No. 3, since it is in terms limited to branch lines constructed pursuant to Clause 14.

The Company submitted that the true answer to be given to Question No. 1 should be in the affirmative; but that even if the Court of Appeal was to be upheld in its view, then Question No. 1 should not be answered unreservedly in the negative, but that there should be added to the word "No" the following words:

. . . Provided, however, that Clause 16 does exempt and free from taxation such stations and station grounds, workshops, buildings, yards and other property required and used for the construction and working of the Canadian Pacific Railway (meaning "the entire railway as described in the Act 37 Vict. c. 14", that is to say: the four main line sections, the Georgian Bay branch, the Pembina branch and the Winnipeg Branch).

The Company further submitted that Question No. 3 should be answered in the negative; but that, at all events, if the Court of Appeal should be upheld in its view, Question No. 3 should not be answered unreservedly in the affirmative, but that there should be added to the word "Yes" the following words:

. . . Provided, however, that such provisions are not operative in respect of stations and station grounds, workshops, buildings, yards and other property located on such branch lines and required and used for the construction and working of the Canadian Pacific Railway (meaning "the entire railway as described in the Act 37 Vict. c. 14", that is to say: the four main line sections, the Georgian Bay branch, the Pembina branch and the Winnipeg branch).

As to Question No. 2, the Company submitted that it should be answered in the affirmative and that Question No. 4 should be answered in the negative.

At bar, counsel for the Respondent stated that the Province would be agreeable to a qualified answer being given to Question No. 1, so that it would read as follows:

No. Provided, however, that the fact that such property is used for the working of the branch lines would not, of itself, defeat any exemption to which such property might be entitled by reason of its being required and used for the working of the main line of the Canadian Pacific Railway in Saskatchewan.

Of the Statute of Canada of 1881 (44 Vict., c. 1), which is entitled *"An Act Respecting the Canadian Pacific Railway"*, very little need be said.

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The preamble states that the Parliament of Canada has expressed a preference for the construction and operation of the railway by means of an incorporated company aided by grants of money and land and that certain statutes have been passed to enable that course to be followed, but the enactments therein contained have not been effectual for that purpose.

It further states that a contract has been entered into for the construction of the railway; that the contract has been laid before Parliament and that it is expedient to approve and ratify it, as well as to make provision for the carrying out of the same.

A copy of the contract is annexed to the Statute. It is declared approved and ratified and the Government is authorized to perform and carry out the conditions thereof; and that, for the purpose of incorporating the persons mentioned in the contract and those who shall be associated with them in the undertaking, the Governor may grant to them, in conformity with the contract, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule, and that such charter, being published in the Canada Gazette, shall have force and effect as if it were an Act of Parliament, and shall be held to be an Act of incorporation within the meaning of the contract.

The Statute provides that the Government may make to the Company certain grants of money and land upon the terms and conditions agreed upon in the contract; that the Government may permit the admission free of duty of certain materials to be used in the original construction of the railway and convey to the Company the possession of and right to work and run the several portions of the railway, as the same shall be hereafter completed; and the Government shall also take security for the continuous operation of the railway during the ten years next subsequent to the completion thereof in the manner provided by the contract.

It is apparent, therefore, that the Statute, in effect, was passed with the object of approving and ratifying the contract without adding anything to it and that it is to the

contract, and not to the Statute, that we must look for the purpose of answering the questions submitted to the Court.

The difference is important for a term of a contract is quite another thing from an exemption section in a taxing Act. *Canadian Pacific Railway* v. *Burnett* (1).

Here, the Appellant does not claim a special treatment as was the case decided by the Judicial Committee in *Montreal* v. *Collège Sainte-Marie* (2). The exemptions claimed by the Appellant are the result of a *quid pro quo,* the company receiving these exemptions as a consideration for the fact that they undertook the construction and the working of the railway throughout Canada. In that respect, the Statute added nothing to the consideration given by the Government; the provisions relating thereto are entirely contained in the contract.

Now, Clause 1 of the contract is stated to be inserted "for the better interpretation of this contract". It may be said, however, that the definition there given of "the Canadian Pacific Railway" far from helping in that interpretation is rather confusing. It states that the words "the Canadian Pacific Railway" are intended to mean the entire railway, as described in the Act 37 Vict., c. 14, and it adds that the individual parties to the contract "are hereinafter described as the Company". As a matter of fact, the entire railway, as described in that Act of 1874, consisted of seven sections, four of which were described in Section 2, two of which were described in Sections 3 and 4, and the seventh of which was described in an Amending Act of 1879, this Amending Act expressly providing that all the provisions of the 1874 Act, with respect to branches of the railway, were to apply to this added branch. The seventh section of the 1874 railway, known as the Winnipeg Branch, is not expressly mentioned in the contract. It had, however, at that time been constructed, or was in the course of construction, probably as part of the main line, and it was conveyed to the Company pursuant to Clause 7 of the contract.

But, by Clause 1 of the contract of 1880, only four sections are provided for. The section corresponding with the first section of the 1874 railway is called the Eastern

(1) (1889) 5 Man. R. 395. (2) [1921] 1 A.C. 288 at 290-1.

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Section. The section corresponding with the second section of the 1874 railway is called the Lake Superior Section. The section extending from Selkirk to Kamloops is called the Central Section which corresponds with the third section and part of the fourth section of the 1874 railway; and the section extending from Kamloops to Port Moody is called the Western Section and corresponds with part of the fourth section of the 1874 railway.

The fifth section of the 1874 railway, known as the Georgian Bay branch, is not provided for in the contract of 1880 and was never built.

The sixth section of the 1874 railway, known as the Pembina branch, is not expressly mentioned in the contract of 1880. It had then been completed and was later conveyed to the Company pursuant to Clause 7 of the contract.

The seventh section of the 1874 railway, known as the Winnipeg branch, is not provided for by the contract of 1880, and, as such, was not built.

By the contract, the Government was to cause to be completed the Lake Superior section and the Western section. The Company was to construct the Eastern section and the Central section. Upon completion of those two last sections by the Company, the Government was to convey to the Company those parts of the railway which the Government undertook to construct.

Thus, the railway contemplated by the 1880 contract is not accurately described in Clause 1 thereof in the Act 37 Vict., c. 14 (1874); and one may not rely upon that so-called description for the purpose of construing the contract of 1880, for the railway provided for by the 1880 contract was a different railway from the entire railway described in the 1874 Act.

It is common ground that one of the principal concepts underlying the 1880 contract was for the purpose of constructing a railway to open up the North-West Territories. For this purpose, the railway was to consist of a main line and of an indeterminate number of branches, as shown by the authority given to the contractors by Clause 14. By that clause, the Company was given the right, from time to time, to lay out, construct, equip, maintain and work branch lines of railways from any point or points along their main line to any point or points within the

territory of the Dominion. The only proviso was that before commencing any branch the railway had first to deposit a map and plan of such branch in the Department of Railways. Further, the Government undertook to grant to the Company the lands required for the road bed of such branches and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, insofar as such lands were vested in the Government.

Moreover, for twenty years from the date of the contract, no line of railway was to be authorized by the Dominion Parliament to be constructed South of the Canadian Pacific Railway from any point at or near the railway, except such line as shall run South West or to the Westward of South West; nor to within fifteen miles of Latitude 49. And in the establishment of any new province in the North-West Territories, provision shall be made for continuing such prohibition after such establishment until the expiration of the said period of twenty years (Clause 15 of the 1880 contract).

It is quite clear, therefore, that describing the railway contemplated by the contract as being described in the Act 37 Vict. c. 14 (1874) was quite inappropriate. If it had any meaning at all, it must have been for the purpose of identifying the Canadian Pacific Railway for the construction of which the Act of 1874 provided. It must be given a meaning and I cannot find any other.

Now, Question No. 1 is put in respect of stations and station grounds, workshops, buildings, yards and other property used for the working of the branch lines . . . . . situated in Saskatchewan.

If we turn to the railway described in Sections 1 to 4 of the Statute 37 Vict. cap. 14, it is to be noted that the branches are there specifically described as "a branch from the point indicated as the proposed eastern terminus of the said railway to some point on the Georgian Bay" and "a branch from the main line near Fort Garry, in the Province of Manitoba, to some point near Pembina on the southern boundary thereof"; and Section 4 states that "the branch railways above mentioned shall be considered as forming part of the Canadian Pacific Railway, and as

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so many distinct sections of the said railway, and shall be subject to all the provisions hereinafter made with respect to the said Canadian Pacific Railway".

It would seem to me, therefore, that the branch lines to which the benefit of the exemption applies, under Clause 16 of the contract, were meant to be only those which are described in Paragraphs 3 and 4 of the Act 37 Vict. cap. 14 and not to apply to the branch lines referred to in Clause 14 of the contract, which were not included in the description contained in Sections 3 and 4 of the Act 37 Vict.

This conclusion, however, should be qualified, as suggested by the Appellant, by saying that Clause 16 does exempt and free from taxation such stations and station grounds, workshops, buildings, yards and other property required and used for the construction and working of the entire railway as described in the Act 37 Vict. cap. 14.

This qualification, moreover, agrees with the statement made by counsel for the Respondent to the effect "that the fact that such property is used for the working of the branch lines would not, of itself, defeat any exemption to which such property might be entitled by reason of its being required and used for the working of the main line of the Canadian Pacific Railway in Saskatchewan".

By force of Section 4 of Schedule "A", annexed to the contract, and referred to in Section 21 thereof (already reproduced at the beginning of these reasons), all the advantages agreed upon, contained or described in the contract of 1880 were "conferred upon the company", but, of course, this cannot be read as having extended the tax exemption. What the company thereby acquired was the exemption described in Section 16 of the contract and nothing more.

This is further emphasized by the wording of the *"Act Respecting the Canadian Pacific Railway"* (44 Vict. c. 1). By that Statute, the contract was approved and ratified and it was therein provided that for the purpose of incorporating the persons mentioned in the contract and those who shall be associated with them in the undertaking, the Governor may grant to them *in conformity with the contract,* under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them *the franchises, privileges and powers embodied in the schedule.*

This made clear the intention of Parliament that the tax exemption contained in Clause 16 was conferred upon the company exactly as described in the said clause. The object was only to specify that the exemption was to apply to the corporate entity or person, but only in respect of the property described in Clause 16 (*Provincial Treasurer of Alberta* v. *Kerr* (1); Lindley J. in *Hartley* v. *Hudson* (2)).

As for the business tax, that is only a form of municipal taxation and as, under Clause 16 of the contract and Section 4 of the Schedule, the company is "forever free from taxation by the Dominion or by any province hereafter to be established, or by any municipal corporation therein", I am of opinion that, as to the business carried on as a railway (both main line and branches, as described in Sections 1 to 4 of the Act 37 Vict. cap. 14), Clause 16 of the contract exempts and frees the Canadian Pacific Railway Company from taxation in Saskatchewan in respect of its business.

In 1905, when the Province of Saskatchewan was constituted, Section 24 of the *Saskatchewan Act* provided that the powers of the province should be exercised subject to Clause 16 of the contract. The Respondent is, therefore, bound by that clause, and, in my humble opinion, the answer to each of the questions submitted should be as follows:

1. Question No. 1—No, provided, however, that the fact that such property is used for the working of the branch lines would not, of itself, defeat any exemption to which such property might be entitled by reason of its being required and used for the working of the main line of the Canadian Pacific Railway in Saskatchewan;

2. Questions Nos. 2(*a*), (*b*) and (*c*)—Yes. As to the business carried on as a railway (both main line and branches, as described in Sections 1 to 4 of the Act 37 Vict. cap. 14), Clause 16 of the contract exempts and frees the Canadian Pacific Railway Company from taxation in Saskatchewan in respect of its business;

3. Question No. 3—Yes, provided, however, that such provisions are not operative in respect of stations and station grounds, workshops, buildings, yards and other property located on such branch lines and required and

(1) [1933] A.C. 710 at 718. (2) (1879) 4 C.P.D. 367.

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used for the construction and working of the Canadian Pacific Railway, as described in the Act 37 Vict. cap. 14;

4. Question No. 4(*a*)—No; Question No. 4(*b*)—Yes, subject to the limitations already stated in the answers to Questions Nos. 1, 2(*a*), (*b*), (*c*) and to Question No. 3.

For the above reasons, the appeal should be allowed, in accordance with the above answers, with one-half of its costs of this appeal to the Appellant.

KERWIN J.: I agree with the reasons for judgment of Mr. Justice Locke.

KELLOCK, J. This is an appeal from the judgment of the Court of Appeal for Saskatchewan (1) answering certain questions referred to that Court by the Lieutenant Governor in Council.

Stated generally, the questions involve the extent of exemption from taxation provided for by paragraph 16 of the contract of October 21, 1880, and approved by 44 Vic. c. 1, Canada (1881).

Appellant first contends that the exemption extends to branch lines which the appellant was authorized by paragraph 14 of the contract from "time to time" to construct and work. These paragraphs are as follows:

14. The Company shall have the right, from time to time, to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway, to any point or points within the territory of the Dominion. Provided always, that before commencng any branch they shall first deposit a map and plan of such branch in the Department of Railways. And the Government shall grant to the Company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands are vested in the Government.

16. The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

Appellant says that "the Canadian Pacific Railway" in paragraph 16 includes the branch lines contemplated by

(1) [1949] 2 D.L.R. 240; 1 W.W.R. 353.

paragraph 14, while the contention of the respondent is that, by reason of the definition of "the Canadian Pacific Railway" in paragraph 1 of the contract, the appellant's contention is excluded. Paragraph 1 together with the introductory words with which the contract commences are as follows:

That the parties hereto have contracted and agreed with each other as follows, namely:

1. For the better interpretation of this contract, it is hereby declared that the portion of railway hereinafter called the Eastern section, shall comprise that part of the Canadian Pacific Railway to be constructed, extending from the Western terminus of the Canada Central Railway, near the East end of Lake Nipissing, known as Callander Station, to a point of junction with that portion of the said Canadian Pacific Railway now in the course of construction extending from Lake Superior to Selkirk on the East side of Red River; which latter portion is hereinafter called the Lake Superior section. That the portion of said railway, now partially in course of construction, extending from Selkirk to Kamloops, is hereinafter called the Central section; and the portion of said railway now in course of construction, extending from Kamloops to Port Moody, is hereinafter called the Western section. And that the words "the Canadian Pacific Railway" are intended to mean the entire railway, as described in the Act 37th Victoria, chap. 14. The individual parties hereto, are hereinafter described as the Company; and the Government of Canada is hereinafter called the Government.

"The entire railway, as described in the Act 37th Victoria, c. 14" is to be found in the first four sections of that statute. Section 1 reads:

A railway, to be called the "Canadian Pacific Railway", shall be made from some point near to and south of Lake Nipissing to some point in British Columbia on the Pacific Ocean, both said points to be determined and the course and line of the said railway to be approved of by the Governor in Council.

By section 2 it is provided that the whole line of the said railway shall be divided into four sections, and the sections are delimited therein. Sections 3 and 4 are as follows:

3. Branches of the said railway shall also be constructed as follows, that is to say:

First:—A branch from the point indicated as the proposed eastern terminus of the said railway to some point on the Georgian Bay, both the said points to be determined by the Governor in Council.

Secondly:—A branch from the main line near Fort Garry, in the Province of Manitoba, to some point near Pembina on the southern boundary thereof.

4. The branch railway above mentioned shall, for all intents and purposes, be considered as forming part of the Canadian Pacific Railway, and as so many distinct sections of the said railway, and shall be subject to all the provisions hereinafter made with respect to the said Canadian Pacific Railway, except in so far as it may be otherwise provided for by this Act.

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Mr. Carson, for the appellant, contends that the definition of "the Canadian Pacific Railway" in paragraph 1 of the contract applies only for the purposes of that paragraph and not throughout the contract.

Prima facie, that contention is unsound. The opening words, "For the better interpretation of this contract it is hereby declared", apply not only to what follows in the first sentence, but to the third sentence. As far as is relevant to the point with which we are here concerned, the paragraph reads:

> For the better interpretation of this contract, it is hereby declared that . . . And that the words "the Canadian Pacific Railway" are intended to mean the entire railway, as described in the Act 37th Victoria, chap. 14.

Unless, therefore, there are compelling reasons in any particular context to the contrary, the definition is to be applied throughout the contract.

Mr. Carson bases his contention upon what he contends to be a fact, namely, that the Georgian Bay branch had, at the date of the contract, been abandoned to the knowledge of both parties, and that the 1874 railway, with or without the amendment of 1879, was not therefore, in contemplation as the subject matter of the contract, but something less than that.

In the first place, however, the alleged abandonment of the *branch* has not been shown as a matter of fact at all. All that appears upon the material to which Mr. Carson refers, namely, the report of the Royal Commission of 8th April, 1882, and the Order in Council of July 25, 1879, is abandonment of a *contract* for the construction of a part of that branch. The report deals with "Contract No. 37" dated 2nd August 1878, by which certain named contractors undertook to complete certain work in connection with some fifty miles of the Georgian Bay branch. The report states that "before much progress had been made under this contract, the Government adopted a policy of discontinuing the construction of the Georgian Bay branch, and the following Order in Council was passed." On referring to the above Order in Council, however, all it provides for is that it was "not the intention of the Government to proceed further with the work under this contract" and that instructions should be given to stop the work. By a

subsequent Order in Council of 14th August, 1879, the contract was "taken out of their" (the contractors') "hands and annulled." Counsel also refers to certain evidence given by the late Sir Charles Tupper before the Commission, but this evidence is similarly restricted to the "reason for abandoning the Georgian Bay branch which was under contract with Heney, Charlebois and Co." It does not go beyond the Orders in Council.

It is noteworthy that in the report itself, reference is made to an earlier contract with a Mr. Foster, "No. 12", concerning the Georgian Bay branch having been annulled by an Order in Council of February 28, 1876, as the route named in that contract had presented more engineering difficulties than were anticipated, and a new survey had to be made for the route in question in Contract No. 37. What happened in connection with these two contracts illustrates a situation by no means unique at that time, when contractors defaulted on their contracts to build a part or parts of the Canadian Pacific. This did not mean the abandonment of the intention to construct the "railway" or even the particular parts which formed the subject matter of the contracts. The very contract here in question, in paragraph 5, indicates that the Government had had the same experience with contractors for the 100 miles of railway extending west of the City of Winnipeg, and had had to take that work out of the hands of the contractor.

The most striking thing, however, in negation of the appellant's contention is that, after the Orders in Council of 1879, the "Canadian Pacific Railway" was defined both in the contract here in question and in the statute confirming it by express reference to the 1874 statute. This shows clearly in my opinion that the 1874 railway in its entirity, including the Georgian Bay branch, was in the contemplation of the contracting parties, unaffected by the fact that in the preceding year the Government had had to take the contract for the fifty mile stretch out of the hands of the then contractors. As a matter of fact, in 1883 the company itself commenced construction of a branch line from Sudbury to Sault Ste. Marie and completed it in 1886 prior to the completion date fixed by paragraphs 4 and 6 of the contract of 1880 here in question. This

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appears in the case filed in the *Branch Lines* case (1). This "Algoma" branch is referred to in 48-49 Vict. c. 57. At page 45 of 36 S.C.R. it is stated that by 1884 this branch line had been constructed "as far as Algoma on the Georgian Bay." It may be—there is no evidence one way or the other—that the Georgian Bay branch contemplated by Section 3 of the 1874 Act was abandoned after the date of the contract, in favour of this Algoma branch. However that may be, the appellant has failed, in my opinion, to establish the factual basis it seeks to establish for its contention. I think, therefore, that the definition in paragraph 1 should be employed, as that paragraph says, for the better interpretation of this "contract" and not simply for the purposes of paragraph 1.

That the words "the Canadian Pacific Railway" were deliberately intended to *"mean"* the *"entire"* railway as described in the Act 37th Victoria, c. 14, is, I think, further emphasized by the fact that prior to the contract here in question, the statute of 1879, 42 Victoria, c. 14, had been passed. Section 1 reads as follows:

> A branch of the Canadian Pacific Railway shall be constructed from some point west of the Red River, on that part of the main line running south of Lake Manitoba, to the City of Winnipeg, so as to connect with the branch line from Fort Garry to Pembina; and all the provisions of "the Canadian Pacific Railway Act, 1874" with respect to branches of the said railway not inconsistent with this Act shall apply to the branch to be constructed under this Act.

We were informed on the argument that this 1879 branch had, at the time of the contract, become a part of the main line. By this it must be meant that, at the time of the Act of 1879, the main line as projected was to pass north of the City of Winnipeg and that, by the date of the contract, this plan had been changed in favour of one which would, by placing the City of Winnipeg on the main line do away with the necessity for construction of this branch. Under the provisions of section 1 of the Act of 1874, the main line had not been more definitely located by the statute than from "some point near to and south of Lake Nipissing to some point in British Columbia on the Pacific Ocean," both of these points and the course of the line itself to be approved by the Governor in Council. Section 2 did not more closely fix the location of the main line in Manitoba than "the second section to begin at some point on

(1) (1905) 36 S.C.R. 42.

Lake Superior, to be determined by the Governor in Council, and connecting with the first section, and to extend to the Red River in the Province of Manitoba; the third section to extend from Red River in the Province of Manitoba to some point between Fort Edmonton and the foot of the Rocky Mountains, to be determined by the Governor in Council."

Accordingly, it was competent for the Governor in Council, as well after the Act of 1879 as before, to determine the course of the main line so as to pass through the City of Winnipeg, and it had evidently become unnecessary, in settling the contract of 1880, to refer to the amendment of 1879 because of the change in the projected route of the main line. The choice of language in paragraph 1, that "the words 'the Canadian Pacific Railway' are intended to *mean* the *entire* railway as described in the Act 37th Victoria, chap. 14", accordingly meant what they said, namely, the main line as described in that statute as it might be located by the Governor in Council, together with the two branches therein mentioned, and nothing else. The Georgian Bay branch was thus deliberately included and there could have been no intention to abandon it at that time.

Far from finding anything in other parts of the contract which casts doubt on the view just expressed, the contract is consistent throughout when the definition in the first paragraph is employed as that paragraph instructs, namely, for the better interpretation "of this contract."

Under paragraph 3, the company was to construct and equip the Eastern and Central sections, and by paragraph 4 these sections were to be completed, equipped and in running order by the 1st of May, 1891, subject to certain events therein provided for. By paragraph 6, the Government assumed the obligation of completing the Lake Superior and Western sections, the latest date set for completion being also the 1st of May, 1891.

Paragraph 7 is as follows:

> The railway constructed under the terms hereof shall be the property of the Company: and pending the completion of the Eastern and Central sections, the Government shall transfer to the Company the possession and right to work and run the several portions of the Canadian Pacific Railway already constructed or as the same shall be completed, and upon the completion of the Eastern and Central sections, the Government

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shall convey to the Company, with a suitable number of station buildings and with water service (but without equipment), those portions of the Canadian Pacific Railway constructed or to be constructed by the Government which shall then be completed; and upon completion of the remainder of the portion of railway to be constructed by the Government, that portion shall also be conveyed to the Company; and the Canadian Pacific Railway shall become and be thereafter the absolute property of the Company. And the Company shall thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway.

The language with which this paragraph begins,

The railway constructed under the terms hereof shall be the property of the Company.

should, I think, be interpreted in the light of the words in the last two sentences of the paragraph and the confirming statute itself. With respect to possession and right to operate, the paragraph provides that, pending completion of the Eastern and Central sections, the Government should transfer to the company the possession and right to operate

the several portions of the Canadian Pacific Railway already constructed or as the same shall be completed.

This language would entitle the company, immediately upon the execution of the contract, to delivery of possession of all portions of "the Canadian Pacific Railway" already constructed at the date of the contract, and to possession of the remainder as it became progressively finished.

In the third paragraph of the preamble of the statute, it is stated that certain sections of the "said" railway had already been constructed by the Government, while others were in course of construction, the greater portion of the "main line thereof", however, not having yet been commenced or placed under contract, and it was necessary in the interests of good faith to "complete and operate *the whole* of the said railway."

The fourth paragraph of the preamble states that a contract had been entered into for the construction of "the said portion of the main line of the said railway" (that is, that portion of the main line of the 1874 railway not then commenced or placed under contract) and for

the permanent working of *the whole line thereof.*

There can be little doubt that the "whole of the said railway" was the 1874 railway as defined by the Act 37th Victoria, c. 14, in view of the clear statements to that effect in sections 4, 5 and 6.

I think "the whole of the said railway" and "the whole line thereof" mean the same thing. No one suggests, least of all the appellant, that the contract did not entitle the appellant to a conveyance of the Pembina branch, which was not, of course, part of the "main line."

In my opinion, these considerations throw light upon the construction of the second sentence of paragraph 7. This provides that, upon completion of the Eastern and Central sections, the Government should convey to the company

> those portions of the Canadian Pacific Railway constructed or to be constructed by the Government which shall then be completed.

The corresponding language in section 5 of the statute is

> those portions of the Canadian Pacific Railway constructed, or *agreed by the said contract* to be constructed by the Government, which shall then be completed.

This language would entitle the company to a conveyance of the portions of railway already in existence at the date of the contract and (reading the language as set out in the section) the Lake Superior and Western sections only. However, the paragraph goes on to provide that

> upon completion of *the remainder* of the portion of railway to be constructed by the Government, that portion shall also be conveyed to the Company.

It is noteworthy that after the word "Government" there is no such wording as "under the contract" or "as provided by the contract", and in my opinion this fact is significant. I think that "the remainder" includes all of the 1874 railway including its branches, and that construction is borne out by the reference to the preamble already made and to the concluding parts of paragraph 7 of the contract. It is "the Canadian Pacific Railway defined as aforesaid" which is "thereafter" to be the absolute property of the company. It is, therefore, the entire railway of 1874 and "thereafter" must mean upon the completion of that railway.

The reiteration in sections 5 and 6 of the statute of the definition employed in paragraph 1 of the contract, and the use of "the Canadian Pacific Railway" three times in paragraph 7 renders it imperative, in my opinion, to read these words as inclusive of the 1874 railway in its entirety

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and exclusive of anything else including branches which might or might not be built in pursuance of the power conferred by paragraph 14 of the contract.

Under paragraph 17, the Government was entitled to retain certain bonds, if issued by the company, as security "for the due performance of the present contract in respect of the maintenance and continuous working of the railway by the company as herein agreed for ten years after the completion thereof." It was also provided that if there was no default in the maintenance and working of "the said Canadian Pacific Railway", the Government would not ask for interest on these bonds. It would, of course, be absurd to say that "the railway" or "the said Canadian Pacific Railway" in paragraph 17 included paragraph 14 branches, for the reason that the period of "ten years after the completion thereof" would never begin to run. The railway which was to become the property of the company after completion and thereafter to be maintained and worked by it as provided by paragraph 7 was clearly the 1874 railway to the exclusion of the paragraph 14 branches, and the security to be given under paragraph 17 was to be given, if the bonds were issued, for the period ending upon the expiration of ten years after the completion of that railway.

By paragraph 9, provision is made for the granting of subsidies of land and money, for which subsidies "the construction of the Canadian Pacific Railway shall be *completed* and the same shall be equipped, maintained and operated." This paragraph, like paragraph 7, would appear to proceed on the assumption that, if the company carried out its part of the work of construction, i.e. the Eastern and Central sections, this would "complete" the construction of the whole, as the Government was to construct the remainder so that the Company would be enabled to carry out its obligation to equip, maintain and operate the whole.

Paragraph 10 provides for the grant by the Government to the company of the lands required for the road bed of "the railway" and for its stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards and other appurtenances required for the effectual construction and working of "the railway" insofar as such land shall be vested in the Govern-

ment. It is plain, in my opinion, that "the railway" as used twice above does not include the branch lines authorized by paragraph 14, if for no other reason than that in the last mentioned paragraph there is a specific provision that the Government should grant to the company the land required for the road bed of branches constructed thereunder and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches. This, in my opinion, is the plainest indication that "the railway" in paragraph 10 means the railway as defined in paragraph 1, and that the branches comprised within paragraph 14 are not part of that railway, that is, "the Canadian Pacific Railway."

Paragraph 15 is as follows:

> For twenty years from the date hereof, no line of railway shall be authorized by the Dominion Parliament to be constructed South of the Canadian Pacific Railway, from any point at or near the Canadian Pacific Railway, except such line as shall run South West or to the Westward of South West; nor to within fifteen miles of Latitude 49. And in the establishment of any new Province in the North-West Territories, provision shall be made for continuing such prohibition after such establishment until the expiration of the said period.

I think this paragraph is to be read consistently with the definition in paragraph 1. It means, in my opinion, that Parliament may not authorize another line except such as shall (*a*) have as its southerly terminus a point nearer to the international border than fifteen miles; (*b*) run in the specified direction; and (*c*) have as its northerly terminus any point "at or near" the main line or either branch line.

By paragraph 22 it is provided that the Railway Act of 1879, insofar as applicable to the undertaking referred to in the contract and insofar as not inconsistent with the contract itself or the Act of incorporation to be granted to the company, shall apply to "the Canadian Pacific Railway." I see no difficulty again in applying the definition in paragraph 1 to this paragraph. "The Canadian Pacific Railway" and "the company" are expressly and separately referred to in the paragraph. In my opinion, it is perfectly clear and the definition clearly applies.

It is significant that when one comes to Schedule "A" to the contract, the first use of the words "the Canadian Pacific Railway" is in paragraph 15 which contains a

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description of what is intended thereby and what is intended when those words are "hereinafter" used in the schedule. In this description and definition the branches authorized by paragraph 14 of the contract are specifically taken in by the use of the words "other branches to be located by the company from time to time as provided by the said contract."

Again in paragraph 18 (*d*) of the schedule there is an express distinction drawn between the "main line" and "any branch of such railway hereafter to be located by the said company in respect of which the approval of the Governor in Council shall not be necessary" (i.e. branches to be located as authorized by paragraph 14 of the contract by simply filing a plan.)

The view to which I have come, negativing the appellant's contention on the first branch of this case, is, I think, confirmed by the provisions of the confirming statute, 44 Victoria, c. 1. I have already referred to certain parts of the preamble.

Section 3 provides for a subsidy in favour of the company in consideration of the "completion and efficient operation" of the "railway" as stipulated in the contract. So far as construction was concerned, the company was limited to the Eastern and Central sections but as to operation it was interested in the whole. As in the case of paragraphs 7 and 9 of the contract, this section appears to proceed on the assumption that "completion" of the entire railway would be effected if the company built the Eastern and Central sections, as the Government would see to the rest.

Section 4 provides for the admission duty free of materials to be used in the original construction of "the Canadian Pacific Railway" and of a telegraph line in connection "therewith" and for all telegraphic apparatus required for the first equipment of "such telegraph line" as provided by paragraph 10 of the contract. In my opinion, the telegraph line envisaged by this section in connection with "the Canadian Pacific Railway" was the same telegraph line as is described in section 5 of the Act of 1874, namely, a line of electric telegraph along the "whole extent respectively" of the "said railway and branches", i.e. the Pembina and Georgian Bay branches. I have already dealt with the remainder of the statute.

There is therefore not only nothing in the statute which could by any possibility be taken to include in the words "the Canadian Pacific Railway" paragraph 14 branches, but on the contrary the clearest exclusion of such branches by the deliberate use of the definition employed in paragraph 1 of the contract in sections 4 and 5 and in section 6 by reference. I would therefore affirm the judgment below on this point.

The further question in this appeal may be shortly stated as to whether the exemption provided for by paragraph 16 of the contract extends to "business" taxes as provided for by the Saskatchewan statutes set out in the case. The argument proceeded on the basis that it was sufficient for the purposes of this question to consider the provisions of the *Cities Act,* c. 43 of the statutes of 1947.

The statute provides by section 441 that the assessor shall each year assess (1) the owner or occupant "in respect to every parcel of land" in the city, with certain exceptions, and (2) every person "who is engaged in . . . business." "Business", which is defined by paragraph 4 of section 2 as including any trade, profession, calling, occupation or employment, is to be assessed as provided by section 443. Under that section the assessor shall fix a rate per square foot of the floor space of each building or part thereof used for business purposes, and a different rate may be fixed for different classes of business. It must not, however, exceed the statutory limits which appear to run from $4.00 to $15.00 per square foot. It is provided by subsection (5*a*) of this section that a railway company, whether its property is liable to assessment and taxation or not, shall be liable to assessment and taxation under this section "in respect of the business carried on as a railway" and the provisions of the section otherwise are made to apply except that in the case of a railway it is only buildings occupied which may be taken into consideration; (subsection (2)).

It is provided by section 479 that, subject to other provisions of the statute, the municipal and school taxes shall be levied upon lands, businesses and special franchises. The last mentioned is dealt with in subsections (7) and (8) of section 443 by which the owner of a special franchise is

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assessed for 10 per cent of the value of the franchise and is not assessable in respect of business. By section 485 the owner of a building is liable, in addition to taxes levied in respect of the land and buildings, to business tax levied in respect of business carried on therein. By section 495 the council is required to levy annually on the whole rateable property within the municipality. Section 504 deals with the tax roll and by subsection (2) it is provided that this roll shall contain "(*a*) the name of every person assessed," "(*c*) the nature and description of the property *in respect of which he is assessed,*" "(*d*) the total amount for which he is assessed."

It is plain in my view that the "business" assessment provided for by these taxing provisions is the assessment (and taxation) of a person in respect of land or building occupied by him for the purposes of a business, and that, apart from any question of a statutory lien or charge, such taxation does not differ from that of a person in respect of ownership of land and building. In each case, the liability imposed is with respect to, in the one case, the value of land owned, and in the other, with respect to the value fixed by the statute of land occupied. In nature, therefore, there is no essential difference. In the case of the land tax, the tax is not simply imposed upon and payable out of the land, nor in the case of the business tax is it simply imposed upon and payable out of assets apart from the land employed in carrying on the business. In each case the tax is imposed upon a person in respect of land owned or occupied.

With respect to the meaning of "taxation of property" as distinguished from "taxation of persons in respect of property", Rand J. said, in *Municipal District of Sugar City* v. *Bennett and White* (1), that

> to "tax property" is to subject it, as a legal object, to some sort of inhering obligation vaguely to be regarded as the equivalent of a lien is, I think, a misconception . . . Except as it may be evidential of an employed means of collection, the conception of the assessment, *per se,* as of property or of a person in relation to property, carries no practical significance of difference.

(1) [1950] S.C.R. 450 at 461.

In *Provincial Treasurer* vs. *Kerr* (1), Lord Thankerton said at page 718:

> Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the taxpayers' interests in property, or in respect of transactions or actings of the taxpayers. It is at least unusual to find a tax imposed on property and not on persons . . .

In the present instance, the tax here in question is imposed on persons in respect of their interest in property, not as a matter of title but as a matter of use.

In *City of Halifax* vs. *Fairbanks* (2), the respondent owned premises which it let to the Crown for use as a ticket office, the lessee agreeing to pay the "business tax." The city assessed the respondent for business tax under provincial legislation which imposed a "business tax" to be paid by every occupier of real property for the purposes of any trade. The statute also provided that any property let to a person exempt from taxation was to be deemed, for business purposes, to be in the occupation of the owner and to be assessed for business tax according to the purposes for which it was occupied. The city was authorized under the legislation to levy the business tax, a household tax and a real property tax. The business tax was assessed on 50 per cent of the capital value of the property occupied for purposes of the business. The household tax was payable by every occupier of real property for residential purposes, and was assessed on 10 per cent of the capital value of such property. The real property tax was a tax on the owners of all real property and was assessed on the capital value. The actual question for decision in the case was as to whether or not the business tax was or was not a direct tax within the meaning of section 92 of the *British North America Act*. While that was the actual question for decision, their Lordships had to consider the nature of the tax. After pointing out that the framers of the *British North America Act* had drafted that statute on the basis of a well-known distinction at that time between direct and indirect taxes, Viscount Cave, L.C., said at page 124:

> Thus, taxes *on property* or income were everywhere treated as direct taxes; . . . When, therefore, the Act of Union allocated the power of direct taxation for Provincial purposes to the Province, it must surely have intended that the taxation, for those purposes, *of property* and income should belong exclusively to the Provincial legislatures . . .

(1) [1933] A.C. 710. (2) [1928] A.C. 117.

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Their Lordships decided that the tax in question was a tax on property and a direct tax.

Under the provisions of paragraph 16 of the contract here in question, the stations, station grounds, workshops and buildings required for the working of the railway were to be "forever free from taxation." It would be an extraordinary result if the proper interpretation of this exemption were to be said to be that while taxes imposed upon the owner in respect of his ownership of these things fall within the exemption, nevertheless taxes imposed upon the owner in respect of his use of the same items do not. I do not think the intention of the contracting parties to be derived from the language which they have employed involves any such result and I think application of the business tax here in question to the "Canadian Pacific Railway" as I have already interpreted those words is precluded by the terms of paragraph 16, made binding upon the province by section 24 of 4-5 Edward VII, c. 42, Canada.

I do not think it useful to refer to dicta in earlier cases in this court. In none of them was there involved the question here under consideration. We were also referred to decisions with respect to "business tax" in the provincial courts, for instance, *Re Hydro Electric Commission and the City of Hamilton* (1). By virtue of George V, c. 20, sec. 39, which enacted section 45(*a*) of the *Assessment Act*, certain property of the Commission (assuming the statute applied to the particular Commission there in question) was to be exempt from assessment and taxation and it was argued that inasmuch as the business tax imposed by the *Act* must be paid out of the property, the Commission was exempt from business tax. The *Ontario Assessment Act* provided for assessment and taxation of land and also for business assessment and taxation. In the course of his judgment (1), the Chief Justice said at page 160:

> The business assessment is imposed by section 10 and is a personal tax, and not a tax on real or personal property. The assessment on land is used only for the purpose of determining the amount of business assessment, which is a percentage on the assessed value of the land occupied or used for the purpose of the business.

The business tax under the statute did not constitute a lien on the land as was the case with the real property tax,

(1) (1920) 47 O.L.R. 155.

and in that sense it was not a tax "on" land. Both, however, constituted taxes on persons with respect to their ownership or occupation of land and under the contract in question on this appeal both are within the intendment of the language employed in paragraph 16. As stated by Beck J. as he then was in *Hedley Shaw* vs. *Medicine Hat* (1):

> The "business assessment" . . . is in effect an assessment of "the buildings or land or both" in or on which the business is carried on.

In *re Ford* (2) Middleton J.A. at 411 said with reference to business assessment under the Ontario statute:

> . . . in lieu of the assessment of personal property, there was substituted a business assessment *fundamentally based upon the value of the land actually occupied* in connection with the business which forms the subject matter of the assessment.

It is nothing less than the assessment of a person with respect to land occupied by him. The assessment and the tax which follows are in essence the same, whether the assessment is the full capital value of the land as in the case of "land tax" or a percentage of that value as in the case of business and household assessment in the city of Halifax and business assessment under the Ontario statute, or whether the assessment is a value of the land fixed by statute as in the case of the Saskatchewan legislation.

The decision in *Moose Jaw* vs. *B.A. Oil Co.* (3) is largely based on the passage quoted from the judgment in *Hydro Electric* v. *Hamilton ubi cit.*, and for the reasons already given I do not think it can apply here.

I adopt the answers given by my brother Locke, and would allow the appellant one-half of its costs in this Court.

ESTEY J. (dissenting in part): This is an appeal from the answers given by the Court of Appeal for Saskatchewan (4) to four questions submitted to it under the *Constitutional Questions Act* of that Province (R.S.S. 1940, c. 72).

Questions one and three ask: Does clause 16 of the contract dated October 21, 1880, for the construction of the Canadian Pacific Railway, exempt and free from taxation the branch lines constructed pursuant to clause 14 of the said contract, and the stations, the station grounds,

(1) [1918] 1 W.W.R. 754 at 756.
(2) (1929) 63 O.L.R. 410.
(3) [1937] 2 W.W.R. 309.
(4) [1949] 1 W.W.R. 353; 2 D.L.R. 240.

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workshops, buildings, yards and other property used for the working of those branch lines? Questions two and four ask: Does clause 16 of the said contract exempt and free the Canadian Pacific Railway from taxation in respect to the business carried on by the Railway in Saskatchewan?

Clause 16 of the contract reads:

16. The Canadian Pacific Railway, and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the Crown.

The Statute (1905 S. of C., 4-5, Edw. VII, c. 42) creating the Province of Saskatchewan provided in sec. 24 thereof:

24. The powers hereby granted to the said province shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to Chapter 1 of the Statutes of 1881 being an Act respecting the Canadian Pacific Railway Company.

These questions arise by virtue of amendments made by the Legislature of that Province to its municipal acts in 1948. These are: the *City Act* (R.S.S. 1947, c. 43), the *Town Act* (*R.S.S.* 1947, c. 44), the *Village Act* (R.S.S. 1946, c. 31), the *Rural Municipality Act* (R.S.S. 1946, c. 32) and the *Local Improvement Districts Act* (R.S.S. 1946, c. 33). The issues have been presented on the basis that these 1948 amendments are all to the same effect and, therefore, reference will be made only to the provisions of the *City Act*.

The aforementioned contract of October 21, 1880, was made a schedule to and approved and ratified by a Statute of the Dominion of Canada (1881 S. of C., 44 Vict., c. 1). The terms of incorporation were made a schedule to this contract and later the Canadian Pacific Railway was incorporated by letters patent dated February 16, 1881, in terms identical with those made a schedule to the contract.

The preamble to the foregoing Statute (1881 S. of C. 1) approving the construction contract recited, *inter alia*, the obligation of the Dominion to construct a railway connecting the seaboard of British Columbia with the railway system of Canada, the efforts made to obtain the con-

struction of that railway, and that certain portions thereof had already been constructed by the Dominion Government. It also pointed out the necessity for the development of the Northwest Territories.

The contract divided the main line into four sections: Eastern, Lake Superior, Central and Western. It provided that the Company would construct the Eastern and Central sections and that the Government would transfer the completed Lake Superior and Western sections to the Company, which would equip, maintain and efficiently operate the entire railway.

Clause 1 of the contract sets out certain definitions. The answers to questions one and three depend largely upon the construction of the words "and that the words 'the Canadian Pacific Railway' are intended to mean the entire railway as described in the Act 37th Vict., cap. 14" as they appear in that clause.

1. For the better interpretation of this contract, it is hereby declared that the portion of Railway hereinafter called the Eastern section, shall comprise that part of the Canadian Pacific Railway to be constructed, extending from the Western terminus of the Canada Central Railway, near the East end of Lake Nipissing, known as Callander Station, to a point of junction with that portion of the said Canadian Pacific Railway now in course of construction extending from Lake Superior to Selkirk on the East side of Red River; which latter portion is hereinafter called the Lake Superior section. That the portion of said Railway, now partially in course of construction, extending from Selkirk to Kamloops, is hereinafter called the Central section; and the portion of said Railway now in course of construction, extending from Kamloops to Port Moody, is hereinafter called the Western section. And that the words "the Canadian Pacific Railway," are intended to mean the entire Railway, as described in the Act 37th Victoria, cap. 14. The individual parties hereto, are hereinafter described as the Company; and the Government of Canada is hereinafter called the Government.

The appellant contends that the definition of "Canadian Pacific Railway" in clause 1 is for the purpose of that clause only and that in clause 16 the words "Canadian Pacific Railway" include the main line and the branch lines constructed under clause 14 of the contract, and the property specified in clause 16. The respondent contends, to the contrary, that the definition set forth in clause 1 of "Canadian Pacific Railway" applies generally throughout the contract and in particular to clause 16 and, therefore,

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the exemption is restricted, so far as the Province of Saskatchewan is concerned, to the main line and the property specified in that clause.

The opening words of clause 1, "for the better interpretation of the contract," disclose that the purpose and intent of clause 1 is to provide such definitions as may assist in the interpretation of the contract. The four sections, Eastern, Superior, Central and Western, of the main line are first defined. Then follows the sentence "and that the words 'the Canadian Pacific Railway' are intended to mean the entire railway as described in the Act 37th Vict., cap. 14." This sentence indicates that "the Canadian Pacific Railway" did not mean merely the four sections defined and constituting the main line, but in addition thereto the three branch lines defined in the Act of 1874 and the amendment thereof in 1879 described as the Georgian Bay, Pembina and Winnipeg branch lines. Then follows the definitions of the words "Company" and "Government." Counsel for the appellant emphasized that the word "hereinafter" does not appear in relation to "the Canadian Pacific Railway" while it does appear with regard to every other term defined in that paragraph. Under other circumstances such might be significant, but in this particular case the phrase is used twice prior to this definition in clause 1 and, while this definition is not essential to clarify the meaning of the phrase as used in that clause, it was a circumstance sufficient to justify the draftsman's omission of the word "hereinafter" in this instance. The conclusion seems unavoidable that the parties intended that the definitions in clause 1 should obtain generally throughout the contract and that the phrase "the Canadian Pacific Railway" as in that clause defined includes the main line and the three branches, Georgian Bay, Pembina and Winnipeg (hereinafter referred to as the "specified branches"). Moreover, this conclusion finds support when the contract is read as a whole.

In the Act of 1874 only the main line and the three specified branches were provided for. There was no provision for the construction of branch lines such as that contained in clause 14 of the 1880 contract. Clause 14 reads as follows:

14. The Company shall have the right from time to time to lay out, construct, equip, maintain, and work branch lines of railway from any

point or points along their main line of railway to any point or points within the territory of the Dominion. Provided always, that before commencing any branch they shall first deposit a map and plan of such branch in the Department of Railways. And the Government shall grant to the Company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands are vested in the Government.

Under the contract of 1880 the railway envisaged may be divided into three parts: the four sections constituting the main line, the three specified branches, the construction of both of these being obligatory under the contract, and as to the third, or the branch lines under clause 14, the contract created no obligation but granted to the Company the privilege of constructing these from time to time as it might decide.

The Winnipeg branch provided for in the 1879 amendment was never completed and the part thereof constructed by the Government was transferred to the Company and included in the main line when its route in the Winnipeg area was changed. The Pembina branch was completed by the Government and turned over to the Company, but the Georgian Bay branch was never constructed. I do not think, however, that any conclusion can be drawn from the fact that these changes were made. The Statutes and Orders-in-Council passed between 1874 and 1880 clearly disclose that the actual location of the main line was changed from time to time. When this contract was executed in 1880 it seems clear that the parties had in mind the Dominion Government's obligation with the Province of British Columbia to construct a railway and the development of the prairies; but the route of the railway had been only tentatively arrived at. In fact, under clause 13 of the contract, the Company had the right, subject to the approval of the Governor-in-Council, to determine the exact location of the line within the two sections it was building and the Government itself made changes in the sections which it constructed. All this but emphasizes the fact that no conclusion can be drawn from the fact that changes were made with regard to the specified branch lines adverse to the respondent's contention in respect to the meaning of "the Canadian Pacific Railway" where it appears in clause 1.

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It is significant that branch lines, apart from those included in the reference to the Act of 1874, are referred to only in clauses 11 and 14. In the former the reference is not of any assistance in determining the answers to the questions here submitted, as it merely indicates the locations in which the Company may select in substitution for those sections of land contained in the twenty-five million acres which "consist, in a material degree, of land not fairly fit for settlement."

While the Government granted to the Company land for the stations, station grounds, etc., on both the main and branch lines, provisions therefor were made in separate clauses: that for the former in clause 10, and the latter in clause 14. Clause 14 imposes no obligation upon the Company to construct these branch lines. It merely gives to the Company the privilege of constructing them as and when it may decide to do so. The consideration of land and money and the transfer of the Lake Superior and the Winnipeg sections when constructed had, under the terms of the contract, no relation to the branch lines referred to in clause 14 and imposed no obligation on the Company to construct them.

In clause 7, when the parties intended to refer to the railway and the specified branches, they spoke of "the Canadian Pacific Railway," but when referring to those parts to be constructed and transferred to the Company the terms "several portions of" or "those portions of" preceded the words "the Canadian Pacific Railway." Then again in clause 8 the parties provided that when the Government transferred "the respective portions of the Canadian Pacific Railway" the Company should equip, maintain and operate same. In these clauses when the parties used the phrase "the Canadian Pacific Railway" they intended it as defined in clause 1.

The parties, in clause 9, are providing for the payment and transfer to the Company of the subsidies as the construction on the part of the Company progressed. It is clear that the consideration of money and land in this contract has no reference to the actual work of constructing the branch lines provided for in clause 14 and these branch lines are not included in this clause under the words "the Canadian Pacific Railway." The context makes it clear

that the parties in the phrase "the Canadian Pacific Railway" are referring to that portion to be constructed by the Company. A general definition in a contract such as that which appears in clause 1 is always subject to the implication that it applies only where the context does not otherwise indicate.

There may be some ambiguity with respect to this phrase "the Canadian Pacific Railway" in clause 15. It may well be that the parties here intended the phrase to mean the main line. If that be the construction, it is again on the basis that the context leads to that conclusion, but here again it cannot be suggested that the branch lines under clause 14 are included in the phrase "the Canadian Pacific Railway" as used in this clause.

Clause 17 authorized the issue by the Company of land grant bonds and when issued one-fifth shall be deposited with the Government

> as security for the due performance of the present contract in respect of the maintenance and continuous working of the railway by the company, as herein agreed, for ten years after the completion thereof . . . And as to the said one-fifth of the said bonds, so long as no default shall occur in the maintenance and working of the said Canadian Pacific Railway . . .

It is as defined in clause 1 that the phrase "the Canadian Pacific Railway" is here used. It includes the "maintenance and continuous working" thereof but not of the branch lines as constructed under clause 14.

Clause 22 makes applicable the Railway Act of 1879 to "the undertaking referred to in this contract," and then goes on to provide that the said Act shall apply to "the Canadian Pacific Railway," except where the provisions of this contract, or the Act of Incorporation, show a contrary intention. The parties, in this clause, have in mind both "the undertaking referred to in this contract" and the provisions of sec. 17 of the letters patent incorporating the Canadian Pacific Railway. The use of the phrase in this last clause no doubt refers to the railway as it may be eventually constructed, but it is abundantly clear that in this clause "the undertaking referred to in this contract" is, in the contemplation of the parties, quite a different entity from "the Canadian Pacific Railway" as it may ultimately be constructed.

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Sec. 15 of the Terms of Incorporation provides:

and the said main line of railway, and the said branch lines of railway, shall be commenced and completed as provided by the said contract; and together with such other branch lines as shall be hereafter constructed by the said Company, and any extension of said main line of railway that shall hereafter be constructed or required by the Company, shall constitute the line of railway hereinafter called "The Canadian Pacific Railway."

The Terms of Incorporation were made a schedule to the contract and, therefore, these documents must be read together. The language adopted in the foregoing sec. 15 further indicates that the parties contemplated the branch lines constructed under clause 14 a separate and distinct entity from the main line and specified branch lines and where they were intended to be included they were expressly mentioned.

In clause 1 the words "Company" and "Government" are defined and as such used throughout the contract. These words and the terms "Eastern," "Lake Superior," "Central" and "Western" sections are all used throughout the contract as defined in clause 1. The terms of the clause do not suggest any exception with respect to the definition of "the Canadian Pacific Railway" apart from the omission of the word "hereinafter" already discussed and which is not of sufficient significance to offset the purpose and intent of the clause as expressed in the opening words thereof.

Moreover, the paragraphs above mentiond and discussed support the view that the parties intended throughout that the words "the Canadian Pacific Railway" should be construed, unless the context otherwise indicates, as defined in clause 1.

The first words in clause 16 are "The Canadian Pacific Railway." This phrase does not refer to the Company as incorporated by letters patent in the following February. In clause 1 it is provided: "The individual parties hereto are hereinafter described as the Company" and throughout the contract this word is used as so defined, except where, as in clause 17, the context indicates a different meaning. Moreover, in clause 16 the items specified are restricted to those "required and used for the construction and making thereof." The word "thereof" refers back to "the Canadian Pacific Railway" and as such refers to the physical property.

This conclusion is supported by the manner in which these words are used throughout the contract. In clause 17 reference is made to "the maintenance and working of said Canadian Pacific Railway." In clause 7: "The Canadian Pacific Railway shall become and be thereafter the absolute property of the Company." In clause 9: "The construction of the Canadian Pacific Railway." It is the physical property of the lines in respect to which the parties had obligated themselves to construct under the contract that is included in the meaning of this phrase generally throughout the contract. This construction is in accord with the meaning as defined in clause 1 and there is nothing in the context of clause 16 to indicate any other or different meaning. It was contended that the word "all" in the phrase "all stations and station grounds" in clause 16 indicates that stations etc. both of the main and branch lines constructed under clause 14 were to be exempt. This contention overlooks that it is "all stations . . . required and used for the construction and working thereof." This latter word "thereof" refers back to "the Canadian Pacific Railway" in the first line. In these circumstances the submission that in clause 16 the phrase "the Canadian Pacific Railway" should include not only the main line and the specified branches but also the branch lines to be at some future time constructed by the Company under the privilege granted in clause 14 is to attribute an intention to the parties which, having regard to the other provisions, they would have expressed in either language which is clear and definite or such as, by necessary implication, would include these branch lines constructed under clause 14.

Appellant then submits that the similarity of the language in clauses 14 and 16, as well as the fact that clause 16 follows so immediately thereafter, discloses an intention on the part of the contracting parties to exempt the branch lines constructed under clause 14. The respective clauses of the contract should be read together, in this sense, that any conflict should, so far as construction of the language may permit, be avoided. Here, however, the language of clause 16 presents no ambiguity, once the meaning of "the Canadian Pacific Railway" is determined, and so construed it is not in conflict with any provision in clause 14.

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Moreover, in regard to the construction of the branch lines under clause 14, the Government made no contribution, either of money or of lands, corresponding to the twenty-five million dollars and the twenty-five million acres of land as specified in the contract. The branch lines under clause 14 were a matter separate and apart from the main line and the specified branches and when clause 16 is read and construed in the light of this general intention and the specific clauses already mentioned it is clear that branch lines were not intended to be included under the exemption therein provided for. It is true, as the appellant contends, that the Government intended to encourage the construction of branch lines, but only to the extent provided for in clause 14.

I am, therefore, in agreement with the learned judges in the Court of Appeal (1) that the exemption in clause 16 does not apply to the branch lines constructed under clause 14. I would, however, vary the answers to questions one and three as stated by my brother Locke.

Then referring to questions two and four, these ask if the Canadian Pacific Railway, by virtue of the above-quoted clause 16, is exempt from the business tax authorized by the amendments to the aforementioned municipal Acts.

Business is defined "to include any trade, profession, calling, occupation or employment," *City Act*, sec. 2(4). Sec. 443(1) of that *Act* provides that the business tax shall be computed at

> a rate per square foot of the floor space . . . used for business purposes, and shall as far as he deems practicable classify the various businesses and portions thereof.

Then sec. 443(5*a*) deals specifically with the railway and provides as follows:

> (5*a*) A railway company, whether its property is liable to assessment and taxation or not, shall be liable to assessment and taxation under this section in respect of the business carried on as a railway and the provisions of this section, except subsection (2), shall apply.

This is a familiar type of tax, in its nature and character distinct from other taxes. It is not imposed upon particular items of property, real or personal, and is not dependent upon ownership or interest in either the premises or the chattels thereon. It is not a tax upon occupation. A

(1) [1949] 2 D.L.R. 240; 1 W.W.R. 353.

person may occupy the premises and be in possession of the chattels thereon, but neither would provide a basis for the assessment of this business tax. The essential without which such a tax cannot be imposed is that a business is conducted upon the premises.

Sir George Jessel M.R. defined business:

> Anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite significance.

Smith v. *Anderson* (1).

Rowlatt J., in *Commissioners of Inland Revenue* v. *Marine Steam Turbine Co.* (2), after pointing out that the word "business" may have a very wide meaning and that "in whatever sense it be understood is undoubtedly an elastic word capable of wide extension," stated:

> The word "business," however, is also used . . . as meaning an active occupation or profession continuously carried on, and it is in this sense that the word is used in the Act with which we are here concerned.

The business of the Company is its activity or undertaking. In the main that of the appellant is the provision and selling of services and facilities for transportation of passengers and goods. The time and ability of its officers, agents and servants are directed to the provision and selling of these services and facilities and it is that activity or undertaking that constitutes the business of the Company. The business tax here provided for is imposed upon that activity or undertaking.

This being the nature and character of the tax, the question arises: Is it within the ambit of the exemption in clause 16? The phrase "the Canadian Pacific Railway" in that clause, as already defined, includes the main and specified branch lines. These, together with the other property "used for the construction and working thereof," constitute that which "shall be forever free from taxation." In this clause the word "thereof" refers to the phrase "the Canadian Pacific Railway" in the first line of the clause and, therefore, to the physical property of the main and specified branch lines and the phrase "used for the construction and working thereof" determines the quantum of the property included under the exemption.

(1) (1879) 15 Ch. D. 247. (2) [1920] 1 K.B. 193 at 203.

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It is the taxation of the physical property specified in clause 16 that is exempted by the provisions of that clause. That all or any part of this as well as other property would be used in the course of its business does not extend the scope of the exemption. The business of the Company is distinct from the physical property and its separate significance is in no way destroyed by the use of the specified or any other property in the course thereof.

In 1880 taxes were generally spoken of as property or personal taxes. The former included taxation of real and personal property and the latter income and poll taxes. Our attention was drawn to the fact, in the course of the hearing, that at that time both British Columbia and Ontario imposed income taxes. It may be assumed that the business tax as here assessed was not in the contemplation of the parties. They would be cognizant of all of the foregoing taxes and of the efforts of even that day to find new sources of revenue. It was in 1875 that the Legislature of Quebec enacted what was construed as, in effect, a stamp tax upon policies of insurance. *The Attorney-General for Quebec* v. *The Queen Insurance Company* (1).

In these circumstances, if the parties had intended that more than a tax upon the physical property should be exempted, they would have adopted language expressive of that intention. On the contrary the parties, in the language they have chosen, have expressed their intention in terms not sufficiently wide and comprehensive to include a business tax such as provided for in the municipal legislation here under review. It is unnecessary here to discuss whether a business tax is a property or a personal tax, as in either event the language in clause 16 does not include it in the scope of the exemption therein provided for.

In *Canadian Northern Pacific Railway Company* v. *Corporation of New Westminster* (2), the Privy Council, in construing the word "railway" as it appears in the *British Columbia Railway Act 1911,* c. 44 sec. 2, differentiated between the physical property and the whole undertaking of the Company. In the course of the judgment it was stated:

> The things so brought by definition into the term "railway" are all physical things, as the railway itself is. The definition does not bring

(1) 3 App. Cas. 1090; 1 Cam. 222. (2) [1917] A.C. 602.

into "railway" the whole "undertaking" of the company . . . It is used in the clause as denoting a physical thing, of which something else can form part and which can be "operated."

A similar distinction between the physical property and the business of the Company is apparent in the language of clause 16.

The fact that the tax is computed on the floor space does not necessarily affect the character of the tax. In *Smith* v. *Council of the Rural Municipality of Vermillion Hills* (1), the fact that a tax was imposed of so many cents per acre did not make it a land tax or affect its true nature and character as a tax upon the occupant. Moreover, in *City of Montreal* v. *The Attorney-General for Canada* (2), the fact that the tax was computed upon the basis of 1 per cent on the capitalized value of the property did not destroy the nature and character of the tax as one imposed upon the occupant.

While, therefore, the computation of a tax may well be taken into consideration in determining its true nature and character, it is not conclusive. The problem in *City of Halifax* v. *Fairbanks Estate* (3) was quite different from that at bar. It does, however, illustrate the basis for and the nature and character of the business tax. There the owner was made liable by statute for a business tax, though he was not in possession of the premises and did not conduct the business. In my opinion, the Legislature of Saskatchewan imposed a tax here upon the business which is not included in the terms of the exemption provided for in clause 16.

While question No. 2 suggests three bases for the exemption of the business tax and the Legislature adopts but the first, there is no difference in principle involved and I think the answer should be the same with respect to all the three divisions.

Questions 1 and 3 should be answered as stated by my brother Locke. Question 2 should be answered "No" and question 4 "Yes."

I would dismiss the appeal with costs.

(1) [1916] 2 A.C. 569; 2 Cam. 97.
(2) [1923] A.C. 136; 2 Cam. 312.
(3) [1928] A.C. 117; 2 Cam. 477.

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The judgment of Locke and Cartwright JJ. was delivered by:

LOCKE J.:—The answer to be made to the first question depends upon the meaning to be assigned to the words "Canadian Pacific Railway" in clause 16 of the contract entered into between the Crown and George Stephen and his associates dated October 21, 1880, the terms of which were approved and ratifid by c. 1, Statutes of Canada, 1881. That clause reads:

16. The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company shall be forever free from taxation by the Dominion, or by any Province hereafter to be established or by any Municipal Corporation therein, and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

By clause 14 of the contract it was provided that the Company should have the right to build branch lines of railway from any point along the main line to any point within the territory of the Dominion and it is contended on its behalf that branch lines built under this authority in what is now the Province of Saskatchewan are included in the expression "Canadian Pacific Railway" and as such entitled to the exemption provided by clause 16. The contention of the Attorney-General is that the exemption is restricted to the railway described in an *Act to Provide for the Construction of the Canadian Pacific Railway*, c. 14, Statutes of Canada, 1874.

Clause 1 of the contract reads:

1. For the better interpretation of this contract, it is hereby declared that the portion of Railway hereinafter called the Eastern section, shall comprise that part of the Canadian Pacific Railway to be constructed, extending from the Western terminus of the Canada Central Railway, near the East end of Lake Nipissing, known as Callander Station, to a point of junction with that portion of the said Canadian Pacific Railway now in course of construction extending from Lake Superior to Selkirk on the East side of Red River; which latter portion is hereinafter called the Lake Superior section. That the portion of said Railway, now partially in course of construction, extending from Selkirk to Kamloops, is hereinafter called the Central section; and the portion of said Railway now in course of construction, extending from Kamloops to Port Moody, is hereinafter called the Western section. And that the words "the Canadian Pacific Railway," are intended to mean the entire Railway, as

described in the Act 37th Victoria, cap. 14. The individual parties hereto, are hereinafter described as the Company; and the Government of Canada is hereinafter called the Government.

By the Terms of Union under which the Colony of British Columbia entered Confederation the Government of Canada undertook to secure the commencement within two years from the date of Union of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as might be selected east of those Mountains towards the Pacific to connect the seaboard of British Columbia with the railway system of Canada. The statute of 1874, after reciting this term of the arrangement in the preamble, enacted that a railway to be called the "Canadian Pacific Railway" should be made from a point near to and south of Lake Nipissing to some point in British Columbia on the Pacific Ocean, both of such points to be determined and the course and line of the railway to be approved of by the Governor in Council. The terms in which the proposed railway were described and the references made to the branch railways are of importance. They read:

2. The whole line of the said railway, for the purpose of its construction, shall be divided into four sections;—the first section to begin at a point near to and south of Lake Nipissing, and to extend towards the upper or western end of Lake Superior, to a point where it shall intersect the second section hereinafter mentioned; the second section to begin at some point on Lake Superior, to be determined by the Governor in Council, and connecting with the first section, and to extend to Red River, in the Province of Manitoba; the third section to extend from Red River, in the Province of Manitoba, to some point between Fort Edmonton and the foot of the Rocky Mountains, to be determined by the Governor in Council; the fourth section to extend from the western terminus of the third section to some point in British Columbia on the Pacific Ocean.

3. Branches of the said railway shall also be constructed as follows, that is to say:—

First—A branch from the point indicated as the proposed eastern terminus of the said railway to some point on the Georgian Bay, both the said points to be determined by the Governor in Council.

Secondly—A branch from the main line near Fort Garry, in the Province of Manitoba, to some point near Pembina on the southern boundary thereof.

4. The branch railways above mentioned shall, for all intents and purposes, be considered as forming part of the Canadian Pacific Railway, and as so many distinct sections of the said railway, and shall be subject

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to all the provisions hereinafter made with respect to the said Canadian Pacific Railway, except in so far as it may be otherwise provided for by this Act.

In the interval between the passing of this Act and the date of the contract various efforts were made by the Government of Canada to arrange for the construction of the proposed railway by private interests and all had proved abortive. The Government had meanwhile proceeded with the work of construction on what was referred to in the statute of 1874 as the second section, some work had been done in British Columbia, the branch from Emerson to Fort Garry (referred to in the proceedings as the Pembina Branch) had been built and a start had been made on the line from Winnipeg West. In addition, surveys had been made and various decisions made regarding the route of the line for the Western section. By c. 14 of the Statutes of 1879 the *Canadian Pacific Railway Act of 1874* was amended by providing that a branch of the railway should be constructed from some point west of the Red River on that part of the main line running south of Lake Manitoba to the City of Winnipeg, there to connect with the Pembina Branch, and providing that all the provisions of the Act of 1874 with respect to branches of the railway should apply to the branch to be constructed. It was contemplated at this time that the main line of the road would cross the Red River at East Selkirk, proceeding from there in a general westerly and north-westerly direction to Fort Edmonton and thence down through the Yellow Head Pass to Kamloops and thence to the Pacific Coast. The line from Selkirk westerly, however, was not proceeded with, it being decided that instead of proceeding through Stonewall and the country immediately south of Lake Manitoba and thence west the main line should follow the line of settlement further to the south, crossing the Red River at Winnipeg and proceeding westerly a short distance to the north of the Assiniboine River through Portage la Prairie and thence west. The Act of 1874 required the approval of the Governor in Council to the exact site of the proposed line throughout its course and in advance of the date of the contract it had been decided that the Pacific Terminus of the railway should be a point

on Burrard Inlet. The decision, however, to alter the course of the line by proceeding through the Kicking Horse Pass instead of the Yellow Head Pass had not been made until after the contract was made. The construction which preceded the contract was of part of the railway and branches described generally in the statute and the lines so partially completed were ultimately conveyed to the Company.

For the appellant it is urged that the third sentence of clause 1 above quoted is not intended to define the expression "Canadian Pacific Railway" in any part of the contract other than that clause. I find difficulty in appreciating the force of this argument. Clause 1 is designed to define certain terms and sentences 1 and 2 define the Eastern, Lake Superior, Central and Western sections, all of which are thereafter referred to by these designations in the succeeding paragraphs. The first sentence refers to "that part of the Canadian Pacific Railway to be constructed", and again to a point of junction with "that portion of the said Canadian Pacific Railway now in course of construction", and the meaning of the expression there can only be the railway the construction of which is thereafter provided for in the contract. In the second sentence it refers to "the portion of said railway" referring back to the Canadian Pacific Railway to be constructed mentioned in the preceding sentence. There appears then to have been no necessity for defining the words "the Canadian Pacific Railway" in the construction of the first two sentences and the preliminary words of the third sentence indicate to me that it is intended to be read in conjunction with the opening words of the first sentence. The matter would be more clear if, instead of the second sentence ending after the words "Western section", it had continued to the last words of the third sentence, the period after the word "section" being replaced with a comma. I think, however, the first three sentences are to be interpreted as if they read:

> For the better interpretation of this contract it is hereby declared that (the various sections of the railway should be as defined) and that the words "the Canadian Pacific Railway" are intended to mean the entire railway as described in the Act 37 Vict. cap. 14.

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Unless this is the true construction, I cannot understand why the third sentence was included in the clause. While the argument of the appellant is that the remainder of the contract indicates that this was not intended, I have come to a different conclusion.

Clause 3 contains the first of the obligations assumed by Stephen *et al* (described for the purpose of the contract in the last sentence of clause 1 as the company) as to the construction of the road and by that clause they agreed to construct and equip the Eastern section and the Central section, using the designations applied to these respective parts of the line in clause 1 and by clause 4 the times at which this work should be commenced and completed are stated.

Clause 7 declares that the railway constructed under the terms of the agreement shall be the property of the Company and that pending the completion of the Eastern and Central sections the Government "shall transfer to the Company the possession and right to work and run the several portions of the Canadian Pacific Railway already constructed or as the same shall be completed," and in the succeeding sentence the railway, portions of which had been constructed or were to be constructed by the Government and conveyed to the Company, is referred to as the "Canadian Pacific Railway." Here the expression clearly refers to the portions of the "entire railway" referred to in the third sentence of clause 1 which had been or was to be constructed under the terms of the contract. The last sentence of this clause:

> And the Company shall thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway.

is said to indicate that the meaning of "Canadian Pacific Railway" cannot be restricted in the manner defined in clause 1, since it cannot have been in contemplation that the obligation to maintain, work and run the road should be restricted to the main line and the branches referred to in the statute of 1874. I do not think that this follows. The advisers of the Government who passed upon the form of the contract may well have considered that when the Company built branch lines under the powers given by clause 14 the obligation to supply facilities for traffic im-

posed by section 25(2) of the *Consolidated Railway Act, 1879*, and the powers vested in the Railway Committee by that statute would suffice to protect the public interest.

By clause 8 the Company was required to equip, maintain and efficiently operate the respective portions of the "Canadian Pacific Railway" which were to be conveyed to it by the Crown. By its very terms it is manifest that the expression here refers only to the portions of the road constructed or which were to be constructed by the Crown, as required by the contract.

Clause 9 contains the obligation of the Crown to grant a subsidy of money and land "for which subsidies the construction of the Canadian Pacific Railway shall be completed." Here the reference is to the road to be constructed in accordance with the contract.

Clause 10 contains the obligation of the Crown to grant to the Company the lands required for the right-of-way, stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards, and other appurtenances required for the convenient and effectual construction and working of the railway, in so far as such land shall be vested in the Government. The clause further obligated the Crown to admit free of duty certain rails and other material "to be used in the original construction of the railway and of a telegraph line in connection therewith." The expression "Canadian Pacific Railway" does not appear in this clause. However, the railway referred to is that to be constructed under the obligations imposed by the contract partly by the Crown and partly by the Company and not the branch lines which the Company might thereafter undertake, as to which provision for a grant of the right-of-way and other lands required is made by clause 14.

Clause 15 provides that within twenty years from the date of the contract no line of railway shall be authorized by the Dominion Parliament to be constructed south of the "Canadian Pacific Railway" from any point at or near the Canadian Pacific Railway, except such line as shall run southwest or to the westward of southwest, nor to within fifteen miles of Latitude 49. The expression here cannot mean the line of railway to be constructed under the terms of the contract plus such branch lines as might thereafter

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be constructed under the powers contained in clause 14, in my opinion. It was obviously in the contemplation of both parties to the contract that branch lines would be constructed to open up the country to the south of the main line, some of which would extend to the international boundary and connect with railways operating in the United States and such a branch line was built in the course of time from Moose Jaw to North Portal at the boundary. The Canadian terminus of this road being on the international boundary, if the expression "Canadian Pacific Railway" included the branch lines, any point "south of the Canadian Pacific Railway" would be in the United States. Such a construction would render the clause meaningless.

It is by clause 16 that the exemption is provided. It is of importance to note that it is not merely the stations, station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances situate upon the road to be constructed which are exempted but these "required and used in the construction and working thereof:" thus round houses or machine shops required in the operation of the line to be constructed under the terms of the contract might well be situate on a branch line constructed under the powers granted by clause 14. I can perceive nothing in clause 16 itself to indicate that the definition contained in the third sentence of clause 1 is not to apply to the expression "Canadian Pacific Railway."

Clause 17 provides for the deposit of certain of the land grant bonds with the Government which the Company was authorized to issue as security for the "due performance of the present contract in respect of the maintenance and continuous working of the railway by the Company, as herein agreed, for ten years after the completion thereof." By the third sentence it was provided as to the bonds so deposited that "so long as no default shall occur in the maintenance and working of the said Canadian Pacific Railway" the Government shall not demand payment of the coupons on the bonds. The words here can have no other meaning than the railway to be constructed under the contract. If, as contended, it meant the line to be constructed under the contract, plus such lines as the

Company might at any time in the future choose to construct under the powers contained in clause 14, the date of the expiration of the ten year period would never be ascertainable.

Great stress is laid by the appellant upon the language of section 22 providing that the *Railway Act of 1879,* in so far as its provisions are applicable to the undertaking referred to in the contract and are not inconsistent with the terms of the agreement or contrary to the provisions of the Act of Incorporation to be granted to the Company, shall apply to the "Canadian Pacific Railway." The expression here, it is said, obviously refers to the entire undertaking including branch lines to be thereafter constructed, since it is inconceivable that the statute would be made applicable to a part of the future railway system. I think, however, that this section is to be interpreted as providing that the Railway Act of 1879, with named exceptions, should apply to the operation of the Railway as defined in clause 1. The matter is similarly expressed in sections 2 and 4 of the *Consolidated Railway Act of 1879* referred to in clause 22 which may well have been in this respect patterned upon it. Section 2 provided that sections 5 to 35 "shall apply to the Intercolonial Railway" and section 4 says that sections 34 to 98 "shall apply to the Intercolonial Railway in so far as they are not varied by or inconsistent with the special Act respecting it, to all railways constructed by the Government of Canada and to all railways which have been in or since the said year (1868) or which may be hereafter constructed under the authority of, or made subject to, any special Act passed by the Parliament of Canada and to all companies incorporated for their construction and working." The reference to the Intercolonial Railway is to the physical property and to the railways constructed under special Act by corporations both to the physical property and the companies operating them, and while this latter reference was omitted in clause 22 I think the meaning to be no less certain. If the Act was made applicable to the Railway those operating it would be bound to conform to its terms.

It is, however, further contended on behalf of the appellant that the definition in clause 1 cannot apply since the railway to be constructed under the terms of the contract

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was not that contemplated in the Act of 1874. That statute which defined the proposed route of the railway in general terms as being from a point to the south of Lake Nipissing to extend to the upper and western end of Lake Superior, thence to the Red River, thence to some point between Fort Edmonton and the foot of the Rocky Mountains, and from there to some point in British Columbia on the Pacific Ocean, also provided for the construction of a branch from the point indicated as the proposed Eastern terminus of the railway to some point on Georgian Bay and a branch from the main line near Fort Garry to some point near Pembina on the Southern boundary. This description of the proposed line was of necessity vague since the most desirable route had not then been determined and was accordingly left to be approved by the Governor in Council. When the contract was entered into in 1880 the definition of the proposed Western line contained in section 1 was more specific, though the final route had not then been decided. The line from Fort Garry to Pembina had been built and while I think it is not entirely clear whether the extension from Fort Garry to Selkirk, authorized by the amendment of 1879, was then completed, the report of Sandford Fleming to Sir Charles Tupper of April 8th, 1881, shows the entire line from Selkirk to Emerson as under contract. The definition in the third sentence of clause 1 would thus include the Pembina Branch from Emerson to Fort Garry if the description in the statute of 1874 is taken, and the extension north to Selkirk if what was intended was the Act of 1874, as amended by the Act of 1879. The so-called Georgian Bay Branch, however, it is said, had been abandoned prior to the date of the contract and it is said that this indicates clearly that the description in clause 1 of the contract did not apply. On the assumption that we are entitled to examine the available evidence, I have read the documents filed in support of the contention that the intention to construct the Georgian Bay line had been abandoned prior to the time of the contract and I am not satisfied that this is so. A contract had been let for the line but, with the exception of a comparatively insignificant amount of

work done under it, it was not proceeded with and the Crown terminated this contract. That the project itself was abandoned was not, in my opinion, proven.

It is further said for the appellant that, if, as contended on its behalf, it is not clear that the phrase "Canadian Pacific Railway" in clause 16 applies not only to the line to be built under the terms of the contract but also to the branch lines constructed under the powers contained in clause 14, then extrinsic evidence is admissible to explain the meaning of the term. A large number of documents were by consent filed, reserving to the Attorney-General his right to object to their admissibility. Assuming, but without deciding, that any of the documents filed are admissible as an aid to construction, I have examined all of them and do not find that doing so assists the contention of the appellant. It must be said on this aspect of the matter that perhaps the strongest argument to be made in favour of the appellant's contention is that to one familiar with Western Canada it seems highly improbable that those undertaking to construct this vast railway work the success of which would undoubtedly depend upon the development of the country from a few miles east of the Red River to the foothills of the Rockies, which would of necessity require the construction of numerous branch lines, would have been satisfied with a tax exemption restricted to the main line only and the Pembina and Georgian Bay branches. It would be apparent to anyone familiar with the country to be traversed that very little freight traffic could be expected to originate in the territory lying between Lake Superior and the eastern limit of the Prairies in Manitoba and between the foothills of the Rockies and the Pacific Coast for many years to come. These are matters of common knowledge and, as one would expect, the question of tax exemption was brought up during the early attempts to obtain the construction of the road which Canada had obligated itself to construct under the Terms of Union with British Columbia. Thus in 1872 two companies, the Inter-Oceanic Railway Company of Canada and Canada Pacific Railway Company were incorporated, the private Acts constituting them each containing a provision that the buildings, right-of-way, permanent way, rolling stock and earnings of the company and all its

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properties, except the lands granted, should be exempt from taxation in any province thereafter to be constituted from the territory of the Dominion for fifty years after the completion of the railway under any law, ordinance, or by-law of any provincial, local or municipal authority. Neither of these companies proceeded with the matter and in a memorandum transmitted by Sir John A. Macdonald to Duncan MacIntyre which, we are told, was prepared in the summer of 1880, what was called a confidential project for the construction of the Canadian Pacific Railway was submitted which proposed a subsidy of varying amounts per mile of construction from Nipissing to Thunder Bay and from Red River to Kamloops, $20,000,000. in cash and a land grant. MacIntyre on behalf of himself and his associates who included George Stephen and others who finally became parties to the contract, in an undated reply addressed to Sir John, said in part:

> Among the points not referred to in the memorandum we may mention that of taxation from which we think the proposed line should be free.

Later, in a document dated September 14th, 1880, produced from the possession of the railway company and called "Heads of Arrangement" details of a plan for the construction of the Canadian Pacific Railway are set out. While these provided for a subsidy in money of $25,000,000, a land grant of 25 million acres, the admission free of customs duties of certain materials to be used in the construction of the road, no mention is made of any tax exemption. In my opinion, if any inference is to be drawn from these documents, it is that the matter of exempting the undertaking from taxes to be imposed by the Dominion and by any province to be thereafter constituted out of the Northwest Territories, was considered and deliberately limited to that part of the line the construction of which was provided for by the contract and those portions built or to be built by the Crown and conveyed to the Company. It seems to me to be impossible to draw any other inference than that the limitation of the exemption to the line as defined in clause 1 was the real agreement of the parties. In a matter of this moment, I cannot believe that the legal advisers of Stephen et al who passed upon the contract could have approved it in its present form if the real

agreement was that now contended for by the appellant.

We are also referred to what is an undoubted fact that in the period between 1880 and 1908 the respective governments of the Northwest Territories and of the Province of Saskatchewan apparently considered that the exemption was of both the main line and the branch lines constructed under clause 14 and made no attempt to impose or authorize the imposition of taxation and that the late Sir Frederick Haultain and the late Mr. Walter Scott were of that opinion. However, neither the Legislative Assembly of the Northwest Territories or the Legislature of Saskatchewan or that Province authorized the contract, nor were they or their respective Governments parties to it and their conduct cannot be relied upon as an aid to construction.

The first question cannot, in my opinion, be answered by a simple affirmative or negative. Clause 16 exempts the stations, station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working of the Canadian Pacific Railway. Question 1 asks if the same properties "used for the working of the branch lines of the Canadian Pacific Railway situated in Saskatchewan" are exempt. There may well be properties of the description mentioned which are "required and used for the working" of the main line which are also used in part for the working of the branch lines constructed under clause 14. This would undoubtedly be so in respect to the rolling stock and may refer to a large number of other properties and works situate upon branch lines of this description. No statement as to this appears in the reference which would enable us to determine what properties are in fact exempt. Having come to the conclusion that the exemption in the Province of Saskatchewan is restricted to the main line and the named branches the answer to be made should be qualified accordingly.

The second question submitted is as to whether clause 16 of the contract exempts the Canadian Pacific Railway Company from taxation in Saskatchewan in respect of the business carried on as a railway, based on either the area of the land or the floor space of buildings used, the rental

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value of the land and buildings used or their assessed value and which is not made a charge upon such land or buildings. By section 24 of the *Saskatchewan Act* (4-5 Edw. VII, c. 42) which constituted the Province it is provided:

> The powers hereby granted to the said Province shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to Chap. 1 of the Statutes of 1881, being an Act respecting the Canadian Pacific Railway Company.

The language of section 1 of the Act of 1881 is that the contract:

> is hereby approved and ratified and the Government is hereby authorized to perform and carry out the conditions thereof according to their purport.

The question is thus not the construction of a provision in a statute but in a contract to which the Province was not a party. The exemption granted by clause 16 is as to the named properties "required and used for the construction and working" of the railway. The benefit of that exemption was vested in the Canadian Pacific Railway Company by section 4 of the letters patent of incorporation and remains in it so long as the company continues to be the owner or operator of the property and uses it for the defined purpose. The position adopted on behalf of the Province of Saskatchewan put bluntly is this: that while neither the physical property defined by clause 1 nor the Canadian Pacific Railway Company in respect of its ownership of that property is liable to taxation, so-called business taxes may be levied upon the Company in respect of its business of operating it. While the language of clause 16 is that the property shall be "forever free from taxation" by any province thereafter to be established, it is said that to tax the Company in respect to the *use* of the property (itself a term of the exemption), is not to tax the property and that that alone is prohibited. The question, as submitted, states that the business tax levied by any of the three methods mentioned will not be made a charge upon the land or buildings. I cannot understand what possible difference this can make. Municipal taxes may be and at times are declared to be a lien upon the property in respect to which they are levied, but this is merely a provision to secure their collection: in determining the nature of this tax, the fact that there is no charge upon the land or buildings in respect of it appears to me irrelevant.

By the *City Act 1947* the imposition of a business tax was authorized and by amendments made by c. 33 of the Statutes of 1948 this was made to apply to every railway company owning or operating a railway in Saskatchewan (sec. 20 (*a*)). Section 443 which authorized the imposition of the tax was also amended in that year by the addition of subsection 5(*a*) which reads:

A railway company, whether its property is liable to assessment and taxation or not, shall be liable to assessment and taxation under this section in respect of the business carried on as a railway and the provisions of this section, except subsection (2) shall apply.

The case has been argued on the footing that the provisions of this statute, in so far as they affect the taxation of the business of a railway, do not differ in substance from like provisions in the *Village Act, 1946,* the *Rural Municipalities Act, 1946,* the *Local Improvement District Act, 1946,* and the *Town Act 1947,* all as amended, which are referred to in the fourth question and Questions 2 and 4, may thus be dealt with together.

The *City Act,* by section 2(4), defines the term "business" as including any trade, profession, calling, occupation or employment. Part VII of the statute under the heading "Assessment and Taxation" provides by section 441 that not later than a named date the assessor shall assess: in respect to every parcel of land in the City, *inter alia,* the registered owner or the owner under a *bona fide* agreement for sale. Subsection 2 of section 441 requires the assessor to assess every person engaged in mercantile, professional or any other business in the City, with certain named exceptions. By section 442 the right-of-way of a railway owned by a railway company or occupied by it if owned by others and exempt from taxation is to be assessed at an amount not exceeding $6,000 per mile.

Section 444 provides that no person who is assessed in respect of a business shall be liable to pay a licence fee to the City in respect of the same business. Section 443 which declares the basis of the assessment for business tax commences:

Business shall be assessed in the following manner:

The assessor is directed to fix a rate per square foot of the floor space of each building used for business purposes

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and if the business is carried on wholly or in part outside of any building a rate per square foot of the yard space used. Subsection 4 directs the entry on the assessment roll of each of the persons who as partners, joint tenants, tenants in common or by any other kind of joint interest are "the owners or occupants of real property liable to taxation hereunder." Section 479 directs that the municipal and school taxes of the City shall be levied upon (1) lands, (2) businesses, and (3) special franchises. Section 485 provides that the owner of a building who is liable to assessment in respect of business carried on therein shall in addition to his liability for taxes levied in respect of the land and building be liable for the business tax in respect of such business. By section 504, the first of a number of sections which appear under the heading "Taxes", the assessor is directed to prepare a tax roll on or before the 1st day of October in each year which shall contain the name of every person assessed and:

(2) (c) the nature and description of the property in respect of which he is assessed.

While section 479 refers to the tax levies as being upon lands and businesses, this must be read together with other sections of the statute which in terms make it clear that as regards the owner of land the tax is assessed against and levied upon him and not upon the land. As to the business tax, while the opening words of section 443 read that "business" is to be assessed, it is the individual carrying on the business upon whom the assessment is made and the tax levied and the true nature of the tax is shown to be a tax in respect of the occupation of property for the purpose of carrying on the business.

Clause 16 of the contract does not grant an absolute exemption of the stations, station grounds, buildings and other property referred to but only such as are used for the construction and working of the railway and, in my opinion, if buildings which fell within the description ceased to be used by the owner or operator of the property for such purposes the exemption would be lost. Since, therefore, it is the buildings, station grounds, yards and other property when used for these purposes which are declared to be forever free from taxation by the Dominion or by

any province thereafter to be established, I think it cannot be said that a tax upon the owner in respect of the use of the property for the purpose of working the railway is not squarely within the exemption. To construe the clause otherwise is to say that the properties mentioned are exempt from all taxation *when* used for the defined purpose, but *if* they are so used that the owner may be taxed in respect of that use. I am unable to so construe the clause.

The third question relates to the liability to assessment and taxation of the Canadian Pacific Railway Company in respect of its real estate situate upon its branch lines constructed under the powers contained in clause 14. While the first question as to the branch lines of the railway speaks of these lines generally, we were informed upon the argument that the Company did not contend that properties exempted by clause 16 situate upon branch lines constructed under powers other than those contained in clause 14 were exempt. I think this admission was not intended to extend to properties of the kind referred to situate upon such lands if they were used either for the construction or operation of the main line. The answer to the first question, as thus restricted, answers the third.

I would answer the questions submitted as folows:—

1. No, except such properties, if any, real or personal, enumerated in clause 16, situate upon the branch lines in Saskatchewan as are entitled to the benefit of the exemption from taxation as being required and used for the construction and working of the railway described in sections 1, 2 and 3 of the Act 37 Vict. cap. 14.

2. Yes, as to the business carried on as a railway upon or in connection with the railway as described in sections 1, 2 and 3 of the Act 37 Vict. cap. 14, and upon such other properties, if any, real or personal, of the Company situate upon its branch lines in Saskatchewan as are entitled to the benefit of exemption from taxation under clause 16 as being required and used for the construction and working of that portion of the line referred to in the said sections of the statute.

3. Yes, except in respect of such real estate, if any, situate upon branch lines constructed pursuant to clause 14 of the contract as is entitled to the benefit of the exemption from taxation under clause 16 as being

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required and used for the construction and working of the railway as described in sections 1, 2 and 3 of the Act 37 Vict. cap. 14.

4. (*a*) No.

(*b*) Yes, subject to the limitation stated in the answer to Question 2.

I would allow the appellant one-half of its costs of this appeal.

Appeal allowed in part; appellant allowed one-half of its costs.

Solicitors for the appellant: *Hamilton & Knowles.*

Solicitor for the respondent: *J. L. Salterio.*

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*Nov. 14
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*Feb. 6

FRANÇOIS ROZON .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Manslaughter—Operation of motor vehicle—Verdict of criminal negligence—Substituted by Court of Appeal for dangerous driving—Whether dissent in Court of Appeal within section 1023(1) of Criminal Code—Sections 285(6), 951(3), 1016(2) and 1023(1) of the Criminal Code.

In 1948, appellant was tried before a jury on a charge of manslaughter arising out of the operation of a motor vehicle. The jury, implicitly acquitting him of that offence, returned a verdict of guilty of criminal negligence. The Court of Appeal was unanimously of the opinion that this verdict could not stand and the majority, therefore, basing itself on sections 1016(2), 951(3) and 285(6) of the *Criminal Code*, substituted a verdict of guilty of dangerous driving. The minority, expressing a doubt as to whether section 1016(2) applied and not wanting to speculate as to what the jury intended by their verdict, would have acquitted the accused.

Held: (Affirming the judgment appealed from) Locke and Cartwright JJ. dissenting, that the appeal should be dismissed as the dissent in the Court of Appeal was not on any ground of law dealt with by the majority, and upon which there was a disagreement in the Court of Appeal. (Expressing a doubt is not dissenting).

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

Per the Chief Justice, Taschereau and Fauteux JJ.: As an appeal under s. 1023(1) of the *Criminal Code* is limited to grounds of law alone, upon which there were points of difference in the Court of Appeal, and as the ground raised by the minority, assuming that it was a ground of law alone, was not considered by the majority because of the view they took of the case, there was, therefore, no disagreement in the Court of Appeal on a question of law alone and this Court has, consequently, no jurisdiction to entertain the appeal.

Per Locke and Cartwright JJ. (dissenting): The appeal should be allowed and a new trial ordered as the Court of Appeal had no right to substitute a verdict of dangerous driving under 1016(2) since, because of errors in law in the charge, this verdict could not have stood even if the jury had found it.

Per Locke and Cartwright JJ. (dissenting): To give this Court jurisdiction to entertain an appeal under s. 1023(1), it is not necessary that the dissenting judgment upon which the appeal is based proceeded upon a point of law with which the majority also dealt and upon which the majority and the dissenting judges were in disagreement, but it is sufficient under that section that (*a*) there be a dissenting judgment and (*b*) that a ground upon which such dissenting judgment is based be a question of law.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), substituting, Letourneau C.J.A. and Barclay J.A. dissenting, for a jury's verdict of guilty of criminal negligence a verdict of dangerous driving of an automobile pursuant to section 285 of the *Criminal Code*, affirming the sentence passed by the trial judge and dismissing the appeal.

Jean Drapeau for the appellant.

Noel Dorion K.C. and Lucien Thinel for the respondent.

The judgment of the Chief Justice and of Taschereau and Fauteux J.J. was delivered by

FAUTEUX J.—The appellant has been charged with the offence of manslaughter, arising out of the operation of a motor vehicle on the 17th of October 1947, in the district of Terrebonne, Province of Quebec. On the 26th of October 1948, the jury, implicitly acquitting him of the major offence of manslaughter, returned a verdict expressed in the following terms: "guilty of criminal negligence." The record does not disclose any objection being taken to the verdict, either as to its form or as to its substance, at the time it could have been corrected.

(1) Q.R. [1949] K.B. 472.

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About two weeks later, Rozon appealed to the Court of King's Bench (Appeal Division) (1) on questions of law alone. There was no appeal on questions of fact or mixed law and fact nor was there any leave granted or even asked to appeal on such questions. Of the three grounds raised on law, one was that the accused having been indicted for manslaughter as the result of the operation of a motor vehicle, the verdict of criminal negligence was illegal.

By a majority judgment (St.-Jacques, Gagné and MacKinnon (ad hoc), JJ.), that appeal was dismissed; a verdict of reckless driving was substituted for the one expressed by the jury and the sentence imposed by the trial judge was allowed to stand. Mr. Justice Barclay, with the concurrence of the late Chief Justice Létourneau, expressed a dissent clearly limited to the manner in which the appeal should be disposed of in view of the illegality of the verdict expressed by the jury. They would have allowed the appeal and quashed the conviction and the sentence. Thus, there was no dissent as to any of the grounds of appeal raised by the appellant in the Court below and, in point of fact, all the judges, as appears by the following excerpts from the reasons for judgment, agreed that the accused could not, on the indictment, be found guilty of criminal negligence. Mr. Justice St.-Jacques, in reference to the accused, said:

Il soutient que depuis l'amendement apporté en 1938, à l'article 951 du Code Criminel, un verdict de négligence criminelle sous l'autorité de l'article 284 ne peut plus être rendu. Ainsi formulée, la proposition de l'appelant n'est pas discutable; il faut l'admettre comme bien fondée.

Mr. Justice Gagné:

Comme M. le Juge St.-Jacques et M. le Juge Barclay, dont j'ai eu l'avantage de lire les notes, je crois qu'en vertu des amendments adoptés aux articles 951 et 285, en 1938, l'appelant ne pouvait pas être condamné pour négligence criminelle.

And, then, Mr. Justice MacKinnon:

I am in agreement with the Hon. Messrs. Justices St.-Jacques, Barclay and Gagné, whose notes I have had the opportunity of reading and for the reasons given by them that the appellant could not be found guilty of "criminal negligence" on this charge.

Though no reference is made to ss. 2 of section 1016 of the *Criminal Code*, either in the formal judgment or in the reasons for judgment of Mr. Justice St.-Jacques who wrote

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it, it appears from the reasons for judgment delivered by the other members of the Court that the dissent is related to this section, in respect of which the only two questions considered were:

1. Whether section 1016 ss. 2 is, in law, applicable to the case and, if it is,

2. Whether or not, being applied, the substitution of verdict could properly be made in the light of the actual finding and the facts of the case.

It is convenient to quote ss. 2 of section 1016 and, then, relate the views expressed on the two points by the members of the Court.

2. Where an appellant has been convicted of an offence and the jury or, as the case may be, the judge or magistrate, could on the indictment have found him guilty of some other offence, and on the actual finding, it appears to the Court of Appeal that the jury, judge or magistrate must have been satisfied of facts which proved him guilty of that other offence, the court of appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed by the trial court as may be warranted in law for that other offence, not being a sentence of greater severity.

Mr. Justice St.-Jacques first deals with the facts of the case, then with the charge, and finally, without referring in terms to ss. 2 of section 1016, concludes, as in the formal judgment, that the jury, really intending to return a verdict of reckless driving, ill expressed themselves in wording it: "guilty of criminal negligence." At page 150, the learned judge says:

Lorsque ce verdict a été rendu, le président du tribunal aurait pu ordonner au jury de le libeller, suivant la preuve et la direction donnée, à savoir: conduite dangereuse ou désordonnée d'une automobile suivant les expressions que l'on retrouve au cours de la charge. Il ne l'a pas fait. Sans doute, parce que tout le monde a compris, à ce moment-là, qu'il s'agissait bien, malgré la rédaction du verdict, de l'offense prévue à l'article 285.

Je ne puis admettre que ce verdict doive être cassé et mis à néant; il peut être modifié dans sa rédaction, sans en affecter la substance qui ressort clairement, et de la preuve et de la charge du juge.

Messrs. Justices Gagné and MacKinnon are clearly of the opinion that the section is applicable to the case and applying it, conclude that the substitution is justified by the finding and the facts of the case. Thus, at page 160, the former says:

Il s'agit de savoir si cette Cour a le pouvoir de modifier le verdict pour le rendre conforme au paragraphe 6 de l'article 285. L'article 1016, paragraphe 2, nous le permet.

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And, having considered the address of the trial judge, he concludes, at page 163, to the substitution of a verdict:

Comme on le voit, le savant juge confond, dans les remarques qui suivent la lecture de l'article 285, par. 6, la négligence criminelle, ou coupable, et ce qu'il appelle la conduite désordonnée d'une automobile. Mais, tout cela est en relation avec l'offense prévue au dit paragraphe qu'il a lu en entier.

Le jury n'a pas pu comprendre qu'il puisse s'agir d'autre chose. L'expression employée au verdict est impropre, mais c'est bien l'offense de conduite dangereuse que le jury avait à considérer, et c'est de cette offense qu'il a voulu déclarer l'accusé coupable.

Finally, referring to the evidence, the learned judge says:

Ce qui s'est passé avant et après l'accident, d'après la preuve, et l'état du cadavre lorsqu'on l'a trouvé, démontrent de façon tellement évidente la culpabilité de l'appelant, que le jury n'a pas pu être influencé par les quelques inexactitudes que signale le savant procureur.

Mr. Justice MacKinnon, at page 166, states:

I consider that under Art. 1016, paragraph 2, C.C., this Court has the right to substitute for the verdict as found a verdict of guilty of an offence under paragraph 6 of Art. 285, C.C.

And, at the same page, on the second point, he concludes:

As pointed out by the Hon. Messrs. Justices St.-Jacques and Gagné, the judge in his address to the jury made no reference to Art. 284 which defines criminal negligence. He did however read to the jury paragraph 6 of Art. 285 C.C. which deals with reckless driving. To me it is evident that taking the judge's charge as a whole that he intended to direct the jury that it could bring in a verdict of guilty of manslaughter or reckless driving and that it was the offence of reckless driving which the jury considered when it found the appellant guilty of criminal negligence. For the reasons given by Messrs. Justices St.-Jacques and Gagné, with which I concur, I would substitute for the verdict given a verdict of guilty of reckless driving and would allow the sentence to stand.

For the minority judges, Mr. Justice Barclay did not consider the facts at all. Dealing first with the second point, he concludes, at page 159:

. . . With all these directions to the jury, I am of the opinion that speculation as to what they really intended would be most unfair to the accused.

And, dealing then with the first point, he expresses a doubt:

I am also very doubtful as to whether Article 1016-2 is applicable to the present case.

And he ends his notes of judgment in saying:

I consider therefore that we have no right to substitute any other verdict.

On the alleged basis of this dissent and under the provisions of ss. 1 of section 1023, Rozon now appeals to this Court, formulating as follows his grounds of appeal:

(*a*) The verdict of criminal negligence was illegal in view of the indictment for manslaughter resulting from an automobile accident against the appellant in the present case;

(*b*) The Court of Appeal erred in substituting as it did a verdict of reckless driving to the verdict of criminal negligence rendered by the jury;

(*c*) The Court of Appeal, for the reasons mentioned in the foregoing grounds of appeal, should have quashed the conviction.

It may, at first, be stated that the sole question of law, if any, on which a dissent may be suggested by the appellant to establish the jurisdiction of this Court and its limit is in ground (*b*). For it clearly appears from the above excerpts from the various reasons for judgment that there is no dissent as to ground (*a*) and what is alleged as ground (*c*) does not point to a dissent but to the manner in which the appeal should have been disposed of had the majority agreed with the minority that the substitution was not appropriate under ss. 2 of section 1016.

So, whether, on the issue, the different conclusions reached by the majority and the minority groups in the Court below rest on a point of difference on a question of law and, if so, the merit of such point of law, are the matters to be considered. For this purpose, what was said by the members of the Court below as to each of the three features conditioning the exercise of the special powers given to the Court of Appeal under ss. 2 of section 1016, may now be examined.

The first condition is that the appellant must have been convicted of an offence. The appellant contended that the existence of this condition is not established because the offence of which he was found guilty by the jury—criminal negligence—was not, in the case at bar, an offence included in the indictment. Mr. Justice Barclay dealt with this point but left it as above indicated with no conclusion but simply the expression of a doubt. And if the sentence at the very end of his reasons: "I consider there-

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fore that we have no right to substitute any other verdict" cannot, because of inconsistency with the doubt expressed, be related to the point being considered, I should not hesitate to say that there is no dissent within the meaning of section 1023 and, consequently, no jurisdiction for this Court to deal with this point for *dubitante* is not tantamount to *dissentiente*. (*The King* v. *Bailey et al* (1)).

Assuming, however, that this conclusion with respect to the lack of right to substitute another verdict could be related to the point under discussion, and that our jurisdiction cannot otherwise be questioned, I must confess that I fail to see the difficulty. Again the first condition reads: "Where an appellant has been convicted of an offence . . ." It does not read: "Where an appellant has been convicted of an offence *included in the indictment.*" To accept the appellant's suggestion would be tantamount to add a qualification to the first condition. It would equally curtail the field of the operation of the section to the limits of the authority assigned in section 951 to a jury to bring a verdict of guilty for a lesser offence. That ss. 2 of section 1016 includes a like power for a Court of Appeal is certain but it goes further for the second condition to its applicability does not read: "And if the jury could, on the indictment, have found him guilty of a lesser offence," but reads: ". . . of some other offence." In brief, the evident purpose of the section is to authorize the Court of Appeal to give effect to the finding of the jury or of the trial judge, if at all possible within the conditions prescribed. And such authority is consistent with the principle governing the disposal of appeals in criminal matters that, failing miscarriage of justice or substantial wrong, the appeal generally should be dismissed, even if it might, on the grounds raised, be decided in favour of the appellant.

The second condition to the right of substitution is that it must have been open to the jury on the indictment to find the appellant guilty of the offence proposed in substitution. The provisions of ss. 3 of section 951 were specifically enacted for the purpose of giving the authority to find "reckless driving" and this verdict, substituted by the Court of Appeal, is precisely the only one, the appellant

(1) [1939] 2 D.L.R. 481.

contended, which could—failing a verdict of manslaughter or an acquittal—have been rendered on the indictment. As to the second condition, there is not even a discussion.

The third condition is that, on the actual finding, it must appear to the Court of Appeal that the jury must have been satisfied of facts which proved the appellant guilty of that other offence,—in the premises, reckless driving. From their reasons for judgment, it is clear that the judges of the majority have exhaustively dealt with all the material available in the record to consider and answer the question implied in this condition. To that end, and to that end only—for there was then no other issue legally before the Court—they considered the verdict expressed by the jury, the facts revealed in the evidence put before the latter, and the address of the trial judge. They ultimately concluded that, on the actual finding of "criminal negligence," not only was it clear to them that the jury were satisfied of facts which proved the appellant guilty of the offence of "reckless driving," but that there was no other rational conclusion. In point of fact, they formed the opinion that, as expressed in the formal judgment, the jury ill expressed themselves.

For the minority judges, Barclay J. proceeded on quite a different basis with, naturally, quite a different result. He completely dismissed from his examination the facts proven. Dealing simply with the address of the trial judge and finding confusion as a result of some misdirections—which were not in issue as such but which he found—he concluded:

> With all these directions to the jury, I am of opinion that speculation as to what they really intended would be most unfair to the accused.

And, at the end, he said:

> I consider that we have no right to substitute any verdict.

In substance, and as I read it, the dissent of the minority rests on the view that the Court of Appeal cannot, as a matter of law, substitute a verdict under section 1016 subsection 2 when speculation, needed to ascertain what the jury intended by their actual verdict, would, because of misdirections, be unfair to the appellant.

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In brief, what was really intended by the jury—this was the issue and this cannot be a question of law alone—was clear to the majority, while it was obscure to the minority the members of which, for the reason they indicated, refused to speculate.

It is thus manifest that with different elements in mind in the consideration of the question in issue,—the members of the minority dismissing the evidence from the study of the question,—the members of the Court naturally had a different view of the same and for reasons entirely unrelated, were led, in the result, to a different conclusion. And while the decision of the majority rests on a question of fact, i.e., the intent of the jury, the dissent of the minority rests on the question of law above stated. On this point of law expressed by the latter, the former never dissented either expressly or by implication. Nor did, upon the view they took, even the occasion to consider the point of law ever arise.

The appeal to this Court being taken under subsection 1 of section 1023, as enacted in 1925 c. 38 s. 27 in substitution to the relevant part of what was then section 1024, it is convenient to quote the material parts of the two sections and a few of the decisions of this Court rendered thereunder with respect to the limits of the jurisdiction of this Court in the matter.

Before 1925, section 1024 read:

> Any person convicted of any indictable offence whose conviction has been affirmed on an appeal taken under section 1013, may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction . . .

In *Davis* v. *The King* (1), Newcombe, J., delivering the judgment of the majority, said, at page 526, in reference to section 1024 above:

> The interpretation of the latter section has frequently been considered by this Court and it is established by a long and practically uniform course of decision which has become firmly embedded in the practice of the Court that the only questions open to consideration upon appeals under that provision are the *points of difference* between the dissenting judge or judges and the majority of the Court of Appeal.

(1) [1924] S.C.R. 522.

Subsection 1 of section 1023, applicable to this case, reads:

> Any person convicted of any indictable offence whose conviction has been affirmed on an appeal taken under section 1013, may appeal to the Supreme Court of Canada against the affirmance of such conviction on any question of law on which there has been dissent in the Court of Appeal.

It may be observed that the latter provision, clearer in this respect than the former, does not read "any question of law in the dissent" but reads "any question of law *on which* there has been dissent in the Court of Appeal."

In *Manchuk* v. *The King* (1), the appeal being taken upon subsection 1 of section 1023 above, Sir Lyman Duff, the then Chief Justice, delivering the judgment of the majority, said at page 346:

> The appeal is, by law, necessarily *limited to the grounds upon which the learned judges dissented.*

In *The King* v. *Décary* (2), the same learned jurist, again delivering the judgment for the Court, stated at page 82:

> It is well settled by the decision of this Court that such grounds must raise the question of law in the strict sense and that it is not a competent ground of appeal if it raises only a mixed question of fact and law.

And having proceeded to compare the reasons for judgment of the majority with those of the minority, in order to find the *points of difference on law,* Sir Lyman concluded with respect to the reasons of the former:

> It is quite plain that the judgment does not rest upon any view of the majority upon a question which is a question of law alone.

And with respect to the reasons of the latter:

> Turning now to the judgment of the minority, Mr. Justice Hall simply says: "I am of opinion that this appeal should be dismissed." Plainly there is no dissent upon any question of law. Mr. Justice Walsh, in the reasons delivered by him for his conclusion that there should be a new trial, does not say either expressly or by implication, that this conclusion is based upon an opinion that the majority proceeds upon any error in point of law alone.

Being of opinion that the judgment of the majority in this case does not rest upon a question of law alone and that the judgment of the minority rests on a question of law upon which there was no expressed or implied dissent from the majority, I must conclude that it is not within the jurisdiction of this Court to review the answer given

(1) [1938] S.C.R. 341. (2) [1942] S.C.R. 80.

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by the Court of Appeal to the question implied in the third condition of section 1016 subsection 2.

For the appellant, it was suggested, at first, that the point of law ultimately raised by the minority is that subsection 2 of section 1016 cannot apply to a case where, the verdict proposed in substitution to the actual verdict would, on the state of the record, have been bad in law, had it been found by the jury. And then, it was said that the minority effectively found misdirections which, in their views, could have vitiated the verdict of reckless driving, had it been rendered.

With respect to the first branch of this contention, I must say with deference, that I am unable to read this proposition of law as being either expressed or implied in the views of the minority. It is certainly not expressed and, even if and with the necessity of involved construction, it could be said to be implied, again I should not fail to observe that the members of the majority, because of the view they took, never considered nor had to consider this proposition for the conclusion they reached and, therefore, never dissented upon it.

As to the second branch of the contention, it must be assumed that, had this been the reasoning of the minority, they would not have failed—as they did—to deal with the facts of the case in order to consider whether or not, in the light of the principle of subsection 2 of section 1014, the result, notwithstanding these misdirections, would inevitably have been the same. And in the event of a doubt on this question, they would, in view of the evidence on the record, have ordered a new trial.

I may finally add that, if an affirmative conclusion, as to the existence of such a dissent within the meaning judicially approved of section 1023 could have been reached, it would then have been necessary, in the consideration of the merit of the alleged point of law, to note that this Court in the *Manchuk* case (1) applied subsection 2 of section 1016 though clearly of the opinion that there were, in the address of the trial judge, misdirections amounting, in the result, to a mistrial.

For the above reasons, the appeal should be dismissed.

(1) [1938] S.C.R. 341.

The dissenting judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.—This is an appeal from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec (1) pronounced on the 12th of May, 1949, substituting for a verdict of "guilty of Criminal Negligence" a verdict of "Dangerous driving of an automobile pursuant to section 285 of the *Criminal Code*", affirming the sentence passed by the learned trial judge and dismissing the appeal. Létourneau C.J. and Barclay J. dissenting would have allowed the appeal and directed the acquittal of the accused.

The appellant was tried before Cousineau J. and a jury on a charge of manslaughter arising out of the operation of a motor vehicle. The jury brought in a verdict of guilty of criminal negligence. This verdict was entered and the appellant was sentenced to fifteen months imprisonment. An appeal was taken, the grounds of appeal being as follows:

1. Le verdict de négligence criminelle était illégal vu l'acte d'accusation porté contre l'appelant dans la présente cause;
2. Les commentaires illégaux du procureur de la Couronne dans son adresse aux jurés sur le fait que l'accusé n'a pas témoigné et le refus du président du Tribunal d'arrêter les procédures et d'ordonner un nouveau procès, tel que demandé par le procureur de l'appelant;
3. Le président du Tribunal a erré dans sa charge aux jurés en omettant de leur donner les directives requises par la loi dans le cas de preuve de circonstances.

The Court of Appeal held unanimously that the verdict of guilty of criminal negligence could not stand and the correctness of that holding was not questioned before us. It is, I think, clear that, as a matter of law, on an indictment for manslaughter arising out of the operation of a motor vehicle only three verdicts are possible, (i) guilty of manslaughter, (ii) guilty of the offence created by section 285(6) of the *Criminal Code* (which by implication is a finding of not guilty on the charge of manslaughter);

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or (iii) not guilty. The majority of the Court of Appeal were of opinion that the proper course was to substitute a verdict of guilty of dangerous driving, pursuant to section 285(6), taking the view that this course was authorized by the provisions of section 1016(2) of the *Code*.

From this judgment the appellant appeals to this court, the grounds of appeal being stated as follows:

> The grounds of law on which the present appeal is based are those set forth in the dissenting judgment of the Honourable Messrs. Justices Barclay and Létourneau of the Court of King's Bench, Appeal Side, for the Province of Quebec, which heard the case and in the formal judgment of the other judges and also those mentioned in the appeal, to wit:
>
> A) The verdict of criminal negligence was illegal in view of the indictment for manslaughter resulting from an automobile accident against the appellant in the present case;
>
> B) The Court of Appeal erred in substituting, as it did, a verdict of reckless driving to the verdict of criminal negligence rendered by the jury;
>
> C) The Court of Appeal, for the reasons mentioned in the foregoing grounds of appeal, should have quashed the conviction;

I agree with the view of Barclay J. that the Court of Appeal had no right to substitute a verdict of guilty of dangerous driving.

It must, I think, be clear that the Court of Appeal can convict an accused of an indictable offence of which he has not been convicted by the court of first instance only if statutory authority can be found for such a course. It is suggested that such authority is conferred by section 1016(2).

Before section 1016(2) can be effective to confer this power upon the court in an appeal following a trial by jury there appear to be three conditions which must exist.

(1) The appellant must have been convicted of an offence.

(2) It must have been open to the jury on the indictment to have found him guilty of some other offence.

(3) It must appear to the Court of Appeal on the actual finding that the jury must have been satisfied of facts which proved the accused guilty of such other offence.

In the case at bar it is evident that the second condition set out above is satisfied.

Dealing with the first condition mentioned above, Mr. Drapeau argues that the offence of which the appellant has been convicted must be an offence of which it was possible in law that he could be convicted on the indictment and that a conviction of an offence neither charged nor included in the indictment is a legal nullity and not a conviction at all. We were not referred to any case in which this argument appears to have been considered and I have not been able to find one. I have examined a number of cases decided either under section 1016(2) of the *Criminal Code* or under section 5(2) of the English Criminal Appeal Act, 1907, 7 Edward VII c. 23, which is in substantially the same words, but I have found only one in which it appeared that the verdict for which a different verdict was substituted was one which could not in law have been found on the indictment. The case to which I refer is *The King* v. *Quinton* (1) affirming 1947 O.R. 1. In that case the accused was tried on an indictment charging attempted rape. The jury returned a verdict of "guilty of assault on a female causing actual bodily harm." The Court of Appeal for Ontario held unanimously, and it was apparently not disputed in this court, that the last mentioned offence is not included in a charge of attempted rape, the only other offences included in that charge being indecent assault and common assault. The Court of Appeal substituted a conviction for common assault and passed a lesser sentence. The Crown appealed to this court arguing that a conviction for indecent assault should have been substituted. The appeal was dismissed. There is nothing in the reasons for judgment of the Court of Appeal or of this court to indicate that the argument put forward in the case at bar by Mr. Drapeau was advanced or considered and the point appears to me to be still open for consideration in this court. I do not find it necessary to pass upon it in this appeal and I think it very doubtful whether it is open for our consideration in view of the manner in which the dissenting judgments are expressed.

In my view the third condition mentioned above is not fulfilled in the case at bar. It will be observed that it

(1) [1947] S.C.R. 234.

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must appear to the Court of Appeal on the actual finding that the jury must have been satisfied of facts which proved the appellant guilty of a breach of section 285(6). In determining whether on the actual finding the jury must have been satisfied of facts which proved the accused guilty of such offence no doubt the Court of Appeal would find it necessary to examine the evidence and the charge of the learned trial judge. If, in the course of such examination, it should appear that there was error in law in the charge, so grave that had the jury found a verdict of guilty of dangerous driving it must have been set aside on appeal, I think that section 1016(2) would not empower the Court of Appeal to enter such a verdict. The section must, I think, contemplate a situation where if the jury had found the verdict proposed to be substituted such verdict would on the state of the record have been good in law. To hold otherwise would bring about the startling result that the Court of Appeal could substitute for a verdict, which for some reason can not stand, another verdict which if the jury had found it must have been set aside.

In my view, for the reasons given by Barclay J., because of what was, I think, a fatal defect in the charge of the learned trial judge, a verdict of guilty under section 285(6) could not have stood even if the jury had made it. I think that in effect the learned trial judge charged the jury that they could, and indeed should, find the accused guilty if, in their view of the evidence, his conduct was such as to amount to what is commonly called civil negligence. I think that this was clearly wrong. The learned trial judge appears to have adopted a passage from one of the judgments delivered in *McCarthy* v. *The King* (1), without giving effect to the explanation of that judgment contained in *The King* v. *Baker* (2). In my view this is entirely a matter of law and this ground is I think stated in the dissenting judgment of Barclay J.

It is argued for the Respondent that this ground is not open for our consideration. It is said that it was not taken in the notice of appeal to the Court of King's Bench (Appeal Side) and is not a ground of dissent. It is true

(1) (1921) 62 Can. S.C.R. 40 at 46. (2) [1929] S.C.R. 354.

that the defect in the charge referred to above was not made a ground of appeal to the Court of Appeal but this seems to me, in this case, to be unimportant. The conviction from which the appeal was taken was bad in law as not being possible on the indictment. I do not think that the appellant was required to set out other grounds or to anticipate that the Court of Appeal would substitute a different verdict and to state reasons why that course should not be followed. The appeal to this court is expressly stated to be based on "the grounds of law set forth in the dissenting judgment." While it may be proper that the notice of appeal should state with particularity what those grounds are said to be, it is in the reasons for judgment given by the dissenting judge rather than in the notice of appeal that our jurisdiction must be found. The only question as to which there was disagreement in the Court of Appeal was whether the verdict of guilty of criminal negligence having been annulled, the Court of Appeal could or should substitute another verdict. If and in so far as this decision turned on matters of fact or of mixed fact and law we have no jurisdiction to review it, but if and in so far as it turned on matters of law and if and in so far as such matters of law form part of the grounds of dissent, we have jurisdiction. I read the reasons of the minority as holding *inter alia* that section 1016(2) cannot be applied because there was such misdirection by the learned trial judge as to the kind of negligence which must be found to exist to warrant a verdict of guilty of dangerous driving under section 285(6) that as a matter of law a verdict of dangerous driving even if the jury had found it could not have stood.

It will be observed that at the commencement of his reasons Barclay J. says "In the view which I take of this case, it is not necessary to consider the facts." After holding that the jury could not on the indictment legally find a verdict of criminal negligence, the learned judge goes on to discuss the question whether a verdict of dangerous driving should be substituted under section 1016(2). He quotes the fatal misdirection referred to above, adds other criticisms of the charge and continues: "With all these directions to the jury, I am of the opinion that speculation

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as to what they really intended would be most unfair to the accused." He then expresses a doubt, but does not decide, as to whether section 1016(2) applies unless the verdict proposed to be substituted is included in the offence found by the jury; and concludes "I consider therefore that *we have no right* to substitute any other verdict."

I do not think it is a forced construction of the reasons of the learned judge to read them as indicating that one of the grounds which moved him to hold that the Court of Appeal had no right to substitute a verdict was the misdirection referred to above.

In *The King* v. *Décary* (1), in quashing an appeal on the ground that there was no dissent on any question of law, the judgment of the court at page 84 reads as follows: "Mr. Justice Walsh in the reasons delivered by him for his conclusion that there should be a new trial, does not say, either expressly or by implication, that this conclusion is based upon an opinion that the majority proceeds upon any error in point of law alone."

In my view, in the case at bar, Barclay J. does point out an error in law, the misdirection referred to above, and does, I think expressly but certainly if not expressly then by implication, base his judgment upon it. I think the point is properly before us.

It has been suggested that it is a condition of this Court's jurisdiction to entertain an appeal under section 1023(1) of the *Criminal Code* that the dissenting judgment upon which such appeal is based shall proceed upon a point of law with which the majority also deals and upon which the majority and the dissenting judge or judges are in disagreement. I am unable to accept this view. It is not, I think, disagreement between the judges of the Court of Appeal on a point of law which gives jurisdiction. If that were so there would be a right of appeal in a case in which one judge expressed definite disagreement on a point of law dealt with by the other members of the court but agreed with them that the appeal should be dismissed. In my opinion the existence of the following two conditions is sufficient to give this court jurisdiction: (i) that there be a dissenting judgment in the

(1) [1942] S.C.R. 80.

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Court of Appeal, that is a judgment differing from the result proposed by the majority and (ii) that a ground upon which such dissenting judgment is based be a question of law.

I would allow the appeal and quash the conviction but under all the circumstances of the case I think that the proper course is not to direct a verdict of acquittal to be entered but to direct a new trial on the charge of a breach of section 285(6) of the *Criminal Code.*

Appeal dismissed.

Solicitor for the appellant: *Jean Drapeau.*

Solicitor for the respondent: *Lucien Thinel.*

AIME BOUCHER .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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*May 31
*Jun. 1, 2, 3
*Dec. 5

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*Jun. 9, 12, 13
*Dec. 18

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

Seditious libel—Religious pamphlet distributed by Witness of Jehovah—Seditious intention—Good faith—Whether incitation to violence is necessary element of seditious libel—Whether jury was properly charged—Criminal Code, R.S.C. 1927, c. 36, s. 133 (as amended by S. of C. 1936, c. 29, s. 4) and s. 133A (as enacted by S. of C. 1930, c. 11, s. 2).

Neither language calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects nor criticizing the courts is seditious unless there is the intention to incite to violence or resistance to or defiance of constituted authority.

The definition of a seditious intention given in Stephen's Digest of the Criminal Law, 8th Ed. p. 94, to the extent that it differs from the foregoing, disapproved.

Appellant was convicted by a jury of having published a seditious libel, by distributing copies of a pamphlet containing alleged seditious passages, to several persons at St. Joseph, in the district of Beauce,

PRESENT AT FIRST HEARING: Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

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

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in the province of Quebec, contrary to s. 134 of the *Criminal Code*. The conviction was affirmed by a majority in the Court of King's Bench (Appeal Side). An appeal to this Court was allowed on grounds of misdirection and improper rejection of evidence. On the first hearing of this appeal, heard by a Court of five judges, the majority ordered a new trial. Application was then made, and granted, to have the appeal reargued before a full Court of nine judges. On the reargument, it was conceded on behalf of the Crown that the conviction should be quashed due to errors in the trial judge's charge, and the only question which remained was as to whether there was evidence upon which a properly instructed jury could find the appellant guilty of publishing a seditious libel by reason of the publication of the pamphlet here in question.

Held: (Reversing the judgment appealed from) the Chief Justice, Taschereau, Cartwright and Fauteux JJ. dissenting, that the accused should be acquitted as there was no evidence, either in the pamphlet or otherwise, upon which a jury, properly instructed, could find him guilty of the offence charged.

Per Rinfret C.J. (dissenting): Since the *Criminal Code* has dealt with the matter, the Courts must administer the law respecting seditious libel in accordance with the Canadian legislation and not in accordance with statements by commentators in England. Section 133(4) of the *Code* makes it clear that the advocating of force is not the only instance in which an accused could be found guilty of a seditious intention. Moreover, it does not belong to this Court to pass upon any other passage of the charge than those referred to in the dissent in the Court of Appeal, nor to decide itself whether there was any ground for coming to the conclusion that the document was or was not a seditious libel. What the jury alone had to decide was: (*a*) whether the document contained matters which were producing or had a tendency to produce feelings of hatred and ill-will; (*b*) whether the accused pointed out these matters in order to their removal; and (*c*) whether he did so in good faith. This Court has no authority to decide these questions, more particularly in view of the fact that the jurisdiction of this Court in criminal cases is limited to the points of dissent in the Court of Appeal (which, in this case, were exclusively on the ground that the charge was incomplete and erroneous in certain respects and had exceeded the limitations imposed by the rules of law).

Per Taschereau, Cartwright and Fauteux JJ. (dissenting): That, although to render an intention to create ill-will and hostility between different classes of His Majesty's subjects seditious there must be an intention to incite resistance to lawfully constituted authority (and this cannot be found to have been the intention here); at common law an intention to vilify the administration of justice and bring it into hatred or contempt or to excite disaffection against it is a seditious intention, the *Criminal Code* has not altered the law in this respect and as the words of the pamphlet furnish evidence upon which a properly instructed jury could reasonably find the existence of that intention, there should be a new trial.

(The history of the law relating to a seditious intention considered and the authorities reviewed).

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), dismissing, Letourneau C.JA and Galipeault JA dissenting, appellant's appeal from his conviction, at trial before a jury, on the following charge: "Que le ou vers le 11 décembre, 1946, à St Joseph dans le district de Beauce, le dit Aimé Boucher de Ste Germaine a publié des libelles séditieux contenues dans un fascicule intitulé "La haine ardente du Québec pour Dieu, pour Christ et pour la liberté est un sujet de honte pour tout le Canada", en les exhibant en public ou les faisant lire ou les montrant ou les délivrant, ou les faisant montrer ou délivrer dans le but de les faire lire par quelqu'un, le tout malicieusement et contrairement au code Criminel du Canada, spécialement aux articles 133, 134 et 318.

The points of dissent in the Court below, to which this Court was limited in its consideration of this case, were as follows:

1) That references in the charge to the facts proven in the case appealed more to the religious or national sentiments of the jury than to the latter's reason;

2) That the trial judge should not have undertaken to establish that some of the statements in the document were erroneous, after he had properly ruled that the truth of the statements was immaterial;

3) That the trial judge misdirected himself when he told the jury that it ought to find the accused guilty if it thought that the document was of a nature to insinuate that in Quebec the administration of justice was biased, that the clergy controlled the Courts, and that there existed in that Province an apparent hate for God and Christ and Freedom;

4) That a certain objection to a question put by the defence and of a nature to establish the good faith of the accused should not have been maintained;

5) That the trial judge misdirected himself when he stated that he could not see where the jury could find that there was a doubt in this case.

(1) Q.R. [1949] K.B. 238.

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A. L. Stein K.C., W. G. How and D. B. Spence for appellant at the first hearing.

A. Lacourcière K.C. for respondent at the first hearing.

W. G. How for appellant at the second hearing.

L. H. Gendron K.C. for respondent at the second hearing.

THE CHIEF JUSTICE (dissenting): There has been a rehearing in this appeal, but the appellant has failed to convince me that I should modify the reasons for judgment which I had written after the first hearing and which were as follows:

The appellant was convicted by a jury of publishing a seditious libel contrary to Section 133 of the *Criminal Code* and the conviction was affirmed by the Court of King's Bench (Appeal Side) of the Province of Quebec (1), the Chief Justice of the Province of Quebec and Galipeault J.A. dissenting.

This Court is limited to the consideration of the points of dissent. Galipeault J.A. states in his reasons that he would have ordered a new trial "m'arrêtant uniquement aux griefs de l'appelant à l'encontre de la charge du Juge". Likewise Chief Justice Letourneau dissented exclusively on the ground that the trial judge's charge to the jury was incomplete and erroneous in certain respects and that it had exceeded the limitations imposed by the rules of law. He also would have granted a new trial. The majority of the Court of King's Bench (Appeal Side) was of opinion that no fault could be found in the learned judge's charge and the appeal of the accused should be dismissed.

Very properly Chief Justice Letourneau avoided discussing the circumstances of the trial, in view of the fact he thought that a new trial should be granted to the appellant, and I feel that I should do the same.

His reasons for dissent were that references in the charge to the facts proven in the case appealed more to the religious or national sentiments of the jury than to the latter's reason. He also thought that since the learned judge had ruled in the course of the trial that the truth of the statements contained in the libel was immaterial,

(1) Q.R. [1949] K.B. 238.

the learned judge should not have undertaken to establish that these statements were erroneous. Further, the Chief Justice considered that the learned trial judge had misdirected himself when he said that, if the jury was of the opinion that the incriminated document was of a nature to insinuate that in the Province of Quebec the administration of justice was biased, that the Catholic clergy controlled the Courts, and that there existed in that Province an apparent hate for God and Christ and Freedom, then the jury ought to find the accused guilty.

The learned Chief Justice also found fault with the ruling of the presiding judge to the effect that a certain objection to a question put by Counsel for the defence and of a nature to establish the good faith of the accused should not have been maintained.

In addition to the above, the dissent also expresses the view that when dealing with the question of reasonable doubt, at the request of Counsel for the defence, the learned trial judge misdirected himself again when he stated that in the present case he could not see where the jury could find that there was a doubt.

Finally, the dissent also refers to a direction alleged to have been made by the trial judge in reference to the good faith of the accused, that after the jury had read the incriminated document they would have to decide if such document was really of a nature to re-establish good will between the Witnesses of Jehovah and the people of the Province of Quebec, which, the accused had stated in evidence, was his purpose in publishing the document; and when, after the charge had been delivered to the jury, the learned presiding judge was asked to inform the jury as to the nature of a blasphematory libel and a defamatory libel as contrasted to a seditious libel, the learned judge defined both defamatory and blasphematory libel, but he added:

> This was not the accusation brought against the accused. I do not believe that there is here in the document anything blasphematory. C'est plutôt un libelle séditieux qui a été produit.

The dissent finds that such a declaration on the part of the trial judge was of a nature to influence the verdict. The learned Chief Justice, therefore, concluded that the

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charge was erroneous, both on the ground of mis-direction and non-direction and that, as a consequence, the verdict was tainted with illegality.

Now those are the grounds of dissent. It does not belong to this Court to pass upon any other passage of the charge of the learned trial judge, nor to decide itself whether there was any ground for coming to the conclusion that the document now in question, and for which the accused was brought to trial, was or was not a seditious libel. If this Court were to so decide, it would attribute to itself a finding which is exclusively the province of the jury. As an illustration of this, I might point out that under Section 133 (*a*) of the *Criminal Code* the question of the good faith of the accused forms a necessary part of the circumstances to which the jury must direct its attention; and, of course, good faith is essentially a matter left to the jury, properly directed, and regarding which this Court has no right to interfere.

I would be willing to accept some of the reasons of the learned Chief Justice of the Province of Quebec, and to say that, on some of the points he refers to, the charge was incomplete and perhaps even erroneous, although, with respect, I do not agree with him in his interpretation of some of the statements made by the trial judge.

I may say, at once, without referring to any of the passages in the document distributed by the accused, that I agree with the rule laid down by Lord Cairns in *Metropolitan Railway Company* v. *Jackson* (1) and would apply it to the present case:

> The Judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the Jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever.

(1) (1877-78) 3 A.C. 193 at 197.

In the present case all that was necessary for the Crown to do was to file the document and to prove that the accused had published it within the meaning of the law. That is what the learned trial judge stated and meant when he said:

J'en conclus donc, et sur ce point vous devez suivre ma direction, que la preuve de la Couronne a été complète par le fait d'avoir produit le pamphlet et le fait d'en avoir prouvé la distribution.

This sentence cannot be understood otherwise than to say that the Crown had adduced all the evidence necessary to allow the jury to render a verdict on the accusation, but it does not mean that the Crown had proven its case.

Far from agreeing with the dissenting judgment of the learned Chief Justice where he quotes the presiding judge as saying:

. . . si vous croyez qu'un document de cette nature peut laisser croire à nos canadiens de langue anglaise que dans la province de Québec, la justice n'est pas observée, que le clergé a le contrôle sur les tribunaux et enfin, qu'il y a dans la Province de Québec une haine ardente pour le Christ, pour Dieu et pour la liberté, dans ce cas-là, vous devez condamner Boucher.

And where he says that the remarks of the trial judge were "of a nature to prejudice and vitiate the verdict", I would point out that such a passage should not have been detached from its context. The whole passage reads as follows:

Si vous trouvez qu'il n'y a rien de séditieux dans cet article, vous devez acquitter Boucher. D'un autre côté, si vous l'avez lu, après en avoir apprécié tous les termes qu'il contient, vous croyez qu'il peut en résulter dans la Province de Québec un élément de discorde et de trouble qui peut devenir sérieux, si vous croyez qu'un document de cette nature peut laisser croire à nos canadiens de langue anglaise que dans la Province de Québec, la justice n'est pas observée, que le clergé a le contrôle sur les tribunaux et enfin, qu'il y a dans la Province de Québec une haine ardente pour le Christ, pour Dieu et pour la liberté, dans ce cas-là, vous devez condamner Boucher.

It is, therefore, apparent that the learned judge was there telling the jury that if they found nothing seditious in the document they had to acquit Boucher, but that if, on the contrary, they thought there was something seditious in it, in the nature of what he enumerates in the passage, then they ought to condemn him. I cannot find anything objectionable in that way of presenting the matter to the jury.

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Then in respect of the objection to certain evidence which is mentioned in the dissenting judgment and the fact that it was maintained by the learned judge, my humble view is that the question to which the objection was maintained was illegal and that it was properly maintained. In that instance Boucher was asked to state the impression he intended to convey by a reading of the pamphlet, according to what he himself thought and his appreciation of the pamphlet. Surely it did not exclusively belong to the accused to state to the jury what he intended to convey; it was for the jury itself to come to a conclusion as to what the document conveyed to the people among whom it was distributed. Again the passage of the charge quoted by the learned Chief Justice is as follows:

Vous lirez ce document-là, Exhibit P-1, et vous déciderez si réellement il est de nature à ramener la bonne entente entre les témoins de Jéhovah et les gens de la province de Québec.

This is merely a reference to the fact that Boucher had claimed that he had distributed the document in order to "ramener la bonne entente entre les témoins de Jéhovah et les gens de la province de Québec"; and the learned judge was telling the jury that, having read the pamphlet, it was for them to decide whether it was of a nature to bring about what Boucher had contended.

The learned Chief Justice also points to the sentence in the charge:

C'est plutôt un libelle séditieux qui a été produit.

The meaning of that sentence is quite clear, more particularly if it is read in conjunction with the context. The learned trial judge had been asked by Counsel for the accused to instruct the jury on the nature of blasphematory and defamatory libel. He gave the instruction asked for and then concluded by saying:

But in this case you are not concerned with either of those. The document which has been filed, if anything, is rather a seditious libel.

With due respect, I cannot find any other meaning to that sentence which, of course, so understood cannot be held to be objectionable.

That concludes my analysis and review of the dissenting judgment of the learned Chief Justice of Quebec. I am of opinion that the several points to which I have just referred

were not well taken. However, I would otherwise agree with the remainder of his reasoning and, on that account, I am of opinion that a new trial should be ordered in this case.

Now, dealing with a general review of the case, I would first observe that the French version of the document is the one to which the attention of the jury should be brought, because admittedly the region in which it was distributed is largely, if not exclusively, French speaking. The document in French would, therefore, be the one that could affect the people among which it was published. Having read it several times I would say without hesitation that it contains statements upon which the jury might reasonably come to the conclusion that such statements are in the nature of seditious libels; and, applying the language of Lord Cairns in the *Metropolitan Railway Company* case (*supra*), my view would be that the presiding judge could direct the jury that it might reasonably infer that the document could be looked upon, under Canadian law, as a seditious libel. It would, of course, be for the jurors to say whether, when submitted to them, guilt ought to be inferred. Merely as an illustration of what I have in mind I would refer to the several passages where the document says that the French Canadian Courts are so much under the influence of the Catholic priests that they are thereby induced to confirm infamous sentences and to render judgments not according to their judicial duties and oath, but as a result of the influence of the priests.

Here is the passage to which I refer. The French version reads:

> Toutes les cours Canadiennes Françaises étaient tellement sous l'influence sacerdotale qu'elles confirmèrent la sentence infâme, et ce ne fut que lorsque la cause fut portée en Cour Suprême du Canada que le jugement fut renversé.

The English version reads:

> All the French Canadian courts were so under priestly thumbs that they affirmed the infamous sentence, and it was not until the case reached the Supreme Court of Canada that judgment was reversed.

Perhaps it should be noted here that the statement that the judgment was reversed by the Supreme Court of Canada

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is a falsity. The judgment in question is that of *Brodie* v. *The King* (1), having been reported, it is therefore public and it is sufficient to refer to that judgment to see that it is absolutely incorrect to say that there was a reversal. The Supreme Court merely quashed the indictment and the conviction on the ground that the necessary averments were omitted and the necessary ingredients were lacking in the indictment preferred against the appellants and that their absence constituted defects in matters of substance. But the Court stated that the Crown was at liberty "to prefer a fresh indictment if so advised."

In Canada it should not be forgotten that the criminal law of the country is contained in the *Criminal Code;* and as was pointed out in *Brodie* v. *The King*:

> It cannot be that the criminal law should be administered as though there were no code.

The sections of the *Criminal Code* referring to seditious libel are sections 133 and 133A. This was first enacted by section 123, chap. 25, 55-56 Victoria (1892), the section then having four paragraphs. In 1906, by sec. 132, chap. 146 of the Revised Statutes of Canada adopted in that year, sec. 123, above mentioned, was amended by the deletion of paragraph one of that section. In 1927 when the subsequent Revised Statutes of Canada were adopted this section 132, of chap. 146, R.S.C. 1906, was retained without amendment as sec. 133. By chap. 29, 1936 S.C., a fourth paragraph was added to sec. 133. In addition in 1930 a new section 133A, was enacted by chap. 11 of the Statutes of Canada of that year, and that section was retained without amendment in the amendments of 1947.

Under the law as it stood at the material time, that is when the appellant distributed what is alleged to have been the seditious libel, section 133 stated that "a seditious libel is a libel expressive of a seditious intention".

It was argued by Counsel for the appellant that the *Code* does not define "seditious intention". Of course, subsection (4) of section 133 enacts that "everyone shall be presumed to have a seditious intention who publishes, or circulates any writing, printing or document in which it is advocated or who teaches or advocates, the use, without

(1) [1936] S.C.R. 188.

the authority of law, of force, as a means of accomplishing any governmental change within Canada"; but the subsection begins by the words "without limiting the generality of the meaning of the expression 'seditious intention'". Therefore, we have it here that the advocating of force is not the only instance in which an accused could be found guilty of a "seditious intention".

Then if we turn to section 133A, also in force when the present appellant was proven to have distributed the seditious libel, the legislator there indicated certain cases where one would not be deemed to have had a seditious intention only because he intends in good faith

> (*c*) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects.

Of course, one cannot but be impressed by the analogy of that section added in 1930 with sections 114 and 115 of Stephen's "Digest of the Criminal Law", as they were at the time of the drafting of the *Criminal Code* in Canada in 1892, and also by the definition of "sedition" given by Russell "On Crime", Vol. 1, 9th edit., p. 87.

But the very fact that the Canadian Code has dealt with the matter compels the Canadian Courts to administer the law with regard to seditious libel in accordance with the Canadian legislation and not in accordance with statements by commentators in England, or even with pronouncements by judges administering justice in Great Britain. Indeed that was the very ruling of the Judicial Committee of the Privy Council in *Wallace-Johnson* v. *The King* (1), where it was held that the provisions of the Gold Coast Criminal Code were clear and unambiguous and intended to contain as far as possible a full and complete statement of the law of sedition in the Colony, and that, therefore, the English common law as expounded in a judgment rendered in England was inapplicable. Under Part I of the Canadian *Criminal Code* (sections 8 et seq.) the Courts in this country can refer to the law of England only in so far as a matter has not been dealt with by the Canadian Parliament. Even if in section 133, as it was originally enacted, we did not find sufficient to decide what Parliament thought should be considered as a sedi-

(1) [1940] A.C. 231.

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tious intention, we certainly have some indication of the legislator's mind in subsection (4) as it now stands and as it was introduced by the amendment of 1936. As already pointed out, what is stated there as creating a presumption of seditious intention is qualified by the words "without limiting the generality of the meaning of the expression".

Section 133A, introduced in 1930, by chap. 11 of the Statutes of Canada of that year, undoubtedly contains some indication of the legislator's view of what constitutes seditious intention under the law of Canada. Subsection (*c*) refers to the pointing out of matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects and it says that if one only intends "in order to their removal, to point out such matters", he shall not be deemed to have a seditious intention if he "intends it" in "good faith". It necessarily follows that even pointing out these matters in order to their removal will not relieve an accused of the guilt of seditious intention unless he did it in good faith. Therefore, if you have a matter which is producing, or has a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects, a jury would be justified in finding that a man, under Canadian jurisdiction, ought to be found guilty of seditious libel, unless the jury comes to the conclusion that the man in question pointed out these matters "in order to their removal" and that he did so "in good faith."

In my humble view, therefore, it is unnecessary in the present case to refer to any pronouncements either in Great Britain, and less so in the United States, as the learned Counsel for the appellant invited us to do, because here in Canada we have the precise legislation on the issue; and what the jury alone has to decide here with regard to Boucher is:

(1) Whether the document which he distributed contained matters which were producing, or had a tendency to produce feelings of hatred and ill-will between classes of His Majesty's subjects; ;

(2) Whether he pointed out these matters in order to their removal; and

(3) Whether he did so in good faith.

These three questions are strictly the province of the jury. I cannot see by what authority this Court should decide that Boucher pointed out these matters in order to their removal, or that he did so in good faith, more particularly in view of the fact that the Supreme Court of Canada's jurisdiction in criminal cases is limited to point of dissent in the Court of Appeal. There was absolutely no dissent on these matters in the Court below. The dissenting opinions of Letourneau C.J. and of Galipeault J.A. are expressly limited to misdirections, or non-directions, in the learned trial judge's charge; and the only points which this Court has to decide are whether the alleged misdirections, or non-directions, are really to be found in the charge, and the consequence can only be that there should be a new trial, if they are so found.

I would not like to part this appeal, however, without stating that to interpret freedom as licence is a dangerous fallacy. Obviously pure criticism, or expression of opinion, however severe or extreme, is, I might almost say, to be invited. But, as was said elsewhere, "there must be a point where restriction on individual freedom of expression is justified and required on the grounds of reason, or on the ground of the democratic process and the necessities of the present situation". It should not be understood from this Court—the Court of last resort in criminal matters in Canada—that persons subject to Canadian jurisdiction "can insist on their alleged unrestricted right to say what they please and when they please, utterly irrespective of the evil results which are often inevitable". It might well be said in such a case, in the words of Milton, "Licence they mean when they cry liberty", or as expressed by Mr. Edouard Herriot, "La liberté doit trouver sa limite dans l'autorité légale".

For these reasons, in this particular appeal, the conviction should be set aside on the grounds of misdirection and non-direction, and a new trial should be directed.

KERWIN J.—This is an appeal by the accused from a decision of the Court of King's Bench (Appeal Side) for the Province of Quebec (1), affirming his conviction for

(1) Q.R. [1949] K.B. 238.

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publishing a seditious libel contrary to section 133 of the *Criminal Code*. Chief Justice Letourneau dissented and, as Mr. Justice Galipeault agreed with his reasons, reference thereto may conveniently be made throughout as expressing the dissent with which this Court is concerned. Prior to the hearing, we dismissed a motion by the Crown to quash the appeal on the ground that the dissent was on questions of fact alone because we are all of opinion that there was dissent on questions of law.

The charge against the accused is that he published a seditious libel by distributing copies of a pamphlet to several persons at St. Joseph, in the District of Beauce, which pamphlet contained certain alleged seditious passages. The editors of the pamphlet are stated therein to be Watch Tower Bible and Truth Society, Toronto, Ont., and the accused is a member of Jehovah's Witnesses. There is no doubt as to the publication by the accused in the manner charged but the question is whether what he published constituted the criminal offence known as seditious libel.

Section 133 of the *Criminal Code* under which the charge was laid must be considered together with section 133A enacted in 1930, and these now read:

133. Seditious words are words expressive of a seditious intention.

2. A seditious libel is a libel expressive of a seditious intention.

3. A seditious conspiracy is an agreement between two or more persons to carry into execution a seditious intention.

4. Without limiting the generality of the meaning of the expression "seditious intention" everyone shall be presumed to have a seditious intention who publishes, or circulates any writing, printing or document in which it is advocated, or who teaches or advocates, the use, without the authority of law, of force, as a means of accomplishing any governmental change within Canada.

133A. No one shall be deemed to have a seditious intention only because he intends in good faith,—

(*a*) to show that His Majesty has been misled or mistaken in his measures; or

(*b*) to point out errors or defects in the government or constitution of the United Kingdom, or of any part of it, or of Canada or of any province thereof, or in either House of Parliament of the United Kingdom or of Canada, or in any legislature, or in the administration of justice; or to excite His Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state; or,

(*c*) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects.

Subsection 4 of section 133 was enacted in 1936, at which time Parliament repealed the much discussed section 98, but for our purposes subsection 4 need not be considered. With the exception of this subsection, these enactments follow the corresponding provisions of the Draft Criminal Code, prepared by the Commissioners in England and while "seditious intent" is nowhere defined in our Code, it has always been accepted that the definition proposed by the Commissioners accurately sets forth the law of England on the subject. This definition had been adopted by the Commissioners almost verbatim from that found in Stephen's Digest of the Criminal Law. As explained by Cave J. in *Reg.* v. *Burns* (1), the latter had the authority not only of Mr. Justice Stephen but also of the very learned judges who were associated with him in drafting the proposed English Criminal Code. On the following page, Cave J. points out that Mr. Justice Stephen was a judge of very great accuracy and that, for the proposition laid down in his Digest for seditious libel, there was to be found undoubted authority. The authorities and the history of the matter are set out in Volume 2 of the History of the Criminal Law of England by the same author at p. 298 et seq. That definition should be adopted as the law of Canada.

The definition appears as article 114 in the 8th edition of Stephen's Digest and, together with article 115, are as follows:

ARTICLE 114

SEDITIOUS INTENION DEFINED

A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.

An intention to show that His Majesty has been misled or mistaken in his measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite His Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out,

(1) (1886) 16 Cox C.C. 355 at 359.

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in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not a seditious intention.

ARTICLE 115

PRESUMPTION AS TO INTENTION

In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.

The accused as one of the members of Jehovah's Witnesses distributed a pamphlet in which complaint was made of what was said to have occurred with reference to some of those members. He was entitled to complain of what he conceived to be existing grievances and, in so doing, he was not restricted to a calm and dispassionate exposé, such as might be expected in a court of law.

Specifically, he was entitled to point out what he alleged were errors or defects in the administration of justice and also, in order to effect their removal, matters which were producing, or had a tendency to produce, feelings of hatred and ill-will between the residents of the Province of Quebec and Jehovah's Witnesses. Evidence could be led by the accused in an endeavour to show the truth of these statements as it would be relevant, but as was admitted by counsel for the accused, relevant only, to the question whether the accused intended to point out those matters in good faith as provided by section 133A of our Code.

Chief Justice Letourneau points out that after ruling that the truth or falsity of the allegations made in the pamphlet was immaterial, the trial judge, at various times, picked out various passages in the pamphlet and, referring to each, said: "C'est encore une fausseté". I agree with the Chief Justice that the issue of good faith was not put accurately to the jury.

The question of seditious libel is always one of great delicacy, requiring from the trial judge an instruction distinctly drawing to the attention of the jury the various elements that must be found before they may convict of the offence charged and applying the law to the evidence in the record. I agree with the Chief Justice that this was not done in the present case. The main element which

it was necessary for the jury to find was an intention on the part of the accused to incite the people to violence or to create a public disturbance or disorder: *Reg.* v. *Burns supra; Reg.* v. *Sullivan* (1); *Rex* v. *Aldred* (2); *The King* v. *Caunt* not reported but referred to in a note in 64 L.Q.R. 203. The use of strong words is not by itself sufficient nor is the likelihood that readers of the pamphlet in St. Joseph de Beauce would be annoyed or even angered, but the question is, was the language used calculated to promote public disorder or physical force or violence. In coming to a conclusion on this point, a jury is entitled to consider the state of society or, as it is put by Chief Justice Wilde in his charge to the jury in *The Queen* v. *Fussell* (3)—

> You cannot, as it seems to me, form a correct judgment of how far the evidence tends to establish the crime imputed to the defendant, without bringing into that box with you a knowledge of the present state of society, because the conduct of every individual in regard to the effect which that conduct is calculated to produce, must depend upon the state of the society in which he lives. This may be innocent in one state of society, because it may not tend to disturb the peace or to interfere with the right of the community, which at another time, and in a different state of society, in consequence of its different tendency, may be open to just censure.

This, it should be noted, was said at a trial at the Central Criminal Court before the Chief Justice, Baron Parke and Maule J. An instruction to the same effect was given in *Reg.* v. *Burns supra* by Cave J., of whose charge it is stated generally, at page 88 of the 9th edition of Russell on Crime, that the present view of the law is best stated therein. Reference might also be made to the words of Coleridge J. in his charge to the jury in the later case of *Rex* v. *Aldred* (4):—

> You are entitled also to take into account the state of public feeling. Of course there are times when a spark will explode a powder magazine; the effect of language may be very different at one time from what it would be at another.

While the jury must consider the question of good faith in accordance with section 133A of our Code, it will be noticed that that section specifically states that no one shall be deemed to have a seditious intention *only* because he intends in good faith to show or point out the matters

(1) (1868) 11 Cox C.C. 44.
(2) (1909) 22 Cox C.C. 1.
(3) (1848) 6 St. Tr. (N.S.) 723 at 762.
(4) (1909) 22 Cox C.C. 1 at 3.

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mentioned. The jury should be charged that if they find good faith on the part of the accused, and if in their opinion there is nothing more in the case, the accused is entitled to an acquittal; but, if in addition to that good faith, there was an intention on the part of the accused to create public disorder or promote physical force, or that notwithstanding the motives of the accused the natural tendency of the words (and therefore the intention) was to create such disturbances, then they would be entitled to find a verdict of guilty.

The decision of the Judicial Committee in *Wallace-Johnson* v. *The King* (1), is not of assistance as there it was held merely that the provisions of the Gold Coast Criminal Code were clear and unambiguous and intended to contain as far as possible a full and complete statement of the law of sedition in the Colony, and that, therefore, the English common law as expounded in the *Burns* Case was inapplicable. Nor are the quoted decisions in the Supreme and other Courts of the United States of any real help. Many of them deal with the "clear and present danger" doctrine in construing statutes with reference to the applicability of the First and Fourteenth Amendments to the Federal Constitution and all depend upon that Constitution and laws which are alleged to infringe its provisions. It is strictly unnecessary to consider Chief Justice Letourneau's dissent that the trial judge did not charge the jury sufficiently or properly on the question of reasonable doubt but even if the dissent be not well-founded, the charge in this respect exhibits the very minimum that could be held to be sufficient and is not to be recommended.

There was evidence in the document itself, taken, as it must be, with all the other circumstances, upon which a jury after a proper charge as outlined above, could find the accused guilty, and the conviction should, therefore, be set aside and a new trial directed.

Since the distribution of my reasons in this appeal, there has been a reargument as a result of which I have been persuaded that the order suggested by me is not the proper one to make. With the exception of the last

(1) [1940] A.C. 231.

paragraph, what I have already said may stand, with the following additions. The intention on the part of the accused which is necessary to constitute seditious libel must be to incite the people to violence against constituted authority or to create a public disturbance or disorder against such authority. To what is stated previously that "the question is, was the language used calculated to promote public disorder or physical force or violence", there should be added that that public disorder or physical force or violence must be against established authority. An intention to bring the administration of justice into hatred or contempt or exert disaffection against it is not seditious unless there is also the intention to incite people to violence against it. So far as the decision in *R.* v. *M'Hugh* (1) is in conflict with this opinion, it should not be followed.

Whatever else might be said of the contents of the pamphlet, there is not in it, read in the light of all the surrounding circumstances, any evidence upon which a jury, properly instructed, could find the appellant guilty of the crime with which he was charged. The conviction should be set aside and a judgment and verdict of acquittal entered.

TASCHEREAU J. (dissenting):—At the first hearing of this appeal, the Court did not agree as to the ingredients that are necessary to constitute the offence of seditious libel. Upon application, a new hearing was granted and heard by the full Court, and in view of the opinions now expressed by the majority, it is settled I think that generally speaking, the writings complained of must, in addition to being calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects, be intended to produce disturbance of or resistance to the lawfully constituted authority.

But as pointed out by my brother Cartwright, there is another definition of seditious intention which I think, must be accepted. I agree with him that an intention to bring the administration of justice into hatred or contempt or to excite disaffection against it, is a seditious

(1) (1901) 2 Ir. R. 569.

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intention. In the present case, there is I think sufficient evidence upon which a properly instructed jury could find that there was a seditious intention.

I have no doubt, that in view of the defective charge of the trial judge, this appeal cannot be dismissed, and I would therefore for the reasons given by my brother Cartwright, quash the conviction and direct a new trial.

RAND J.:—For the reasons given by me following the first argument, I would allow the appeal, set aside the verdict and conviction and enter judgment of not guilty.

(The reasons given by Mr. Justice Rand, following the first argument, read as follows).

This appeal arises out of features of what, in substance, is religious controversy, and it is necessary that the facts be clearly appreciated. The appellant, a farmer, living near the town of St. Joseph de Beauce, Quebec, was convicted of uttering a seditious libel. The libel was contained in a four page document published apparently at Toronto by the Watch Tower Bible & Tract Society, which I take to be the name of the official publishers of the religious group known as The Witnesses of Jehovah. The document was headed "Quebec's Burning Hate for God and Christ and Freedom Is the Shame of all Canada": it consisted first of an invocation to calmness and reason in appraising the matters to be dealt with in support of the heading; then of general references to vindictive persecution accorded in Quebec to the Witnesses as brethren in Christ; a detailed narrative of specific incidents of persecution; and a concluding appeal to the people of the province, in protest against mob rule and gestapo tactics, that through the study of God's Word and obedience to its commands, there might be brought about a "bounteous crop of the good fruits of love for Him and Christ and human freedom". At the foot of the document is an advertisement of two books entitled "Let God be True" and "Be Glad, Ye Nations", the former revealing, in the light of God's Word, the truth concerning the Trinity, Sabbath, prayer, etc., and the latter, the facts of the endurance of Witnesses in the crucible of "fiery persecution".

The incidents, as described, are of peaceable Canadians who seem not to be lacking in meekness, but who, for distributing, apparently without permits, bibles and tracts on Christian doctrine; for conducting religious services in private homes or on private lands in Christian fellowship; for holding public lecture meetings to teach religious truth as they believe it of the Christian religion; who, for this exercise of what has been taken for granted to be the unchallengeable rights of Canadians, have been assaulted and beaten and their bibles and publications torn up and destroyed, by individuals and by mobs; who have had their homes invaded and their property taken; and in hundreds have been charged with public offences and held to exorbitant bail. The police are declared to have exhibited an attitude of animosity toward them and to have treated them as the criminals in provoking by their action of Christian profession and teaching, the violence to which they have been subjected; and public officials and members of the Roman Catholic Clergy are said not only to have witnessed these outrages but to have been privy to some of the prosecutions. The document charged that the Roman Catholic Church in Quebec was in some objectionable relation to the administration of justice and that the force behind the prosecutions was that of the priests of that Church.

The conduct of the accused appears to have been unexceptionable; so far as disclosed, he is an exemplary citizen who is at least sympathetic to doctrines of the Christian religion which are, evidently, different from either the Protestant or the Roman Catholic versions: but the foundation in all is the same, Christ and his relation to God and humanity.

The crime of seditious libel is well known to the Common Law. Its history has been thoroughly examined and traced by Stephen, Holdsworth and other eminent legal scholars and they are in agreement both in what it originally consisted and in the social assumptions underlying it. Up to the end of the 18th century it was, in essence, a contempt in words of political authority or the actions of authority. If we conceive of the governors of society as superior beings, exercising a divine mandate, by whom

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laws, institutions and administrations are given to men to be obeyed, who are, in short, beyond criticism, reflection or censure upon them or what they do implies either an equality with them or an accountability by them, both equally offensive. In that lay sedition by words and the libel was its written form.

But constitutional conceptions of a different order making rapid progress in the 19th century have necessitated a modification of the legal view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public. The basic nature of the Common Law lies in its flexible process of traditional reasoning upon significant social and political matter; and just as in the 17th century the crime of seditious libel was a deduction from fundamental conceptions of government, the substitution of new conceptions, under the same principle of reasoning, called for new jural conclusions: *Bourne* v. *Keane* (1).

As early as 1839 in *Rex* v. *Neale* (2), Littledale, J., in his charge to the jury, laid it down that "you are to consider . . . whether they meant to excite the people to take the power into their own hands, and meant to excite them to tumult and disorder; the people have a right to discuss any grievances they have to complain of but they must not do it in a way to excite tumult", which Stephen, in Vol. 2 of his History of the Criminal Law at page 375, sums up: "In one word, nothing short of direct incitement to disorder and violence is a seditious libel". Coleridge, J. in *Rex* v. *Aldred* (3), used these words: "The man who is accused may not plead the truth of the statement he makes as a defence to the charge; nor may he plead the innocence of his motive. That is not a defence to the charge. The test is not either the truth of the language or the innocence of the motive with which he publishes it. The test is this: was the language used calculated, or was it not, to promote public disorder or physical force": (85 Sol, J. (1941), 251). The language used must, obviously, be related to the particular matters in each case complained of.

(1) [1919] A.C. 815.
(2) 9 C. & P. 431.
(3) (1909) 22 Cox C.C. 1.

This development is to be considered also in the light of the practice in administering the law of seditious words followed after Fox's Libel Act of 1792. The jury in such cases by its right under the statute to bring in a general verdict, must, in addition to the publication of the libel and its meaning, have found a seditious intention. That meant more than the issue of the writing knowing what it contained. The Act was interpreted as requiring the libel to have been published with an *illegal* intention. The word "intention" was not always clearly differentiated from indirect purpose or motive, but if the intention, as envisaging immediate or proximate response, regardless of a remote object of whatever nature, was illegal, the libel was seditious.

Stephen suggests a theoretical continuity of the law by taking that Act to have made material those consequential allegations such as of ill-will, disaffection, etc., with which the early indictments were liberally encumbered, but which were looked upon as formal or assumed as necessary effects of the libel otherwise seditious. But if that is sound, then we must have regard to the sense which they then bore; and it would seem to be clear that they signified feelings and attitudes toward established authority.

The definition of seditious intention as formulated by Stephen, summarised, is, (1) to bring into hatred or contempt, or to excite disaffection against, the King or the Government and Constitution of the United Kingdom, or either House of Parliament, or the administration of justice; or (2) to excite the King's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established; or (3) to incite persons to commit any crime in general disturbance of the peace; or (4) to raise discontent or disaffection amongst His Majesty's subjects; or (5) to promote feelings of ill-will and hostility between different classes of such subjects. The only items of this definition that could be drawn into question here are that relating to the administration of justice in (1) and those of (4) and (5). It was the latter which were brought most prominently to the

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notice of the jury, and it is with an examination of what in these days their language must be taken to mean that I will chiefly concern myself.

There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesy's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.

Although Stephen's definition was adopted substantially as it is by the Criminal Code Commission of England in 1880, the latter's report, in this respect, was not acted on by the Imperial Parliament, and the *Criminal Code* of this country, enacted in 1891, did not incorporate its provisions. The latter omits any reference to definition except in section 133 to declare that the intention includes the advocacy of the use of force as a means of bringing about a change of government and by section 133A, that certain actions are not included. What the words in (4) and (5) must in the present day be taken to signify is the use of language which, by inflaming the minds of people into

hatred, ill-will, discontent, disaffection, is intended, or is so likely to do so as to be deemed to be intended, to disorder community life, but directly or indirectly in relation to government in the broadest sense: Phillimore, J. in *R.* v. *Antonelli* (1) "seditious libels are such as tend to disturb the government of this country . . .". That may be through tumult or violence, in resistance to public authority, in defiance of law. This conception lies behind the association which the word is given in section 1 of chapter 10, C.S. Lower Canada (1860) dealing with illegal oaths:

> To engage in any seditious, rebellious or treasonable purpose;

and the corresponding section 130 of the *Criminal Code*:

> To engage in any mutinous or seditious purpose.

The baiting or denouncing of one group by another or others without an aim directly or indirectly at government, is in the nature of public mischief: *R.* v. *Leese & Whitehead* (2); and incitement to unlawful acts is itself an offence.

This result must be distinguished from an undesired reaction provoked by the exercise of common rights, such as the violent opposition to the early services of the Salvation Army. In that situation it was the hoodlums who were held to be the lawless and not the members of the Army: *Beatty* v. *Gillbanks* (3). On the allegations in the document here, had the Salvationists been arrested for bringing about by unlawful assembly a breach of the peace and fined, had they then made an impassioned protest against such treatment of law abiding citizens, and had they thereupon been charged with seditious words, their plight would have been that of the accused in this case.

These considerations are confirmed by section 133A of the *Code*, which is as follows:

> WHAT IS NOT SEDITION.—No one shall be deemed to have a seditious intention only because he intends in good faith,—
>
> (*a*) to show that His Majesty has been misled or mistaken in his measures; or
>
> (*b*) to point out errors or defects in the government or constitution of the United Kingdom, or of any part of it, or of Canada or any province thereof, or in either House of Parliament

(1) 70 J.P. 4.
(2) 85 Sol Jo. 252.
(3) (1881-82) 9 Q.B.D. 308.

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of the United Kingdom or of Canada, or in any legislature, or in the administration of justice; or to excite His Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state; or,

(c) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects.

This, as is seen, is a fundamental provision which, with its background of free criticism as a constituent of modern democratic government, protects the widest range of public discussion and controversy, so long as it is done in good faith and for the purposes mentioned. Its effect is to eviscerate the older concept of its anachronistic elements. But a motive or ultimate purpose, whether good or believed to be good is unavailing if the means employed is bad; disturbance or corrosion may be ends in themselves, but whether means or ends, their character stamps them and intention behind them as illegal.

The condemned intention lies then in a residue of criticism of government, the negative touchstone of which is the test of good faith by legitimate means toward legitimate ends. That claim was the real defence in the proceedings here but it was virtually ignored by the trial judge. On that failure, as well as others, the Chief Justice of the King's Bench and Galipeault, J. have rested their dissent, and with them I am in agreement.

But a further question remains. In the circumstances, should the appellant be subjected to a second trial? Could a jury, properly instructed and acting judicially have found, beyond a reasonable doubt, a seditious intention in circulating the document? In the heading is the chief source of resentment but there are also statements, such as the insinuation of the part played by the Church in judicial administration and the role of some of the clergy in the prosecutions, which offend likewise. Now these allegations are inferences and conclusions drawn from the facts and incidents presented in detail which the accused was ready with evidence to prove, and it is obvious that they and the matters from which they are deduced, must be read together. When it is said that Quebec hates Christ, it is hate sub modo; it means that to persecute is to hate, and that to hate those who follow and love Him, i.e. the

Witnesses, for what they do in His service, is to hate Him. Only in that manner can the real intention evidenced by the document be appreciated.

The writing was undoubtedly made under an aroused sense of wrong to the Witnesses; but it is beyond dispute that its end and object was the removal of what they considered iniquitous treatment. Here are conscientious professing followers of Christ who claim to have been denied the right to worship in their own homes and their own manner and to have been jailed for obeying the injunction to "teach all nations". They are said to have been called "a bunch of crazy nuts" by one of the magistrates. Whatever that means, it may from his standpoint be a correct description;I do not know; but it is not challenged that, as they allege, whatever they did was done peaceably, and, as they saw it, in the way of bringing the light and peace of the Christian religion to the souls of men and women. To say that is to say that their acts were lawful. Whether, in like circumstances, other groups of the Christian Church would show greater forebearance and earnestness in the appeal to Christian charity to have done with such abuses, may be doubtful. The courts below have not, as, with the greatest respect, I think they should have, viewed the document as primarily a burning protest and as a result have lost sight of the fact that, expressive as it is of a deep indignation, its conclusion is an earnest petition to the public opinion of the province to extend to the Witnesses of Jehovah, as a minority, the protection of impartial laws. No one would suggest that the document is intended to arouse French-speaking Roman Catholics to disordering conduct against their own government, and to treat it as directed, with the same purpose, towards the Witnesses themselves in the province, would be quite absurd; in relation to the courts, it is, to use the language of section 133A, pointing out, "in order to their removal", what are believed to be "matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects." That some of the expressions, divorced from their context, may be extravagant and may arouse resent-

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ment, is not, in the circumstances, sufficient to take the intention of the writing as a whole beyond what is recognized by section 133A as lawful.

Where a conviction is set aside, this Court must dispose of the appeal as the justice of the case requires; and where the evidence offered could not, under a proper instruction, have supported a conviction, the accused must be discharged: *Schwartzenhauer* v. *The King* (1); *Manchuk* v. *The King* (2); *Savard and Lizotte* v. *The King* (3).

I would, therefore, allow the appeal, set aside the conviction, and order judgment of acquittal to be entered.

KELLOCK J.:—In opening his argument, counsel for the Attorney General admitted that the charge of the learned trial judge was so defective it could not be supported. Accordingly, the appeal must be allowed and the conviction of the appellant, confirmed as it was by the Court of Appeal (4) with two members dissenting, must be set aside, and the only question which arises is as to the order which this court should make. The appellant contends that there is no evidence upon which a jury, properly instructed, could find the appellant guilty of seditious libel beyond a reasonable doubt by reason of the publication of the pamphlet here in question. On the other hand, the respondent submits there should be a new trial. In the determination of this question, it is necessary at the outset to consider the true nature of the offence charged.

By sec. 133 (*a*) of the *Criminal Code*, seditious libel is defined as

> a libel expressive of a seditious intention.

Subsection 4 reads as follows:

> Without limiting the generality of the meaning of the expression "seditious intention" everyone shall be presumed to have a seditious intention who publishes or circulates any writing, printing or document in which it is advocated, or who teaches or advocates, the use, without the authority of law, of force, as a means of accomplishing any governmental change within Canada.

So far as the *Code* is concerned, "seditious intention" is not defined apart from this subsection, and except for

(1) [1935] S.C.R. 367.
(2) [1938] S.C.R. 341.
(3) [1946] S.C.R. 20.
(4) Q.R. [1949] K.B. 238.

s. 133A, one is forced back to the common law. The pamphlet here in question does not, of course, come within the said subsection.

Counsel for the Attorney General founds himself upon the definition given in Russell, 9th Ed., p. 87. This is essentially the definition laid down by Sir James Stephen in his "Digest of the Criminal Law", which first appeared in 1877.

It is not necessary to discuss the whole law of seditious libel, but only so much as is relevant to the points of difference between the parties, namely, whether or not incitement to violence is a necessary ingredient, and whether that part of the definition which states that an intention "to promote feelings of ill-will and hostility between different classes of His Majesty's subjects", taken literally and by itself, is sufficient.

Stephen's complete definition was adopted by the Royal Commissioners in England in s. 102 of their draft code. In a note the Commissioners state that it is as accurate a statement of the existing law as they could make. Their references in support of this statement are set out in Crankshaw, 5th Ed. at p. 542. I have read all of these, but I can find no support in any of them for the second point stated as a bald proposition without more. The only case in which such language appears at all in any of the references given is *O'Connell* v. *The Queen* (1), where it is included with other matter in a number of the counts of the indictment there in question, but nowhere does it appear alone as constituting a count. Moreover, the indictment in *O'Connell's* case was not for seditious libel but for conspiracy. At p. 234 Tindal L.C.J. in advising the House of Lords, said:

> Indeed there can be no question but that the charges contained in the first five counts do amount, in each to the legal offence of conspiracy, and are sufficiently described therein. There can be no doubt but that the *agreeing* of divers persons together to raise discontent and disaffection amongst the liege subjects of the Queen; to stir up jealousies, hatred and ill-will between different classes of Her Majesty's subjects; and especially to promote among Her Majesty's subjects in Ireland feelings of ill-will and hostility towards Her Majesty's subjects in the other parts of the United Kingdom, and especially in England; which charges are found

(1) (1844) 11 cl. & F. 155.

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in each of the five counts which first appear in the indictment—do form a distinct and definite charge in each, against the several defendants, of an agreement between them to do an illegal act.

Lord Campbell, who alone of all the members of the House refers to this matter, says at p. 403 that he considers that any person who deliberately attempts to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects—to make the English be hated by the Irish or the Irish to be hated by the English—is guilty of a "most culpable proceeding", and that if several combine to do so they commit a "misdemeanor." Lord Campbell does not equate "culpable proceeding" and "misdemeanor." The latter is technically the only offence mentioned and if Lord Campbell intended to describe an offence in each case he certainly knew how to do so.

As is frequently mentioned in the authorities, probably no crime has been left in such vagueness of definition as that with which we are here concerned, and its legal meaning has changed with the years. It is relevant, therefore, to refer to some extent to its history. It is traced by Stephen himself in Vol. II of his "History of the Criminal Law of England" at p. 299 ff. He points out that two different views may be taken of the relation between rulers and their subjects. If, on the one hand, the ruler is regarded as the superior of the subject, and being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly; that even if he is mistaken, his mistakes should be pointed out with the utmost respect; and that whether mistaken or not, *no censure* should be cast upon him likely or designed to diminish his authority. On the other hand, if the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because, being a multitude, he cannot use it himself, it is obvious that the result must be the opposite. In this view, every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part. He is finding fault with his servant. If

others think differently, they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place or perhaps that the arrangement of the household will be modified. The author says that to those who hold this latter view fully and carry it out to all its consequences, there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb or property, and there may be incitements to such offences, but no imaginable censure of the government, *short of a censure which has an immediate tendency to produce such a breach of the peace,* ought to be regarded as criminal. Stephen then makes the statement that each of the above views has had a considerable share in moulding the law of England.

with the practical result of producing the *compromise* which I have tried to express in the articles of my Digest.

Holdsworth, in Vol. VIII of his History, refers to the two views outlined by Stephen and says that the first of these views was the accepted view in the 17th century, but that the second was gathering strength during the latter part of the 18th century.

and is now the accepted view.

He does not speak of a "compromise" and founds himself on *R.* v. *Lovett* (1), per Littledale J. at 466, and *R.* v. *Sullivan* (2), per Fitzgerald J. at 58.

In *R.* v. *Lovett* (1) the court was concerned with a handbill containing three resolutions passed by a large number of people assembled, calling themselves the "General Convention", in which they complained of the use in Birmingham of the metropolitan police from London, the first resolution calling the police "an unconstitutional force from London". The third complained of the arrest of a Dr. Taylor, calling it a summary and despotic arrest and stating that it afforded another convincing proof

of the absence of all justice in England, and clearly shews that there is no security for life, liberty or property till the people have some control over the laws they are called upon to obey.

The indictment charged that the defendant intended "to incite divers liege subjects of the Queen to resist the laws and to resist the persons so being part of the metro-

(1) (1839) 9 C. & P. 462. (2) (1868) 11 Cox C.C. 44

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politan police force in the due execution of their duty, and to bring the said force into hatred and contempt, and to procure unlawful meetings, and to cause divers liege subjects of the Queen to believe that the laws of this kingdom were unduly administered, and intending to disturb the public peace, and to raise discontent in the minds of the subjects of the Queen, and raise and excite tumult and disobedience to the laws."

Littledale J., in his charge to the jury, said: "if this paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, that is sufficient to bring it within the terms of this indictment, and it is a seditious libel."

Stephen, at p. 375, says with respect to this charge:

> In one word, nothing short of a direct incitement to disorder and violence is a seditious libel.

It therefore clearly appears that in the view of Stephen himself, his definition must be read at the least as implying an intention to incitement to violence. In confirmation of this view, the following appears on p. 381 of the same work:

> The question would be whether the writer's object was to procure a remedy by peaceable means, or to promote disaffection and *bring about riots.*

It is noteworthy that the draft code of the Royal Commissioners was not accepted by Parliament, and in my opinion, incitement to violence toward constituted authority, i.e. government in the broad sense, or resistance having the same object, is, upon the authorities, a necessary ingredient of the intention.

In *R.* v. *Sullivan* (1), Fitzgerald J., in the course of his address to the grand jury, said at p. 45:

> Sedition is a crime *against society,* nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed or in writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the empire. The objects of sedition are generally to induce discontent and insurrection and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have *for their object*

(1) (1868) 11 Cox C.C. 44.

to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitution of the realm, and generally all endeavours to promote public disorder.

At p. 50 the learned judge also said:

. . . there is no sedition in censuring the servants of the Crown, or in just criticism on the administration of the law, or in seeking redress of grievances or in the fair discussion of all party questions. You should remember that you are the guardians of the liberty and freedom of the press, and that *it is your duty to put an innocent interpretation on these publications if you can.* But if, on the other hand, from their whole scope, you are *coerced* to the conclusion that their object and tendency is to foment discontent and disaffection, to excite to tumult and insurrection, to promote the objects of a treasonable conspiracy, to bring the adminisration of justice into disrepute, or to stir up the people to hatred of the laws and the constitution, then you may, if you think fit, and you ought to find the bills, and send the case to be tried by a petit jury.

In *R.* v. *Antonelli* (1), Phillimore J. as he then was, in the course of his charge said:

Seditious libels are such as tend to disturb the government of this country . . .

Stephen at page 298 of the same work, in referring to seditious offences, says:

All these offences presuppose dissatisfaction with the existing government, and censure more or less express upon those by whom its authority is exercised and the offences themselves consist in the display of this dissatisfaction in the various manners enumerated.

While the paragraph begins with the sentence,

The second class of offences against internal public tranquillity consists of offences not accompanied by or leading to open violence.

the author had already said on page 242:

Another class of offences against public tranquillity are those in which no actual force is either employed or displayed, but in which steps are taken *tending to cause it.* These are the formation of secret societies, seditious conspiracies, libels or words spoken.

In *R.* v. *Aldred* (2), Coleridge J., in the course of his summing up, said at page 3, with reference to the charge before him:

The word "sedition" in its ordinary natural signification denotes a tumult, an insurrection, a popular commotion, or an uproar; it implies violence or lawlessness in some form.

The learned judge continued:

The test is not either the truth of the language or the innocence of the motive with which he published it, but the test is this: was the language used calculated, or was it not, to promote public disorder or physical force or violence *in a matter of State?*

(1) 70 J.P. 4.

(2) (1909) 22 Cox C.C. 1.

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In *R.* v. *Burdett* (1), Best J. at page 131 told the jury they were to decide whether the paper there in question was a sober address to reason or an appeal to their passion calculated to incite them to acts of violence and uproar. If the latter, it was a seditious libel. At page 376 of his History, Stephen says that the law as to political libels has not been developed or altered in any way since this case.

Lord Cockburn, in the introduction to his "Examination of Trials for Sedition in Scotland", says at page 8:

> The guilt, when analized, resolves into disrespect towards the authority of the State; meaning by disrespect all criminal obloquy or ridicule, or defiance; and by the State, not merely the supreme power, but all the high political bodies and officers that represent it. The quality indicated by the term political (or by some equivalent term) is essential; because there are many merely public officers or bodies, who, as they represent none of the power of the State, can scarcely be the objects of seditious attack. I do not see how the East India Company or the Bank of England could, as such, be libelled seditiously. To give the attack the quality of seditiousness, it must be capable of being justly viewed as a contempt of public authority. Hence the usual objects of the offence are, the sovereign, the Houses of Parliament, the administrators of justice, public officers and departments wielding and representing the State's power or dignity. It is the public majesty that must be assailed, and that must be required to be protected. Sedition is the same thing, in principle, against the State, with the misconduct of the member of the private society who, because he dislikes something that is done, insults the president and defies the majority. The guilt of sedition is often described as consisting of its tendency to produce public mischief—and so it is. But it is not every sort of mischief that will exhaust the description of the offence. It must be that sort of mischief that consists in, and arises out of directly and materially obstructing public authority.

At page 20 Lord Cockburn quotes from Starkie at page 525, as follows:

> The test of intrinsic illegality must, in this as in other cases, be decided by the answer to the question—Has the communication a plain tendency to produce public mischief, by perverting the mind of the subject, and creating a general dissatisfaction with the Government? . . . It may be said, Where is the line to be drawn? . . . To this it may be answered that, to render the author criminal, his publication must have proceeded from a malicious mind; bent, not upon making a fair communication, for the purposes of exposing bad measures, but for the sake of exciting tumult and dissatisfaction.

Baron Hume, in his work published in 1844, says at page 558 of Vol. I:

> For the characteristic of sedition lies in the forwarding, preparing and producing such a state of things as may naturally issue in public trouble and commotion; and it is thus a different sort of guilt from that of those who are actively engaged in the tumult or rising, if any ensue.

(1) 4 B. & A. 95; 106 E.R. 873.

Further, riot and sedition differ in their scope and object. Sedition is a State crime; which is levelled against the government, structure of laws, or political order of the land; or at least has relation to some object of public and general concernment; in regard to which, if any hostile rising ensue, the offender shall be guilty of no lower crime than treason. Whereas the objects of riot or convocation of the lieges . . . are matters of local and private grievance; things in which a particular place or neighbourhood only is interested, and such as in nowise tend to challenge the authority or unsettle the order or economy of the State . . . The crime of sedition lies therefore in the stirring of such humours, as naturally tend to change and commotion in the State.

All these authorities are uniform in support of the view which I have above expressed.

In *Regina* v. *Burns* (1), Cave J., in the course of his charge to the jury as to what was seditious, referred to the definition of Stephen J. and the draft code, and stated that the defendants before him were charged with the seditious intentions, first to incite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of some matter in church or state by law established, and second to promote feelings of hostility between different classes of Her Majesty's subjects. After stating that these, and particularly the second, were somewhat vague and general, he went on to say at page 363:

. . . if you think that those defendants, if you trace from the whole matter laid before you that they had a seditious intention to incite the people to violence, to create public disturbances and disorder, then undoubtedly you ought to find them guilty. If from any sinister motive, as for instance, notoriety, or for the purpose of personal gain, they desired to bring the people into conflict with the authorities, or to incite them tumultuously and disorderly to damage the property of any unoffending citizens, you ought undoubtedly to find them guilty. On the other hand, if you come to the conclusion that they were actuated by an honest desire to alleviate the misery of the unemployed—if they had a real bona fide desire to bring that misery before the public by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the excitement of the moment.

At page 366:

What you are asked to decide on is whether the prisoners . . . did upon this occasion, in Trafalgar Square, incite the people whom they were addressing to redress their grievance by violence. Did they intentionally incite ill-will between different classes in such a way as to be likely to lead to a disturbance of the public peace?

Even on the footing of the law laid down in this case, if an intention to incite ill-will between different classes of

(1) (1886) 16 Cox C.C. 355.

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subjects is sufficient, that incitement, in the view of Cave, J., must be such as naturally leads to violence. In connection with the above decision, however, a writer in 85 Solicitor's Journal at page 252 says that there is no direct precedent for the inclusion in the definition of publishing a seditious libel, of incitement of ill-will and hostility between different classes of subjects. This writer says that *O'Connell* v. *The King, ubi cit.*, is often quoted as an authority for such a view and that Stephen J. had relied apparently on the words of Tindal L.C.J. to which I have already referred. This writer again points out, however, that that case was a case of conspiracy and not of sedition, and goes on to say that stirring up and creating ill-will between classes was the subject of a criminal charge in *R.* v. *Leese* (1), reported in The Times of the 22nd of December, 1936, the two classes there being Jews and non-Jews, but the offence charged was not that of seditious libel or seditious words, but of public mischief. It is to be noted that the actual indictment in Burns' case did not rely alone upon an intention to stir up ill-will between different classes of subjects, but the intention alleged was of

> wickedly, maliciously and seditiously contriving and intending the peace of our said Lady the Queen, and of this realm, and of the liege subjects of our said Lady the Queen, to disquiet and to disturb, and the liege subjects of our said Lady the Queen, to incite and to move to contempt, hatred and dislike of the Government established by law within this realm, and to incite and to move and persuade great numbers of the liege subjects of our said Lady the Queen to insurrections, riots, tumults, and breaches of the peace, and to stir up jealousies, hatred and ill-will between different classes of the said liege subjects, and to prevent by force and arms the execution of the laws of this realm, and the preservation of the public peace.

and it was alleged that the words complained of were spoken

> of and concerning the Government as established by law within this realm, and of and concerning the Commons House of Parliament and the members thereof, and of and concerning divers liege subjects of our said Lady the Queen whose names are to the jurors aforesaid unknown.

The actual subject matter of the trial before Cave, J. therefore, was not simply an indictment charging words spoken tending to create ill-will between classes of subjects simpliciter, but incitement of such ill-will *inter alia*, all directed against government.

(1) 85 Sol. Jo. 252.

In my opinion, there is a great distinction between the subject matter of *Burns'* case and that of *Leese's* case. It cannot be that words which, for example, are intended to create ill-will even to the extent of violence between any two of the innumerable groups into which society is divided, can, without more, be seditious. In my opinion, to render the intention seditious, there must be an intention to incite to violence or resistence or defiance for the purpose of disturbing constituted authority. I do not think there is any basis in the authorities for defining the crime on any lower plane.

The title of the pamphlet here in question is, "La haine ardente du Québec pour Dieu, pour Christ, et pour la liberté est un sujet de honte pour tout le Canada." The opening paragraph proceeds to plead for a calm and sober consideration of the evidence presented in the pamphlet in support of the title. It is clear that the author identifies the sect (and I do not use the word in any offensive sense) of Jehovah's Witnesses with the servants of Christ. His point is that the experiences of members of the sect in the province, as detailed in the pamphlet (which the defence proposed to prove by evidence to which the Crown effectively objected) establish that those who were instrumental, directly or indirectly, in bringing about the occurrences described, must be considered, as the title states, as hating Christ because, notwithstanding any lip-service to Him, such conduct towards His servants (the Witnesses) speaks louder than words.

The pamphlet recites at considerable length instances of destruction of Bibles, of mob violence, even on private property, unrestrained by the police, who, instead of arresting the mobsters, arrested the unoffending Witnesses engaged in distributing Bibles or Bible leaflets. It is alleged that the latter were subjected to heavy fines, prison sentences and delay in the disposition of these charges, as well as to the exaction of exorbitant bail. The pamphlet concludes on the note that the

> force behind Quebec's suicidal hate is priest domination. Thousands of Quebec Catholics are so blinded by the priests that they think they serve God's cause in mobbing Jehovah's witnesses.

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The author quotes St. John 16:2 as foretelling this, and he proceeds to say that such a course will lead to destruction. The reader is asked to avoid this by turning from following men and traditions to the study and the following of Bible teaching.

The pamphlet indicates that there existed, in certain sections of the province at least, a strong feeling against the Witnesses, and the argument for the Crown, on the basis that incitement of ill-will between classes is sufficient, was that the publication of this pamphlet would increase such ill-will and subject those engaged in its distribution to attack. In my opinion, it cannot fairly be said that the pamphlet is open to any such construction. There was no doubt opposition on the part of numbers of people to the Witnesses. The pamphlet says so. But the stated object of the pamphlet was to plead for its removal. It is impossible, in my opinion, to say that the intention of the author of the pamphlet, or of the appellant, was to foment this opposition or to stir up ill-will against himself and the fellow members of his sect, certainly not to the point of disturbing constituted authority. To say that the advocacy of any belief becomes a seditious libel, if the publisher has reason to believe that he will be set upon by those with whom his views are unpopular, bears, in my opinion, its own refutation upon its face and finds no support in principle or authority. Any such view would elevate mob violence to a place of supremacy. Christianity itself, in any form, could hardly exist on the basis of such a view of the law. The *Code* itself protects places of worship from violence and disturbance and the decision in *Beatty* v. *Gillbanks* (1), establishes that the lawbreakers are those who resort to violence rather than those who exercise the right of free speech in advocating religious views however such views may be unacceptable to the former. The occasions of violence described in the pamphlet here in question were of a nature differing not at all from the situation described in the case just mentioned.

I conclude, therefore, subject to one aspect of the matter to be mentioned, that there was no evidence upon which

(1) (1881-82) 9 Q.B.D. 308.

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a jury, properly instructed, could reasonably infer a seditious intention on the part of the appellant. How far short the pamphlet falls of that set forth by Fitzgerald J. in *Sullivan's* case already cited, needs no amplification.

Although little or no mention was made on behalf of the Crown of any reflection in the pamphlet upon the courts or the administration of justice in the province as bringing it within a proper definition of the offence charged, the matter should be referred to.

In Russell 9th Ed. p. 241, the author states that public attacks on courts of justice have *in some instances* been treated as a form of sedition. He refers to *O'Connell* v. *R.* (1); *R.* v. *Gordon* (2); *R.* v. *Collins* (3). On the other hand, the writer in 85 Solicitor's Journal 251, says that "old cases in which reflections on judges have been punished are in reality cases of contempt of court and are no precedent for the crime of sedition."

In *The King* v. *Almon* (4), certain libellous passages upon the Court of King's Bench and the Chief Justice were made the subject of contempt proceedings. In *McLeod* v. *St. Aubyn* (5), a similar case, Lord Morris refers to committals for contempt of this character as having become obsolete in England, the courts being satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. However, in *Regina* v. *Gray* (6), and in *R.* v. *New Statesman* (7), convictions were had for contempt in respect of such statements.

At the present time, therefore, in England, matter of the character here in question, if made the subject of criminal process at all, appears to be treated as contempt of court rather than as seditious libel. Such matter may, of course, be regarded from the standpoint of seditious libel if intention of the necessary character be established. A definition set forth in Vol. IX of Halsbury's Laws of England at 302, so far as relevant on this aspect of the matter, is:

> A seditious intention is an intention—
>
> (1) to bring into hatred or contempt, or to excite *disaffection* against . . . the administration of justice,

(1) (1843) 5 St. Tr. (N.S.) 1.
(2) (1787) 22 St. Tr. 177.
(3) (1839) 3 St. Tr. (N.S.) 1149.
(4) (1765) Wilm. 243; 97 E.R. 94.
(5) [1899] A.C. 549.
(6) [1900] 2 Q.B. 36.
(7) 44 T.L.R. 301.

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to which I would venture to add, "the end and purpose being to defeat its functioning." In *O'Connell* v. *The Queen* (1), for instance, a case of conspiracy, the 8th count includes the following:

> with the intent to induce Her Majesty's subjects to withdraw the adjudication of their differences with and claims upon each other from the cognizance of the said tribunals by law established, and to submit the same to the judgment and determination of other tribunals to be constituted and contrived for that purpose.

The 9th count includes:

> and to assume and usurp the prerogative of the Crown in the establishment of courts for the administration of the law.

In considering this aspect of the matter, it is essential, in the present case, to keep in the forefront of one's mind what has already been said as to the burden of the pamphlet, and the pamphlet itself should be read as a whole. It does not speak generally of the administration of justice in the province, nor of the courts generally, and the references to the courts are bracketed with references to the local legislative bodies and the local police in their attitudes and conduct towards the sect of Jehovah's Witnesses.

Everything put forward by the writer to the charge of these bodies, like all other matter of which the pamphlet complains, is lumped under the heading, "Hateful Persecution of Christians." This is but one aspect of the single protest running from the beginning to the end. The sect is identified by the author, in exclusive terms, with the servants of Christ. (It is one of the tenets of these people that they alone are the custodians of Christian truth.) The argument is that the conduct complained of, because it is directed against His servants, can be motivated only by hate for Him, notwithstanding what may be said to the contrary by those who are regarded as persecutors. All of this leads up to the plea, with which the pamphlet concludes, for the study of God's Word, the Bible, by those whose conduct is complained of, and if studied, love for Christ will replace the hatred, with a consequent cessation of the causes of complaint. Whatever might be the result as establishing contempt of court if the expressions with regard to the courts could be singled out from the criticisms of the other persons and agencies with which the pamphlet

(1) (1844) 11 Cl. & F. 155.

deals, such a course is not possible in the present case. The complaint is one and indivisible. As it is abundantly plain, in my opinion, for the reasons already given, that the intention behind the portions of the pamphlet to which I have referred earlier in this judgment is to obtain cessation of the conduct complained of, it is not possible to ascribe a different motive to the statements with reference to the courts. There is therefore no basis for ascribing to the author or publisher of the pamphlet an intention to defeat the functioning of the administration of justice, without which it cannot be seditious.

The Code, in s. 133(*a*), expressly provides that

No one shall be deemed to have a seditious intention only because he intends in good faith

(*b*) to point out errors or defects in . . . the administration of justice; or to excite His Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state; or

(*c*) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects.

For the reasons given, it is not possible to construe the pamphlet as evidencing any intention other than that which I have already described, and as there was no affirmative evidence on the point outside the pamphlet, the offence charged failed as a matter of evidence. As a necessary result, the question of good faith, a matter normally for the jury, does not arise, and the pamphlet falls within what is, by the statute, expressly excluded from the realm of that which is seditious.

I would therefore allow the appeal, quash the conviction and direct an acquittal.

ESTEY, J.:—This is an appeal under sec. 1023 of the *Criminal Code* on questions of law raised in the dissenting opinions of the learned Judges in the Court of King's Bench (Appeal Side) of the Province of Quebec (1). The appellant was convicted of seditious libel in that he did on or about the 11th of December, 1946, at St. Joseph "dans le district de Beauce," distribute a pamphlet entitled "La haine ardente du Québec pour Dieu, pour le Christ, et pour

(1) Q.R. [1949] K.B. 238.

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la liberté, est un sujet de honte pour tout le Canada." Upon appeal this conviction was affirmed, Chief Justice Letourneau and Mr. Justice Galipeault dissenting.

The pamphlet consists of four pages entitled as aforesaid which the appellant admitted he had read and distributed. The main issue is, therefore, whether the appellant had a seditious intention in distributing and thereby publishing the pamphlet.

There were several points raised in the dissenting opinions but it will be sufficient to confine the discussion to two of them, namely, that the learned trial Judge in charging the jury (*a*) did not sufficiently define "seditious intention", (*b*) did not adequately explain to the jury the place and meaning of "reasonable doubt."

A "seditious libel" is defined in sec. 133 of the *Criminal Code,* the material part of which reads:

133. Seditious words are words expressive of a seditious intention.
2. A seditious libel is a libel expressive of a seditious intention.

A "seditious intention" is not defined in either sec. 133 or in any other part of the *Code* and we must therefore look to the common law. It will there be found that the definition in Stephen's "Digest of the Criminal Law", 5th ed., p. 70, and described by the commissioners who prepared the draft of the English Code to be "as accurate a statement of the existing law as we can make", is generally accepted.

This is set out in sec. 102 of the Draft Code:

A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, or the Government and Constitution of the United Kingdom or of any part of it as by law established, or either House of Parliament, or the administration of justice; or to excite Her Majesty's subjects to attempt to procure otherwise than by lawful means the alteration of any matter in Church or State by law established; or to raise discontent or disaffection amongst Her Majesty's subjects; or

to promote feelings of ill-will and hostility between different classes of such subjects:

Provided that no one shall be deemed to have a seditious intention only because he intends in good faith to show that Her Majesty has been misled or mistaken in her measures; or

to point out errors or defects in the Government or Constitution of the United Kingdom or of any part of it as by law established, or in the administration of justice, with a view to the reformation of such alleged errors or defects; or to excite Her Majesty's subjects to attempt to procure by lawful means the alteration of any matter in Church or State by law established; or

to point out in order to their removal matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of Her Majesty's subjects.

Seditious words are words expressive of or intended to carry into execution or to excite others to carry into execution a seditious intention.

While the foregoing definition has never been enacted as part of our *Criminal Code,* the proviso was enacted in our first Code in 1892 as part of sec. 123 (S. of C. 1892, c. 29) and was deleted by an amendment in 1919 and re-enacted in 1930 and is now sec. 133A (S. of C. 1930, c. 11, s. 2).

The learned trial Judge did not discuss a "seditious intention" in the terms of or in terms similar to those in the foregoing definition more than to say that a seditious intention is one "to provoke feelings of ill-will and hostility between different classes of His Majesty's subjects," and expressed it in French as follows:

. . . le libelle séditieux c'est la publication ou la distribution d'un pamphlet, ou d'un écrit injurieux, blessant, et qui peut provoquer de la haine et de la discorde parmi les différentes classes de sujets de Sa Majesté.

However vague and indefinite the words "ill-will and hostility" may be when read as part of the foregoing definition of sedition, they are certainly more so when, as in this case, they were stated to the jury as separate and apart therefrom.

Cave, J. in *Rex* v. *Burns* (1), referred to the foregoing definition as somewhat vague and general and particularly that portion reading "ill-will and hostility between different classes of Her Majesty's subjects." This vague and general character is further emphasized in "Law of the Constitution", Dicey, 9th ed., p. 244, where, after pointing out that the law permits publication of statements indicating "the Crown has been misled, or that the government has committed errors, . . . and, in short, sanctions criticism of public affairs which is bona fide intended to recommend the reform of existing institutions by legal methods," the learned author concludes:

But any one will see at once that the legal definition of a seditious libel might easily be so used as to check a great deal of what is ordinarily considered allowable discussion, and would if rigidly enforced be inconsistent with prevailing forms of political agitation.

(1) (1886) 16 Cox C.C. 355.

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The foregoing emphasizes the importance of intention and the necessity of a trial Judge explaining to a jury, in such a case as here, the meaning of "intention to promote feelings of ill-will and hostility between different classes" of His Majesty's subjects as an essential in the offence of sedition.

In determining whether a seditious intention is present in a particular case, the language of Fitzgerald, J. in *Rex* v. *Sullivan* (1), adopted by Cave, J. in *Rex* v. *Burns*, (*supra*), is pertinent:

> Sedition has been described as disloyalty in action, and the law considers as seditious all those practices which have for their object to excite discontent or disaffection, to create public disturbances, or to lead to civil war; to bring into hatred or contempt the sovereign or the government, the laws or constitution of the realm, and generally all endeavours to promote public disorder.

Stephen's "History of the Criminal Law of England" Vol. 2, p. 375:

> In one word, nothing short of direct incitement to disorder and violence is a seditious libel.

Rex v. *Burns*, (*supra*), and other authorities rather indicate that an intention to incite something less than violence is sufficient, and that the offence of sedition is committed if it be established that the parties charged intentionally incited ill-will and hostility between different classes of citizens in such a manner as may be likely to cause public disorder or disturbance. It will be recognized that one may freely and forcefully express his views within the limits defined by the law. Those engaged in campaigns or controversies of a public nature may cause feelings of hatred and ill-will but it does not at all follow that those taking part therein and causing these feelings are acting with a seditious intention. The essential, without which there cannot be sedition, is the presence of a seditious intention as above defined and which is a fact to be determined on the evidence adduced in each case.

The defence contended that the appellant's conduct came within the provisions of sec. 133A(*c*).

> 133A. No one shall be deemed to have a seditious intention only because he intends in good faith,—
>
> (*c*) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects.

(1) (1868) 11 Cox C.C. 44.

The appellant's position is therefore that hatred and ill-will already existed between different classes in Quebec and that in the publication of this pamphlet he was only setting forth those matters which had and were producing hatred and ill-will between different classes with the intention, in good faith, that they might be removed.

The presence of these issues requires that the definition of sedition should have been explained and so related to the facts of this case that the jury would be assisted in understanding the issues and the relevant factors to be considered in arriving at their conclusions. With great respect the above quotation from the learned Judge's charge does not satisfy either of these requirements.

I therefore agree with the learned Chief Justice and Mr. Justice Galipeault that the charge of the learned trial Judge was under the circumstances inadequate.

Then with respect to the contention that the learned trial Judge did not adequately charge the jury relative to the burden of proof and reasonable doubt, I am also in agreement with the learned Judges who dissented.

The learned trial Judge at the outset stated to the jury:

> D'autre part, si la Couronne n'a pas établi le bien fondé de l'acte d'accusation, l'accusé devra être acquitté.

and in the course of his address stated:

> J'en conclus donc, et sur ce point vous devez suivre ma direction, que la preuve de la Couronne a été complète par le fait d'avoir produit le pamphlet et le fait d'en avoir prouvé la distribution.

Then referring to sec. 133A the learned Judge stated:

> Cet amendement veut dire qu'il n'y a pas de libelle dans le cas où un accusé prouve qu'il était de bonne foi.

and also:

> . . . si vous croyez qu'un document de cette nature peut laisser croire à nos canadiens de langue anglaise que dans la Province de Québec, la justice n'est pas observée, que le clergé a le contrôle sur les tribunaux et enfin, qu'il y a dans la Province de Québec une haine ardente pour le Christ, pour Dieu et pour la Liberté, dans ce cas là, vous devez condamner Boucher.

Up to that point the learned trial Judge had made no reference to reasonable doubt. Toward the end of his charge he called the attention of the jury to the request

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of counsel for the defence that they should be instructed to give the benefit of the doubt to the accused. He then explained that:

> Dans toute action, dans toute offense, le juge doit toujours dire aux jurés que s'il y a un doute, j'entends un doute raisonnable basé sur les faits, ils doivent en donner le bénéfice à l'accusé, mais il faut que ce doute soit sérieux, non pas un doute basé sur la pitié. Dans la présente cause, je ne vois pas sur quoi pourrait porter le doute.

Again at the conclusion of his address when counsel for the appellant asked that they be further instructed as to their duty with respect to reasonable doubt, the learned trial Judge stated:

> Messieurs les jurés, si vous aviez un doute que ce document là ne soit séditieux, vous en donnerez le bénéfice du doute à l'accusé.

It was not then, nor had it been explained to the jury that the burden rested upon the Crown to prove the essentials of the crime and if upon the whole of the evidence they had any reasonable doubt they should find the accused not guilty. Instead of that, as would appear from the above quotation commencing "si vous croyez", the jury might well conclude that the proof of the Crown had been sufficient and that if they believed the pamphlet would lead those Canadians speaking the English language to believe as he stated in the above quotation they must find Boucher possessed a seditious intention. Further, referring to the question of good faith, the jury might well have erroneously concluded from the instruction given that the burden rested upon the accused. Under the circumstances of this case the learned trial Judge should have charged the jury in language to the effect that if upon the whole of the evidence, the language of the pamphlet as well as the oral evidence, they were not convinced beyond any reasonable doubt that the appellant had a seditious intention in distributing the pamphlet they should find him not guilty. *Woolmington* v. *Director of Public Prosecutions* (1); *Rex* v. *Steane* (2).

With respect, the learned trial Judge did not adequately explain to the jury the position and effect of reasonable doubt. On the contrary he may have in effect taken the

(1) [1935] A.C. 462 at 482. (2) (1947) 116 L.J.K.B. 969.

question entirely out of the hands of the jury by stating, just before concluding his address:

> Dans la présente cause, je ne vois pas sur quoi pourrait porter le doute.

The jury having been misdirected, the question arises whether the conviction should be quashed and a new trial directed or the accused discharged.

Sec. 1024(1) reads as follows:

> 1024. (1) The Supreme Court of Canada shall make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect.

In *Manchuk* v. *The King* (1), it was held that "this Court has authority, not only to order a new trial, or quash the conviction and direct the discharge of the prisoner, but also to give the judgment which the Court of Appeal for Ontario was empowered to give in virtue of s. 1016(2)." The same observation would apply to sec. 1014(3), where it is provided:

> Subject to the special provisions contained in the following sections of this Part, when the Court of Appeal allows an appeal against conviction it may,—
>
> (*a*) quash the conviction and direct a judgment and verdict of acquittal to be entered; or
>
> (*b*) direct a new trial; and in either case may make such other order as justice requires.

Where, apart from the evidence held inadmissible, there is evidence from which the jury may find the accused guilty a new trial was directed: *Allen* v. *The King* (2). But where, apart from the evidence improperly admitted there is no evidence which in law would support a verdict this Court directed that the conviction be quashed and a verdict of acquittal directed: *Schwartzenhauer* v. *Rex* (3).

It is therefore important to determine whether there was any evidence which in law would support a verdict of guilty which in this case would include a finding that the appellant in distributing this pamphlet acted with a seditious intention.

The Crown asked the jury to find the intention of the accused from the language of this four-page pamphlet.

(1) [1938] S.C.R. 341.
(2) (1911) 44 Can. S.C.R. 331.
(3) [1935] S.C.R. 367.

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Nine excerpts from it were specifically embodied in the indictment. These, however, cannot be read separate and apart, but rather their meaning and effect must be determined by reading and construing them in relation to the statements in the pamphlet as a whole.

The pamphlet is entitled, as already stated, "La haine ardente du Québec, pour Dieu, pour le Christ, et pour la liberté, est un sujet de honte pour tout le Canada." In the first paragraph the reader is requested to "calmly and soberly and with clear mental faculties reason on the evidence presented in support of the above-headlined indictment." Then follows a recitation of facts and circumstances in support of the conclusions that the witnesses of Jehovah are ill-treated and their freedom to worship according to the tenets of their religion denied; and that this condition exists because members of the judiciary, police and groups of citizens are directed and controlled by the priests of the Roman Catholic Church. All of which the pamphlet declares to be contrary to the principles of Christianity and that "such blind course will lead to the ditch of destruction. To avoid it turn from following men and traditions, and study and follow the Bible's teaching; that was Jesus' advice." This is the appeal made to all who read this pamphlet. It does not disclose an intention, nor reading the pamphlet as a whole can it be concluded that it is calculated to incite persons or classes of persons to acts or conduct leading to public disorder or disturbance. On the contrary, the pamphlet stresses the view that if the plea therein contained is acted upon the existent ill-will and hatred will disappear and the interference complained of will no longer exist. In these circumstances it is difficult to conclude that the appellant in distributing and publishing this pamphlet was doing so with a seditious intention.

We are not, however, left in this case with respect to a seditious intention to the construction of the pamphlet alone. The appellant gave evidence on his own behalf. He explained that he was a minister of the witnesses of Jehovah, that hatred and ill-will already existed against

Jehovah's Witnesses and that he had read the pamphlet and distributed it, as he explained:

R. Dans le désir de faire connaitre les choses qu'il y a dans le pamphlet pour faire transformer les persécutions passées contre les témoins de Jéhovah pour que tous les gens de bonne volonté connaissent les choses . . . pas pour soulever de la haine ou pour soulever du trouble comme sont venus le dire les témoins qu'il n'y avait pas au de soulèvement.

.....

Q. Quand vous avez distribué cela, dans quel dessein était-ce?

R. Dans le dessein que les gens verraient que le monde après avoir pris connaissance de ce qu'il y a dans ce pamphlet là, voit le gouvernement et que les autorités prennent les moyens pour reformer des choses et qu'il n'y ait plus de persécutions, c'était justement dans ce dessein là pour que les hommes de bonne volonté voient pour prêcher la paix et demeurent en paix, tandis que vous les voyez parler de haine tout le temps.

The appellant specifically denied that he had any intention of creating public disorder; on the contrary he stated that he desired to establish peace between the Roman Catholics and the witnesses of Jehovah. He stated:

. . . je l'ai étudié, je l'ai lu et j'ai vu des faits.

Apart from this general declaration, he deposed that it was his own child, eleven years of age, referred to in the pamphlet who, because of her religious views, was expelled from her school.

The learned trial Judge in the course of his charge suggested that the distribution of this pamphlet was a ludicrous or strange way to effect a reconciliation. The conduct of the appellant may not only, in the opinion of the learned trial Judge, but of many others, be ludicrous or strange. That, however, is quite apart from the question whether the appellant had, upon the whole of the evidence, a seditious intention.

The good faith of the appellant in distributing this pamphlet was directly in issue under sec. 133A(*c*). He, in the course of his evidence as above indicated, adopted as true the statements in the pamphlet. The truth of the pamphlet is not a defence to a charge of sedition but if the facts set out in the pamphlet are untrue, evidence to that effect would have gone far to have shown the appellant did not act in good faith. No such evidence was adduced.

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The learned trial Judge himself observed in the course of his address:

> Nous n'approuvons pas ces actes qui peuvent être commis contre les témoins de Jéhovah, mais vous pouvez vous demander s'ils ne peuvent pas s'expliquer.

The conduct on the part of any group in Canada which denies to or even interferes with the right of the members of any religious body to worship is a matter of public concern. The pamphlet, in the conception of the appellant as he deposed, discusses such an interference. He pledged his oath that it sets forth facts and circumstances which establish this interference with repect to the rights of the Witnesses of Jehovah to worship in the Province of Quebec and that hatred and ill-will exist toward them. He believed the plea set forth in the pamphlet would remove that hatred and ill-will and the interference would cease. He therefore, as he deposed, in good faith and for that purpose published and distributed the pamphlet. No evidence was introduced to contradict any of these factors and therefore the evidence here adduced brings this position of the appellant within the provisions of sec. 133A, already quoted.

The facts as set forth in the pamphlet may be inaccurately stated, even incorrect and the comments unjustified. The statements in it may be objectionable, even repugnant to some and provoke ill-will and hatred. That, however, is not sufficient. It still remains to be proved as a fact that the accused acted with a seditious intention. Under sec. 133A that intention does not exist if the appellant's conduct was within that section and he was acting in good faith. The evidence of good faith on behalf of the defence is consistent with the intent and purpose of the pamphlet as therein expressed and no evidence has been adduced to the contrary. The onus rested upon the Crown throughout to prove beyond a reasonable doubt that the accused acted with a seditious intention and this record does not disclose any evidence that would properly sustain a verdict that the accused possessed such an intention.

The appeal should be allowed, the conviction quashed and a judgment and verdict of acquittal directed to be entered.

I would clarify my previous reasons by adding that a seditious intention must be founded upon evidence of incitement to violence, public disorder or unlawful conduct directed against His Majesty or the institutions of the Government.

This intention, which the pamphlet makes plain, I have reviewed in my previous reasons. The judges, members of the Legislature and the police were all criticized upon the same basis and with the same intention. We are here concerned only with the offence of sedition. With great respect, I am of the opinion that in all cases the intention to incite violence or public disorder or unlawful conduct against His Majesty or an institution of the State is essential. This pamphlet, particularly when considered with due regard to the provisions of section 133A, as I previously stated, does not disclose any evidence that would properly support a verdict that the accused possessed a seditious intention.

The appeal should be allowed, the conviction quashed and a judgment and verdict of acquittal directed to be entered.

LOCKE J.:—The charge upon which the appellant was found guilty was that of publishing a seditious libel. It is conceded on behalf of the Crown that the conviction must be quashed due to errors in the judge's charge, the nature of which it is unnecessary under these circumstances to discuss. For the Crown it is contended that a new trial should be ordered; for the accused that as there was no evidence of a seditious intention on his part his acquittal should be directed.

That the accused published the pamphlet in question to various persons was proven. If there is any evidence that this was done with a seditious intention, it must be found in the document itself. In so far as it may be said to indicate a seditious intent as reflecting upon the administration of justice, it reads as follows:

> What of her judges that impose heavy fines and prison sentences against them (Jehovah's witnesses) and heap abusive language upon them and deliberately follow a malicious policy of again and again postponing cases to tie up tens of thousand of dollars in exorbitant bails and keep hundred of cases pending?

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and:

> Here are some instances revealing Quebec's hatred for God's Word as well as for freedom: In Hull, E. M. Taylor, septuagenarian, of Namur, Quebec, was sentenced to seven days in prison for having distributed Bibles without a permit. In Recorder's Court his attempted explanation was curtly ended by the recorder's ordering him off to prison. Two of Jehovah's witnesses were arrested for distributing free a Bible pamphlet, charged with sedition, and sentenced to 60 days imprisonment or $300 fine. All the French Canadian courts were so under priestly thumbs that they affirmed the infamous sentence and it was not until the case reached the Supreme Court of Canada that judgment was reversed.

and:

> But regardless of this decision (an Order of McKinnon, J.) the lawless arrests of Jehovah's witnesses continue almost daily in Montreal and district, and in the Recorder's Courts they are subjected to abusive tirades. For example, in June of 1946 Recorder Leonce Plante denounced the witnesses as a "bunch of crazy nuts," set cash bail as high as $200 and threatened that if some witnesses came before him again bail would be $1,000. At present, 1946, there are about 800 charges stacked up against Jehovah's witnesses in Greater Montreal, with property bail now involved being $100,000 and cash bail more than $2,000. Court cases are adjourned time after time, to inconvenience and increase expense for Jehovah's witnesses. To have their cases heard, during one short period the witnesses had to appear on 38 different occasions.

A further reference to the courts reads:

> Why, Catholic domination of Quebec courts is so complete that in the courtrooms the imagery of the crucifix takes the place of the British Coat of Arms, which appears in other courts throughout the Dominion.

but this, in my opinion, cannot be said, in itself or when read together with the remainder of the pamphlet, to afford any evidence of a seditious intent. The pamphlet contains in addition charges that the Legislature has passed laws that are unfair to Jehovah's Witnesses and of misconduct on the part of the Provincial Police and of the Royal Canadian Mounted Police, but it is not contended that these are libels published with a seditious intent.

While in some jurisdictions as in India and the Gold Coast seditious conduct or a seditious intention have been defined by statute, this has not been done in Canada. Section 133 of the *Criminal Code* declares that seditious words are words expressive of a seditious intention and that a seditious libel is a libel expressive of a seditious intention, while section 133(*a*) declares that no one shall be deemed to have a seditious intention in certain defined circumstances. When the *Code* was drafted in 1892 and

introduced into Parliament it contained a clause defining a seditious intention in terms similar to those contained in section 102 of the *Criminal Code* which was drafted but never adopted in England and which accepted Stephen's definition, but this was rejected in the House of Commons. While the definition of a seditious intention given in the current edition of Stephen's Digest, or that of sedition given in Russell on Crimes, have been taken in various Canadian cases as accurately expressing the common law, so far as I am aware the authorities said to justify these definitions have not been closely examined to determine whether they justify these respective statements of the law nor, so far as I can ascertain has it been considered whether, in view of the alteration of the respective functions of the Sovereign and the elected representatives of the people since the days preceding the passing of the Bill of Rights in 1688, the old authorities are to be accepted as now binding.

Sir James Fitzjames Stephen's definition in substantially its present form was first enunciated by him in the first edition of his Digest of the Criminal Law of England published in 1877. In the current edition of that work the definition, in so far as it is relevant to the present question, reads:

> A seditious intention is an intention to bring into hatred or contempt or to excite disaffection against the administration of justice.

The matters are stated disjunctively and must be considered separately. The words used are "hatred or contempt against the administration of justice," which must necessarily, I think, include the manner of its administration by individual judges or others discharging judicial functions. Assuming this and the accuracy of the definition, in my opinion, the first three of the quotations from the pamphlet, without more, afford evidence proper to be submitted to a jury of an intention to excite contempt or hatred of the individuals referred to, or of the manner in which justice had been administered by them in the particular matters referred to. If, on the other hand, to Stephen's definition should be added "with the intention of inciting resistance to or disobedience of the law or the

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authority of the state," which, I think, more correctly defines the offence, I think the pamphlet affords no evidence.

In Stephen's History of the Criminal Law of England (vol. 2, p. 301), the learned author states that the first definite instance he had found of a law relating to a quasi-seditious offence was a provision of the first Statute of Westminster passed in the year 1275 (Edw. 1, cap. 34) which provided a penalty for the publishing of false news or tales whereby discord may grow between the King and his people or "the great men of the realm." In the case de *Libellis Famosis* (1), the reason for Sir Edward Coke's opinion that a libel against a magistrate or public person is a greater offence than one against a private person is thus stated: (p. 255)

> . . . for it concerns not only the breach of the peace, but also the scandal of government; for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects under him? And greater imputation to the state cannot be than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice.

Coke used the three expressions "the King", "the government" and "the state", and at a time when the judges held office at the King's pleasure. This view of the law appears to have been adopted in the case of libellous statements upon those holding other offices in the gift of the Queen as in *Udall's case* (2), where a Puritan Minister was charged with having published a libel upon certain of the bishops: the report shows that the judges considered that publishing a libel with a malicious intent against the bishops regarding the exercise of powers vested in them by the Queen was a seditious libel upon Her Majesty and the state and Udall was condemned to death. The court apparently proceeded upon the same ground in *Rex* v. *Darby* (3). At this time it is clear that, at least in the mind of King James II, the judges were his nominees expected to do his bidding. In a note to the report of the trial of *The Seven Bishops* (4), it appears that following the acquittal of the bishops the King dismissed Holloway

(1) (1606) 5 Co. Rep. 125*a*; 77 E.R. 250.
(2) (1590) 1 St. Tr. 1271.
(3) (1688) 3 Mod. 139.
(4) (1688) 12 St. Tr. 183 at 431.

and Powell JJ., each of whom had expressed the opinion that there was no libel "and would have meditated some further severity if his following reign would have allowed it." In that view of the position of the judges there was perhaps some foundation for a contention that a reflection upon their honesty or capacity was a reflection upon the King. I think the change that took place following the accession to the Throne of William and Mary in 1688 bears upon the present question. While it was not so declared in the Bill of Rights, from the time William III came to the Throne the commissions of the judges were by their terms to endure during their good behaviour and not merely at the King's pleasure, and this was expressly provided by the *"Act for the Limitation of the Crown and Better Securing the Rights and Liberties of the Subject"* (12-13 Wm. III, cap. 2). In effect the change brought about by the revolution of 1688 was to transfer the sovereignty from the King to the House of Commons. While the change came gradually the executive power of the Crown was by degrees transferred to what has been termed "a board of control chosen by the legislature out of persons whom it trusts and knows to rule the nation (Taswell-Langmead's Const. Hist. 10th Ed. p. 668). While the personal influence of the sovereign over the administration of affairs continued to be exercised in varying degrees between the revolution of 1688 and the passing of the Reform Bill in 1832, when it may properly be said that the control of the affairs of the nation was finally assumed by the elected representatives of the people, parliamentary government by means of a ministry, nominally the King's servants but really representing the will of the party majority for the time being in the House of Commons, was fully and finally established under George I and George II. During Lord North's administration, however, from 1770 to 1782, the personal influence of George III was constantly exerted, he reserving to himself all of the patronage and nominating and promoting the English and Scottish judges, appointing and translating bishops and dispensing other preferments in the Church (May Const. Hist.; i.58).

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An examination of the reports of trials for seditious conduct during the 18th century indicates a gradual change in the grounds upon which they were based. While in *R.* v. *Tutchin* (1), which was a proceeding for publishing a seditious libel upon the Ministers of the Crown and upon the Navy, Holt, L.C.J. said that it had always been looked upon as a crime to "procure animosities as to the management of" the government, and in *R.* v. *Francklin* (2), where the charge was of seditiously contriving to traduce the administration of His Majesty's government and Ministers of state and to bring "His present Majesty in his administration of the government into suspicion or ill-opinion of his liege subjects," the Attorney-General who prosecuted fell back on Coke's statement of the law as to a libel upon a public person and Lord Raymond, C.J. made it clear that he considered the reflections made upon the officers of the government were seditious as reflections upon the King, the charge against Lord George Gordon in 1787 did not proceed upon that footing. The first of the two indictments against Gordon charged him, inter alia, with intending to excite a general disaffection among His Majesty's subjects towards the administration of justice and the Attorney-General argued that his object in writing the petition in question was to call upon the prisoners to resist the execution of the laws that they had broken and to provoke His Majesty's subjects to rise in defence of the injured persons.

In *Rex* v. *Cobbett* (3), the accused was charged with publishing certain libels on the Earl of Hardwicke, Lord Lieutenant of Ireland, Lord Redesdale, Lord High Chancellor, the Honourable Francis Osborne, one of the justices of the Court of King's Bench in Ireland and Alexander Marsden, an Under-Secretary in the office of the Chief Secretary of the Lord Lieutenant. The prosecution arose out of the publication in England by Cobbett of a number of letters which were thereafter shown to have been written by the Honourable Robert Johnson, a justice of the Court of Common Pleas in Ireland. These contained, in addition to charges against the capacity of the Lord Lieutenant,

(1) (1704) 14 St. Tr. 1095 at 1096.
(2) (1731) 17 St. Tr. 626.
(3) (1804) 29 St. Tr. 1.

statements reflecting upon both the capacity and honesty of Lord Redesdale and Osborne, J. and statements attacking the conduct of the government in Ireland and of certain officers of the government. Of the six counts in the indictment two contained allegations that the publications were seditious. The second charged in part the publication of divers:

> scandalous, malicious and seditious matters and things of and concerning the said part of the said United Kingdom and the persons employed by our said Lord the King in the administration of the government of the said part of the said United Kingdom and of and concerning the said Charles Osborne, so being such justice as aforesaid and the said Alexander Marsden, so being such under-secretary as aforesaid.

and the fourth charged the accused with:

> unlawfully, maliciously and seditiously devising and intending as last aforesaid and also further unlawfully, maliciously and seditiously devising and intending to traduce, defame and vilify the said John Lord Redesdale, so being such chancellor and privy councillor.

Lord Ellenborough in addressing the jury said in part: (p. 50)

> The question for your consideration is whether this paper is such as would be injurious to the individuals and whether it is calculated to be injurious to the particular interest of the country. It is no new doctrine that if a publication be calculated to alienate the affections of the people by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime. It has ever been considered as a crime; whether it be wrapped in one form or in another. The case of the *King* v. *Tutchin* decided in the time of lord chief justice Holt has removed all ambiguity from this question; and although at the period when that case was decided great political contentions existed, the matter was not again brought before the judges by any application for a new trial.

Concluding he said: (p. 54)

> If you are of opinion that the publications are hurtful to the individuals or to the government you will find the defendant guilty.

It would appear that if Lord Ellenborough considered that the matters referred to in the second and fourth counts amounted to seditious conduct, and this does not appear to me to be clear, it was not upon the ground that to impute misconduct to the judges was a reflection upon the King but rather that they were so as calculated to alienate the affections of the people from the government or to bring it into "disesteem." While in *R.* v. *Hart and White* (1), the accused were charged with unlawfully and

(1) (1808) 30 St. Tr. 1194.

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maliciously devising and intending to bring the administration of justice in England into hatred and contempt by publishing a libel, the charge was not of seditious conduct and while Grose, J. in charging the jury said that the letters were "most wicked, gross and abominable libels" he did not suggest that they were seditious.

In Stephen's History (p. 373) it is said that since the Reform Bill of 1832 prosecutions for seditious libel have been so rare in England that they can be said practically to have ceased. I am unable to find any reported case in England since Cobbett's case in 1804 in which words or writings calculated or intended to bring either the administration of justice by the courts, or its administration by partcular judges, into contempt have been made the basis of proceedings for seditious conduct. There are, however, three cases originating in Ireland: *O'Connell* v. *R.* (1); *R.* v. *Sullivan* (2) and *The Queen* v. *McHugh* (3). The charge against Daniel O'Connell and others was that of seditious conspiracy and the trials took place at a time of great political unrest in Ireland. While this case is referred to by Stephen as one of the authorities for his definition of a seditious intention it does not, in my humble opinion, support the portion of that definition which we are now considering. The charge in O'Connell's case was of seditious conspiracy and there were eleven counts in the indictment. The proceedings were initiated in the Court of Queen's Bench in Ireland and the question of the sufficiency of the indictment was considered in the House of Lords where the opinion of Chief Justice Tindal and six of the judges was asked by the Law Lords in advance of their decision in the matter. As pointed out by Chief Justice Tindal each count of the indictment charged one conspiracy or unlawful agreement and no more and, in so far as the conspiracy "to diminish the confidence of Her Majesty's subjects in the tribunals duly and lawfully constituted for the administration of justice" was included in the counts other than the tenth, it was included with other acts as together constituting the offence said to be described in the count. The charge was that the accused did "un-

(1) (1844) 11 Cl. & F. 155.
(2) (1868) 11 Cox C.C. 51.
(3) (1901) 2 Ir. R. 569.

lawfully, maliciously and seditiously combine, conspire, confederate and agree with each other" in the manner alleged in the various counts. If any support is to be found for this part of Stephen's definition in this case, it must be derived from what was said as to the tenth count which differed from the eighth and ninth in that it charged as an offence to conspire to bring into hatred and disrepute the tribunals established by law in Ireland for the administration of justice and to diminish the confidence of Her Majesty's subjects in Ireland in the administration of the law, since here that aspect of the matter is divorced from other charges of unlawful acts. Tindal, C.J. said in part that an agreement by various persons to raise discontent and disaffection among people and to stir up hatred and ill-will between different classes and to promote feelings of ill-will and hostility in Ireland against the people of England was an illegal act, but says nothing to the effect that such conduct was seditious. As to the alleged conspiracy to bring the general administration of the law into disrepute and diminish the confidence of Her Majesty's subjects in it, he said that such an agreement was "to effect purposes in manifest violation of the law." Since the charge as to each of the counts was that the accused did unlawfully, maliciously and seditiously conspire and since to conspire together to commit any offence punishable at law undoubtedly amounted to a criminal conspiracy and was an illegal act, this does not appear to advance the matter. Lord Denman (p. 364) who said that he did not agree with the judges in thinking that there were only two objectionable counts and that there were other counts open to very serious objection said in part:

> I should be sorry to preclude myself by anything which I may now say from giving a judicial opinion against counts so generally stated and charging as an unlawful act a conspiracy to excite disaffection with the existing tribunals for the purpose of procuring a better system. I am by no means clear that there is anything illegal involved in exciting disapprobation of the courts of law for the purpose of having other courts substituted more cheap, efficient and satisfactory.

Lord Campbell (p. 403) who said that he had no doubt that there were various good counts in the indictment said that:

> A conspiracy to effect an unlawful purpose, or to effect a lawful purpose by unlawful means, is, by the common law of England, an

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indictable offence; and it is fit that, if several persons deliberately plot mischief to an individual or to the State, they should be liable to punishment, although they may have done no act in execution of their scheme.

As to the subject matter of the tenth count he said without referring to the language of the count that:

> A conspiracy generally to bring into discredit the administration of justice in the country, with a view to alienate the people from the government, would certainly be a misdemeanour.

He pointedly refrained from saying that to speak in a manner intended or calculated to bring the administration of justice into disrepute simpliciter was seditious conduct or that to conspire with others to do so amounted to a seditious conspiracy.

The second of the Irish cases is *R.* v. *Sullivan and Pigott* (1), where the charge was seditious libel of Her Majesty's government. In a lengthy charge to the grand jury Fitzgerald, J. after saying that sedition is a crime against society, nearly allied to that of treason, attempted to define the offence and in the course of doing so said that: (p. 45)

> The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion.

The charges followed by a year the uprising in Ireland as a result of the Fenian conspiracy and the learned judge said further (p. 47):

> Assuming you find the articles to be seditious—that they were published with the intent laid in the indictment—namely, to spread, stir up, and excite disaffection and sedition amongst the Queen's subjects, to excite hatred and contempt towards Her Majesty's Government and administration, to encourage, foster, and keep alive the Fenian conspiracy, to spread information and intelligence respecting that conspiracy amongst its members in this country, and to keep them and other evil-disposed persons well informed of the acts and proceedings of their brother conspirators in America

they should find a bill and, having said this, proceeded to say that while every man is free to write as he thinks fit he must not under the pretence of freedom "bring justice into contempt or embarrass its functions." Since these statements were made in a charge to a grand jury the learned judge did not refer to authorities and there is thus no indication as to what he relied upon to support the

(1) (1868) 11 Cox C.C. 44 and 51.

statement last referred to. My own view is that he intended his last remark to be read in conjunction with what he had said earlier and accordingly meant that to endeavour to promote public disorder or defiance of the law by bringing the administration of justice into contempt was seditious conduct: if he did not mean this, I think, with respect, that the statement was inaccurate as a statement of the common law.

The last of the Irish cases to which I have referred is *The Queen* v. *McHugh* (1), where the accused was charged with publishing a wicked, scandalous and malicious libel of and concerning the administration of justice, intending to bring it into contempt and to scandalize and vilify William Drennan Andrews (Andrews, J.) and the jurors by whom a certain action had been tried. The indictment did not charge that the conduct was seditious but the court did not consider that this was necessary. O'Brien, L.C.J. adopted Stephen's definition regarding conduct intended to bring the administration of the law into contempt and said that while a judge in his judicial character should always welcome fair criticism of his judicial conduct, deliberate misconduct in his judicial character must not be imputed, and that to say of a judge that he was actuated by any other motive than a simple desire to arrive at the truth and to mete out justice impartially was seditious. Other authority for this sweeping statement is not given. Murphy, J. concurred with the Lord Chief Justice, Gibson, J. stated that an intent to bring the administration of justice into contempt is a seditious intent, Madden, J. agreed and referred to the charge to the jury by Grose, J. in *R.* v. *Hart* (2). There, however, as above stated, the charge was not of publishing a seditious libel.

There are two reported cases in Canada in which it may be said that this part of Stephen's definition was applied. The first of these is *R.* v. *Brodie and Barrett* (3). The case does not appear to have been otherwise reported and the decision in this Court which quashed the conviction on the ground that the indictment did not disclose any offence does not affect the matter under consideration. Brodie

(1) (1901) 2 Ir. R. 569.
(2) (1808) 30 St. Tr. 1194.
(3) [1936] S.C.R. 188.

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and others were charged as parties to a seditious conspiracy. This was based upon their having distributed in the City of Quebec a number of pamphlets with what was said to have been a seditious intention. These pamphlets included extravagant charges against the clergy, "big business" and against practically every branch of the government which, it was said, was contaminated and improperly influenced, and said that there would be no peace so long as the unholy alliance of "commercial and political oppressive power with hypocritical religion" continued to exist. They contained also other statements particularly offensive to the Protestant and Roman Catholic clergy. The charges made were so sweeping that they may well have been considered as including an attack upon the manner in which justice was administered. The learned judges of the Court of King's Bench (Appeal Side) adopted Stephen's and Russell's statements as to what constituted seditious conduct and, apparently considering that the pamphlets were really an attack against all organized authority, upheld the conviction.

In *Duval* v. *R.* (1), all the accused, also members of Jehovah's Witnesses, were charged with seditious conspiracy in connection with the distribution of pamphlets which contained, among other extravagant statements, the following:

> Satan has become the prince of the earth and humanity is in his grip; all human institutions are in his control; the church, the financial bodies, the political governments, the bar, the bench, have become corrupt and serve the purposes of Satan, who has blinded humanity.

Following the decision of the Court in *Brodie's* case the conviction for conspiracy was sustained. It does not appear that in either of these cases in Quebec the question as to whether conduct designed to bring the administration of law into contempt without more was seditious was considered. In view of the nature of the other statements it was perhaps thought unnecessary to do so.

While the charge in *R.* v. *Burns et al* (2), was not based upon words impugning the administration of justice or the conduct of judges or other judicial officers, Mr. Justice Cave in the course of his charge to the jury read Stephen's definition of a seditious intention and said that for every

(1) Q.R. [1938] 64 K.B. 270. (2) (1886) 16 Cox C.C. 355.

proposition there laid down there was to be found undoubted authority. The charge against John Burns and the other accused, briefly stated, was of intending to incite insurrections, riots, tumults and breaches of the peace and to stir up hatred between different classes of the King's subjects and to prevent by force the execution of the laws of the realm and the preservation of the public peace. The approval expressed by Cave, J. of Stephen's definition must be considered, however, with further statements that he made to the jury such as (p. 359):

> There is undoubtedly no question at all, as the learned Attorney-General has said, of the right of meeting in public, and the right of free discussion is also perfectly unlimited, with the exception, of course, that *it must not be used for the purpose of inciting to a breach of the peace or to a violation of the law.*

and further (p. 363):

> If you think that these defendants, if you trace from the whole matter laid before you that they had a seditious intention to incite the people to violence, to create public disturbances and disorder, then undoubtedly you ought to find them guilty.

While in so far as the charge approved that portion of Stephen's definition relating to an intention to bring into hatred or contempt or to excite disaffection against the administration of justice, the statement of Cave, J. is obiter, when the charge is read as a whole it appears to me to be properly construed as saying that such an intention is seditious if intended to incite a breach of the peace or a violation of the law.

If what was said by Fitzgerald, J. in *Sullivan's* case was not intended by him to bear the meaning I suggest, it must have been based on the view of the law expressed by Coke in 1606, by Holt, L.C.J. in *Tutchin's* case in 1704, and by Lord Ellenborough in *Cobbett's* case in 1804. The passage from Lord Holt's charge to the jury, referred to by Lord Ellenborough, as reported in 14 St. Tr. at p. 1128, reads:

> To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government, than to endeavour to procure animosities, as to the management of it; this has been always looked upon as a crime, and no government can be safe without it be punished.

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It is not a matter for surprise that there has been difficulty in defining an offence the nature of which in this and in other cases has been stated in such general terms. In Donogh's History and Law of Sedition (3rd Ed. p. 5) it is said that when the report of the Select Committee regarding the proposed amendments to the Penal Code for India was presented by Stephen in 1870, he said there was a very long history about seditious libel compiled from various authorities contained in Russell on Crime ,that the law was "very vaguely expressed" and that he hoped that someone might soon reduce to a few short sentences the great mass of dicta on the subject. This he himself attempted to do seven years later in his Digest. Writing of this in his History of the Criminal Law published in 1883 (p. 298) Stephen, after referring to the contrasting views of the position of the Sovereign, the one that he is the agent and servant of his people, the other that being the superior of his subjects and by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, said (p. 300):

> These are the extreme views each of which has had a considerable share in moulding the law of England with the practical result of producing the compromise which I have tried to express in the articles of my Digest. It has no claim to that quasi-mathematical precision, which even in the most careful writings is rarely, if ever, attainable, but I think it is sufficiently distinct to afford a practical guide to judges and juries in the discharge of duties which are now seldom imposed upon them. I will now attempt to sketch the history of the various legal controversies which have for the present ended in this compromise.

I think when the cases are examined the sense in which the word "compromise" is intended is not clear since the portion of the definition we are now concerned with appears to be founded on the conception of the law stated as aforesaid in *Cobbett's* case, which in turn appears to be consistent with the view expressed by Sir Edward Coke in 1606.

In his charge to the jury in *R.* v. *Lambert and Perry* (1), Lord Ellenborough said that the prosecution treated the language complained of as a libel upon the person of the King and upon his administration of the government of the Kingdom and that if it meant that His Majesty during his reign had taken an erroneous view of the interests of

(1) (1810) 31 St. Tr. 335 at 363, 367.

the country and imputed nothing but honest error, he was not prepared to say that that of itself was libellous. If, however, it be assumed for the purpose of argument that to intend to reflect upon the wisdom or judgment of the occupant of the Throne by words or writings be a seditious intention, to impugn the honesty or capacity of a judge or of a recorder or of several of them cannot, in my opinion, be any evidence of such an intention. Judges of the Superior Courts in England, as in Canada, are appointed by patents from the Crown and hold office during good behaviour. While thus appointed in His Majesty's name, they have been for a very long time indeed chosen by the government in power, a Cabinet chosen from the elected representatives of the party holding the majority in Parliament. In accordance with long established constitutional practice the occupant of the Throne, and in Canada his representative, acts on the advice of his Ministers and it appears to me quite impossible to suggest that a libel upon one chosen to administer justice in this manner can conceivably be considered as a reflection upon the Sovereign. If it were so in the case of the judges, it would presumably be so in the case of all persons holding offices under patents from the Crown upon the principle upon which Udall was convicted in the year 1590, such as certain of the dignitaries of the established Church in England and Ministers of His Majesty's Provincial governments in Canada. Is it to be said that to adversely criticize the conduct or impugn the motives of the occupants of such an office would evidence an intention to reflect in any manner upon the occupant of the Throne? In the case of the recorders in the Province of Quebec appointed by the Lieutenant-Governor in Council under the provisions of the *Cities and Towns Act* (R.S.Q. 1941, c. 233, s. 643), it appears to me equally impossible to say that a reflection upon their honesty or capacity is a reflection upon the Sovereign. Assuming Coke's statement accurately declared the common law of England at that time, the reason which formed its basis has disappeared with the changed status of the judges and the manner in which they are chosen and

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appointed and this is, in my opinion, no longer the law either in England or Canada: cessante ratione legis cessat ipsa lex.

For this reason, I think also it is error to say that at the present time to reflect upon the capacity or honesty of one or more judges or recorders in a manner calculated to bring them and the manner in which the law is administered by them into contempt is seditious as a reflection upon His Majesty's Ministers or the government responsible for their selection and appointment. Taswell-Langmead (10th Ed. p. 740), speaking of the period following the passing of the Bill of Rights, says that the press soon became the favourite instrument of party warfare and that each party when in power endeavoured to crush its opponents by prosecuting as seditious libels all publications which supported the opposition. There were from time to time up to the period shortly prior to 1832 some prosecutions of this nature in England but there have been, so far as I can find, none such since that date. The right of free public discussion upon all matters affecting the state and its government, subject only to the restraint imposed by the laws both civil and criminal as to defamation, and in the case of the administration of justice to the law as to contempt of court, has long since become firmly established. It is the right of His Majesty's subjects to freely criticize the manner in which the government of the country is carried on, the conduct of those administering the affairs of government and the manner in which justice is administered, subject to these restraints. The criminal law as to defamatory libel is declared in Canada in the *Criminal Code*. Section 317 defines a defamatory libel and section 324 declares that no one commits an offence by publishing any defamatory matter which he, on reasonable grounds, believes to be true and which is relevant to any subject of public interest, the public discussion of which is for the public benefit. The existence of this right of public discussion is wholly inconsistent with a rule of law that judges or others administering justice or Ministers of the Crown are immune from criticism on the ground that to impugn their honesty or capacity is a reflection upon the government. It is very much too late

in the day to say that "if a publication be calculated to alienate the affections of the people by bringing the government into disesteem, whether the expedient be by ridicule or obloquy" it is a crime.

The question remains whether it is accurate to say that "a seditious intention is an intention to excite disaffection against the administration of justice" as stated by Stephen. This, in my opinion, depends upon the meaning to be assigned to the word "disaffection." The word is defined in the Oxford English Dictionary as "absence or alienation of affection or kindly feeling, dislike, hostility": and in a different sense "political alienation or discontent; a spirit of disloyalty to the government or existing authority." When the Indian Penal Code was drafted in 1870 Stephen advised against defining the word, saying that it was difficult to define but impossible to mistake. Donogh (3rd Ed. p. 72) reports him as saying: "and so courts of equity would not define fraud lest fraud were committed outside the definition." Only if disaffection be construed as meaning resistance to or disobedience of the law or the authority of the state is it accurate, in my opinion. The statements complained of in the present matter cannot be said to evidence any such intention.

I concur in the opinion of my brother Kellock that that portion of Stephen's definition which declares that "to intend to promote feelings of ill-will and hostility between different classes of such subjects" is a seditious intention, without more, is inadequate as a statement of the common law and I agree with his conclusion upon this aspect of the matter.

I would allow this appeal, quash the conviction and direct the acquittal of the accused.

The dissenting judgment of Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.:—On a consideration of all the evidence given at the trial of the appellant and of the charge to the jury of the learned trial judge, I am in agreement with, what I understand to be, the unanimous opinion of the court, that the conviction of the appellant must be set

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aside; and I think that the learned counsel for the Crown was right in his decision not to argue that it should be upheld. The question debated before us was as to whether we should order a new trial or direct a verdict of acquittal to be entered.

No relevant evidence tendered by the Crown appears to have been rejected and if, as the appellant contends, on the evidence in the record no jury properly instructed could reasonably have convicted him of the offence charged, it would not, I think, be proper to direct a new trial.

There was ample evidence in the record that the appellant had read the pamphlet, which the Crown submits is a seditious libel, and had distributed copies to several persons. There is no evidence of a seditious intention on the part of the appellant except such as is furnished by the pamphlet itself. It is scarcely necessary to say that the words of a document published with knowledge of its contents may in themselves furnish ample evidence of a seditious intention.

A great portion of the able arguments addressed to us was directed to the question whether the document was, on its face, capable of supporting the inference that it was intended to promote feelings of ill-will and hostility between different classes of His Majesty's subjects and if so whether such an intention, without more, is a seditious one. In my opinion it would have been open to the jury to infer from the words of the document that it was intended to promote feelings of ill-will and hostility between different classes of His Majesty's subjects; and if such intention is, of itself, a seditious intention it would, I think, be proper to direct a new trial as, while the question whether such an inference could be drawn would be for the Judge, the question whether it ought to be drawn would be for the jury.

Undoubtedly several text-writers of high authority do give as one of several definitions of a seditious intention, the definition referred to above. To the definitions quoted in the reasons for judgment of other members of the court may be added that in Halsbury's Laws of England (2nd Edition) Volume 9, page 302: "A seditious intention is

an intention . . . to promote feelings of ill-will and hostility between different classes of such subjects."

The obvious objection to accepting this as a sufficient definition, unless we are bound by authority to do so, is that such acceptance would very seriously curtail the liberty of the press and of individuals to engage in discussion of any controversial topic. It is not easy to debate a question of public interest upon which strong and conflicting views are entertained without the probability of stirring up, to a greater or less degree, feelings of ill-will and hostility between the groups in disagreement.

The reasons of my brother Kellock bring me to the conclusion that the definition quoted above ought not to be accepted without qualification, and that before a writing can be held to disclose a seditious intention by reason of being calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects it must further appear that the intended, or natural and probable, consequence of such promotion of ill-will and hostility is to produce disturbance of or resistance to the authority of lawfully constituted government. I do not think that, on the evidence in the record in this case, a jury could properly find that the pamphlet in question was calculated to have such effect by reason of its tendency to promote such feelings of ill-will between classes. If the words of the pamphlet did not disclose any other sort of seditious intention I would not favour the ordering of a new trial.

There is, however, another definition of seditious intention found in many of the text-writers which in my opinion requires consideration, although comparatively little stress was laid upon it in argument.

The definition in Halsbury's Laws of England (2nd Edition) Vol. 9, page 302, commences as follows:

> A seditious intention is an intention—(1) to bring into hatred or contempt, or to excite disaffection against the King or the Government and Constitution of the United Kingdom, or either House of Parliament, or the administration of justice.

For the purpose of considering its application to the case at bar this definition may be shortened to read, "A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the administration of justice."

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This definition is qualified by the paragraph which follows:

> But an intention is not seditious if the object is to show that the King has been misled or mistaken in his measures, or to point out errors or defects in the Government or Constitution with a view to their reformation, or to excite the subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, with a view to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of the King's subjects.

It will be observed that this definition corresponds almost exactly with that in Stephen's Digest of the Criminal Law, 8th Edition, pages 94 and 95, which in turn is very similar to that set out in Section 102 of the Draft Code. The relevant words of the definition in the Draft Code are:

> A seditious intention is an intention to bring into hatred or contempt or to excite disaffection against . . . the administration of justice . . .: Provided that no one shall be deemed to have a seditious intention only because he intends in good faith . . . to point out errors or defects . . . in the administration of justice, with a view to the reformation of such alleged errors or defects.

In the report of the Commissioners on the Draft Code, at page 20, they make the following statement: "Section 102, relating to seditious offences, is taken without alteration from the Bill. It appears to us to state accurately the existing law as stated in the authorities noted in the margin of the Draft Code. On this very delicate subject we do not undertake to suggest any alteration of the law."

The marginal note to section 102 of the Draft Code is as follows:

> This is as accurate a statement of the existing law as we can make. See 60 Geo. 3 & I Geo. 4, c. 8. *O'Connell* v. *R.* 11, Cl. & F. 155,234. *R.* v. *Lambert & Perry,* 2 Camp. 398 *R.* v. *Vincent,* 9 C. & P. 91. We are unable to assent to the proposition that 33 Geo. 3, c. 29 (Irish Act) is declaratory of the common law.

The two statutes to which reference is made in the marginal note and the cases of *R.* v. *Lambert and Perry* and *R.* v. *Vincent,* do not assist in the solution of the question with which we are immediately concerned.

In *O'Connell* v. *Reg.* (1), the 8th, 9th and 10th counts in the indictment are set out at pages 163 and 164 of the report as follows:

> 8th Count—That the said defendants, unlawfully and seditiously intending, etc., to bring into disrepute and to diminish the confidence of Her Majesty's subjects in the tribunals duly and lawfully constituted

(1) (1844) 11 Cl. & F. 155.

in Ireland for the administration of justice; on, etc. with force, etc. at etc., unlawfully, maliciously and seditiously did combine, conspire, confederate, and agree with each other and with divers other persons whose names are to the jurors unkown, to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice, and to diminish the confidence of Her said Majesty's liege subjects in Ireland in the administration of the law therein, with the intent to induce Her Majesty's subjects to withdraw the adjudication of their differences with and claims upon each other from the cognizance of the said tribunals by law established and to submit the same to the judgment and determination of other tribunals to be constituted and contrived for that purpose, in contempt, etc.

The 9th count was the same as the 8th, omitting from the introductory part the words "in Ireland," after the words "duly and lawfully constituted"; and in the last part of the count, after the words "administration of the law therein," omitting the allegation as to withdrawing the adjudication of differences, and substituting the following: "and to assume and usurp the prerogative of the Crown in the establishment of Courts for the administration of the law, in contempt," etc.

The 10th count was the same as the 8th in the introductory part, but the charge was in general terms, that the defendants unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other and with divers other persons whose names are unknown, to bring into hatred and disrepute, the tribunals by law established in Ireland for the administration of justice, and to diminish the confidence of Her Majesty's liege subjects in Ireland in the administration of the laws therein, in contempt, etc.

It will be observed that in each of these counts the intention "to bring into hatred and disrepute the tribunals by law established for the administration of justice and to diminish the confidence of Her Majesty's subjects therein" was described as seditious.

The first question submitted by the House of Lords for the consideration of the Judges is set out at page 231 of the report as follows:

Are all or any, and if any, which, of the counts in the indictment bad in law; so that if such count or counts stood alone in the indictment, no judgment against the defendants could properly be entered up on them?

The answer to this question insofar as it relates to Counts 8, 9 and 10 is found at pages 235 and 236. The judges were unanimously of opinion that these three counts were good in law. There is nothing in the reasons of the Law Lords who by a majority of three to two rejected the final result arrived at by the majority of the judges which throws any doubt upon the opinion that the counts set out above were good in law and that, had they stood alone

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in the indictment, judgment against the defendants could properly have been entered up on them. While, as has been pointed out, this case was one of seditious conspiracy it appears to me to furnish support for the view that an intention to bring the administration of justice into hatred and disrepute and to diminish the confidence of His Majesty's subjects therein is a seditious intention.

In Odgers on Libel and Slander, 6th edition at page 432, there is the following statement:

> We have already dealt with such contemptuous words as are defamatory of the Courts of Law, or of individual Judges, or of the administration of justice as a whole; *such words are seditious and punishable as such.* (see ante p. 426).

The reference to page 426 is to the following passage:

> It is a misdemeanour to speak or publish of any Judge of a Superior Court words which would be libellous and actionable per se, if written and published of any other person holding a public office.
>
> It is also a misdemeanour to speak or publish words defamatory of any Court of Justice or of the administration of the law therein, with intent to obstruct or invalidate its proceedings, to annoy its officers, to diminish its authority and dignity or to lower it in public esteen.
>
> Such words, whether spoken or written, are punishable on indictment or information with fine or imprisonment or both. They are also in every such case a contempt of Court punishable summarily by the Court itself with fine or commitment, as to which see post, Chap. XX.
>
> It is immaterial whether the words be uttered in the presence of the Court, or at a time when the Court is not sitting and at a distance from it (Crawford's Case, 13 Q.B. 613; 18 L.J.Q.B. 225); nor need they necessarily refer to the Judges in their official capacity.
>
> But there is no sedition in just criticism on the administration of the law. "A writer may freely criticize the proceedings of courts of justice and of individual judges—nay, he is invited to do so, and to do so in a free, and fair, and liberal spirit. But it must be without malignity, and not imputing corrupt or malicious motives" (per Fitzgerald, J., in *R.* v. *Sullivan*, 11 Cox, C.C. at p. 49). "It certainly is lawful, with decency and candour, to discuss the propriety of the verdict of a jury, or the decisions of a judge, . . . but if the extracts set out in the information contain no reasoning or discussion, but only declamation and invective, and were written, not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country, "then the defendants have transgressed the law, and ought to be convicted (per Grose, J., in *R.* v. *White and Another*, 1 Camp. 359, n).
>
> To assert that a Judge had been bribed, or that in any particular case he had endeavoured to serve his own interest, or those of his friends or of his party, or wished to curry favour at Court, or was influenced by fear of the Government or of any great man, or by any motive other than a simple desire to arrive at the truth and to mete out justice impartially, is seditious.

The passage just quoted is contained in the chapter dealing with "seditious words" and it is, I think, clear that in the opinion of the learned author words calculated to bring the administration of justice into hatred or contempt are punishable either on indictment as being a seditious libel or summarily as being a contempt of court.

The case of *R.* v. *White and Another* 1 *Camp.* 359 (*n*), mentioned above, is more fully reported *sub nom R.* v. *Hart and White* (1).

It appears that one Chapman and one Bennet had both been tried for murder before Leblanc, J. and a jury and had been found not guilty. The defendants Hart and White published letters criticizing these verdicts and reflecting in disparaging terms on the Judge and members of the jury.

They were tried upon an information preferred by the Attorney-General containing several counts. The substance of the charge was that the accused "intending to bring the administration of justice and the trial by jury as by law established in England into hatred and contempt among the liege subjects of our said Lord the King and to raise and excite disaffection and discontent in the minds of the liege subjects of our said Lord, the King . . . did publish a certain scandalous, malicious and defamatory libel of and concerning the said respective trials of the said William Chapman and Thomas Bennett and of and concerning the verdicts aforesaid according to the tenor and effect following, (the libel was here set out) to the great scandal and disgrace of the administration of public justice in England."

Other counts included an allegation of intention "to traduce, defame and vilify the said Sir Simon Leblanc and the jurors and to bring the said Sir Simon Leblanc and the jurors into public hatred and contempt."

A reading of the charge to the jury of Grose, J. which is set out in full commencing at page 1190 of the Report makes it clear that in his opinion the accused ought to be found guilty if the jury reached the conclusion that the document in question was published with the intention of maligning and vilifying the administration of justice

(1) (1808) 30 St. Tr. 1131.

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in the country and casting a stigma upon it, and there is nothing in the charge to suggest that there was any further ingredient necessary to complete the offence.

In Russell on Crimes, 9th Edition at page 87, the definition is given in the following words:

> Sedition consists in acts, words, or writings intended or calculated, under the circumstances of the time, to disturb the tranquility of the State, by creating ill-will, discontent, disaffection, hatred, or contempt towards the person of the King, or towards the Constitution or Parliament, or the Government, or the established institutions of the country, or by exciting ill-will between different classes of the King's subjects, or encouraging any class of them to endeavour to disobey, defy, or subvert the laws or resist their execution, or to create tumults or riots, or to do any act of violence or outrage or endangering the public peace.
>
> When the offence is committed by means of writing, or print, or pictures, it is termed seditious libel.
>
> The offence is a misdemeanour indictable at common law.

It will be observed that this definition does not make any express reference to the courts or to the administration of justice, although the courts would presumably be included in the expression "the established institutions of the country." At page 88, the writer says,

> According to the older authorities it is seditious wantonly to defame or indecorously to calumniate that economy, order and constitution of things which make up the general system of the law and government of the country; and more particularly to degrade or calumniate the person and character of the sovereign, or the administration of his government by his officers and ministers of state, or the administration of justice by his judges, or the proceedings of either House of Parliament.

I am not able to determine whether, by the form of expression used, the learned author intends to convey the opinion that an intention to degrade or calumniate the administration of justice is no longer in law regarded as seditious; but I am inclined to think that he did not intend to express this view, as the text immediately continues with the statement that the present view of the law is best stated in *R.* v. *Burns* (1). The learned author proceeds to quote at length from the charge to the jury of Cave, J., in that case, including the following passage at page 92, in which Cave, J. was quoting with approval from the charge of Fitzgerald, J. to the jury in *Reg.* v. *Sullivan* (2),

> Viewing the case in a free, bold, manly and generous spirit towards the defendant, if you come to the conclusion that the publications indicted are not seditious libels, or were not published in the sense imputed to

(1) (1886) 16 Cox C.C. 355. (2) (1868) 11 Cox C.C. 44.

them you are bound, and I ask you in the name of free discussion, to find a verdict for the defendant. I need not remind you of the worn-out topic to extend to the defendant the benefit of the doubt. If on the other hand, on the whole spirit and import of these articles, you are obliged to come to the conclusion that they are seditious libels, and that their necessary consequences are to excite contempt of Her Majesty's Government, or to bring the administration of the law into contempt and impair its functions—if you come to that conclusion either as to the articles or prints, or any of them, then it becomes your duty honestly and fearlessly to find a verdict of conviction upon such counts as you believe are proved.

It will be observed that in the passage quoted the necessary consequences, which the learned judge said would render the publications seditious libels, are stated disjunctively and that one of them is "to bring the administration of the law into contempt and impair its functions."

In Archbold's Criminal Pleading, Evidence and Practice 32nd Edition at page 1238, it is said: "Libels on a judge or a jury may, in certain events be seditious," and at page 1146, "to impute corruption to judges has been said to be seditious."

Many of the cases cited by the respective authors in support of the definition of "seditious intention", above referred to, i.e., "to bring into hatred or contempt or to excite disaffection against the administration of justice", do not touch upon the point now under consideration but deal only with other branches of the definition of seditious intention. I have not found in any of the cases cited any expression which appears to me to be inconsistent with the above definition or to suggest that it omits any essential ingredient. The definition appears to me to have the support of the text-writers mentioned above, of the Commissioners who reported on the Draft Code (Lord Blackburn, Barry, J., Lush, J. and Sir James Stephen, later Stephen, J.) of Grose, J. in *R.* v. *White and Hart* (*supra*), of Fitzgerald, J. in *R.* v. *Sullivan* (*supra*), of Cave, J. in *R.* v. *Burns* (*supra*) and of a court consisting of Lord O'Brien, L.C.J. and Murphy, Gibson and Madden, J.J. in *Reg.* v. *M'Hugh* (1).

The last mentioned case appears to me to be directly in point. Two men had been indicted and convicted before Andrews, J. and a jury on a charge of conspiracy and

(1) (1901) 2 Ir. R. 569.

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M'Hugh was charged with publishing a libel in regard to their trial. The information set forth that the defendant M'Hugh,

being an evil disposed person, wickedly and maliciously contriving and intending to bring the administration of justice in this kingdom into contempt, and to scandalize and vilify the said William Drennan Andrews and the jurors by whom the said issue was so tried as aforesaid, and to cause it to be believed that the said jurors had violated their oaths as such jurors, on the 16th day of December, in the year aforesaid wickedly and maliciously did print and publish, and cause to be printed and published, a certain false, wicked, scandalous and malicious libel of and concerning the administration of justice in this kingdom, and of and concerning the said Right Honourable William Drennan Andrews and the jurors by whom the said issue was so tried as aforesaid, according to the tenor and effect following:

> (Here followed the libel, which in substance and effect, was a scandalous and malicious libel, concerning the administration of justice in Ireland, and concerning the Judge and jury who had tried the case.)

to the great scandal and reproach of the administration of justice, in contempt of our Lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her Crown and dignity.

There were other counts in the information but they were substantially to the same effect.

It will be observed that neither the word "seditious" nor any similar word was used anywhere in the information. The matter came before the court on a demurrer by the Attorney General to pleas made by the accused which might have been good in a case of defamatory libel but not in a case of seditious libel and one of the questions for the court was whether or not the information charged a seditious libel. The following passages appear to me to be relevant to the point under consideration; at page 577 in the judgment of O'Brien, L.C.J.:

> The question remains, are the libels complained of seditious libels? The word "seditious" is certainly not used in the information, but we are all of opinion that it is not a word of art, and that, if the substance of what is a seditious libel is stated, this is enough. In the long history of seditious libels it has never been decided that it was essential to employ in the pleading the words "seditious" or "seditiously". On the contrary, there are cases in the books, which have been referred to during the argument in which, though the prosecutions were plainly for seditious libels, the words "seditious" or "seditiously" were not used.

At the same page:

> Have we then in this case, in substance, the essential elements of a seditious libel? No doubt the words complained of are defamatory, but have we in the averments what is equivalent to the allegation of a seditious intent? This brings me to the consideration of what is the

legal definition of a seditious intent. It is correctly stated in the late Mr. Justice Stephen's work on the criminal law. He there defines a "seditious intention" to be "an intention to bring into hatred or contempt, or to excite disaffection against, the person of Her Majesty, her heirs or successors, or the Government and Constitution of the United Kingdom as by law established, or either Houses of Parliament, or *the administration of the law*" . . . I stop here and do not give the full definition. I give only the relevant portion. An intention, then, to bring into hatred or contempt the administration of the law falls within the definition of seditious intent.

This being so, I turn to the information to ascertain whether what constitutes a seditious intent is sufficiently alleged therein. I find that it is alleged "that Patrick A. M'Hugh, wickedly and maliciously contriving and intending to bring the administration of justice in this Kingdom into contempt," did publish the libel complained of. This is the intent alleged against the defendant, and it is one of the intents which make libellous matter seditious. I am therefore of opinion that what is complained of is a seditious libel.

At page 579:

As I have already stated, if these articles refer at all to Mr. Justice Andrews, it is in his judicial character that they refer to him. In his private personal character a Judge receives no more protection from the law than any other member of the community at large; and even in his judicial character, he should always welcome fair, decent, candid, and I would add, vigorous criticism of his judicial conduct; but, on the other hand, deliberate misconduct in his judicial character must not be imputed. If a Judge deliberately misconducts himself in his judicial office, the Constitution has provided a remedy—his removal.

The law in this respect is correctly stated by Mr. Odgers in his book on libel. He says to assert that a judge has been bribed, or that in any particular case he had endeavoured to serve his own interests, or those of his friends, or his party, or had wished to curry favour at Court, or was influenced by fear of the Government, or of any great man, or by any other motive than a simple desire to arrive at the truth, and to mete out justice impartially, is seditious.

At page 584 in the judgment of Gibson, J.:

An intent to bring the administration of justice into contempt is a seditious intent, and not the less so because it is associated with aspersions on the Judge or jury who tried a particular case. The information here alleges what the law defines to be a seditious intent. The thing is there though the word is not.

At page 587 in the judgment of Madden, J.:

Probably none of the attempts which have been made to define a seditious intention, or rather to enumerate various kinds of intention which the law regards as seditious, are completely satisfactory or exhaustive. But it is clear that an intention to bring the administration of justice into hatred or contempt amounts to such an intention. The intention is, in each instance, something different from the defamatory writing. The character of the writing may be strong, and in some cases irresistible, evidence of the existence of an intention to bring the administration of justice into contempt. In other cases a jury might fairly believe that a charge was brought, against persons engaged in the conduct

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of a trial, for the purpose, not of vilifying, but of purifying, the administration of justice. In such a case the defendant ought to be acquitted, because the intention, which is the essential part of the offence, was not proven as charged.

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In my opinion at Common Law an intention to bring into hatred or contempt or to create disaffection against the administration of justice is a seditious intention and I do not find anything in the provisions of the *Criminal Code* to negative this view. Section 133 (4) of the *Criminal Code* defines one type of seditious intention but the opening words of that subsection "Without limiting the generality of the meaning of the expression 'seditious intention'", make it clear that in the view of Parliament that definition is not exhaustive.

In section 133 (*a*) it is provided that "no one shall be deemed to have a seditious intention only because he intends in good faith . . . to point out errors or defects . . . in the administration of justice." The wording of this proviso seems to indicate the view of Parliament that under some circumstances an attack on the administration of justice is to be regarded as seditious.

If it is suggested that there is an inconsistency in rejecting the definition of seditious intention contained in the Draft Code as incomplete insofar as it deals with the intention to create ill-will and hostility between different classes of His Majesty's subjects and accepting it as accurate insofar as it deals with the intention to bring the administration of justice into hatred and contempt, the answer is that, in my view, the former branch of the definition is not supported by authority, whereas the latter is.

It is true that strictly speaking none of the authorities to which I have made reference are binding upon this court but I do not think we should disturb a current of authority, which appears to me to extend over many years and against which I can find no reported judgment, unless we were clearly of the opinion that such authority was wrong in principle. Far from entertaining any such view, it appears to me that it is right in principle. It is easy to imagine many cases where an intention to create ill-will and hostility between different classes of His Majesty's subjects would not include the intention, or have the probable effect, of an interference with the due processes of lawfully constituted authority; but it seems to me that

such an interference must of necessity result from bringing the administration of justice into hatred or contempt or exciting disaffection against it.

It is not necessary to adopt everything that was said by Wilmot, J. in his opinion in *Almon's* case (1), which, although never delivered as a judgment of the court, has been quoted and accepted as a high authority in many subsequent judgments, but the following passage from page 259 appears to me to be relevant.

> The Constitution has provided very apt and proper remedies for correcting and rectifying the involuntary mistakes of judges, and for punishing and removing them for any voluntary perversions of justice. But if their authority is to be trampled on by pamphleteers and newswriters, and the people are to be told that the power, given to the Judges for their protection, is prostituted to their destruction, the Court may retain its power for some little time, but I am sure it will instantly lose all its authority; and the power of the Court will not long survive the authority of it.

The opinion in *Almon's* Case was prepared in a case of attachment for contempt and not in a case of indictment for libel. It has been suggested that a publication which amounts to a criminal contempt of the court by "scandalizing the Court" should be proceeded against, if at all, as a contempt and not as a seditious libel. It seems to me that where the nature of a publication appears to the Attorney-General to merit the institution of criminal proceedings against its publisher it is his responsibility to decide whether the matter should be brought before the courts by way of contempt proceedings or by indictment for seditious libel.

There is, I think, much to be said in favour of the view that, where it is intended to commence criminal proceedings against a person for publishing matter said to be calculated to bring the administration of justice into hatred and contempt, it is better that such proceedings should be taken by way of indictment so that the accused may have the benefit of a trial by jury, rather than by summary proceedings for contempt, in which, it has sometimes been said, the judge is at once judge of the law, of the fact, of the intention and of the sentence, and his decision is without any power of review. (See Sir John Fox, Contempt of Court (1927) page 42).

(1) (1765) Wilm. 243; 97 E.R. 94.

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It cannot be successfully argued that because a matter appears to be a criminal contempt of Court it may not also be a seditious libel. Section 15 of the *Code* recognizes that an act or omission may constitute several different offences and this was true also at Common Law (vide, e.g. *Wemyss* v. *Hopkins* (1), *Regina* v. *King* (2).

To briefly summarize my conclusions, I am of opinion that an intention to bring the administration of justice into hatred or contempt or to excite disaffection against it is a seditious intention; that an intention in good faith to point out errors or defects in the administration of justice is not a seditious intention and that it is the right of every citizen to criticize freely and vigorously the proceedings of the courts of justice, the decisions of the judges, and the verdicts of juries.

I think that in the case at bar, and in the case of every charge of publishing a seditious libel, where the gravamen of the charge is the alleged intention to bring the administration of justice into hatred and contempt, the question to be left to the jury is whether the real intention of the person charged was to vilify the administration of justice, destroy public confidence therein and to bring it into contempt; or whether the publication, however vigorously worded, was honestly intended to purify the administration of justice by pointing out, with a view to their remedy, errors or defects which the accused honestly believed to exist. As in all cases tried by a jury, there is a preliminary question for the Court whether there is any evidence on which a jury could reasonably find the existence of the guilty intention. If in the Court's opinion there is such evidence the case should be left to the jury, who after being instructed as to what is and what is not a guilty intention should be reminded that if they are in doubt as to the true intention of the accused it is their duty to acquit him.

As, in my opinion, there should be a new trial in the case at bar, it is not desirable that I should say more than is necessary about the evidence in the record. It appears to me that the words of the pamphlet furnish evidence upon which a properly instructed jury could reasonably

(1) (1875) 10 Q.B. 378. (2) (1897) 1 Q.B. 214.

find the existence of an intention to bring the administration of justice into hatred or contempt or to create disaffection against it.

I have particularly in mind the following two passages:

> . . . et que faut-il penser de ses juges qui imposent de lourdes amendes ainsi que des sentences de prison à ces personnes, qui les invectivent d'un langage injurieux, et qui suivent délibérément une politique malicieuse en ajournant maintes et maintes fois les causes, afin de retenir engagé des dizaines de milliers de dollars en cautionnements exhorbitants, et afin de garder des centaines de causes pendantes? Ces législateurs, ces corps de police et ces juges du Québec montrent-ils ainsi leur amour pour la liberté? Honnêtement, croyez-vous que ces fruits sont le produit de l'amour, ou celui de la haine? "Vous les connaîtrez donc à leurs fruits." (Matthieu 7:20, Crampon).
>
> Toutes les cours Canadiennes Françaises étaient tellement sous l'influence sacerdotale qu'elles confirmèrent la sentence infâme, . . .

While, as has been already mentioned, the greater part of the argument before us was devoted to other aspects of the case, the two passages, just quoted, were set out verbatim in the indictment, were mentioned in the charge to the jury of the learned trial Judge and were dealt with both by Counsel for the Crown and by Counsel for the Appellant in their Factums and in their oral argument.

The first quoted passage appears to me to be a direct imputation to the Judges of the Province of Quebec, not of mistake but of malice, in the performance of their judicial duties. The last quoted passage appears to me to fall directly within the passage from Odgers which was approved by O'Brien, L.C.J. in *R.* v. *M'Hugh* in the quotation set out above. It is, I think, an assertion that all those Courts in Quebec which dealt with a certain case affirmed a sentence, described not as erroneous but as infamous, and did so because they were influenced by something other than a simple desire to arrive at the truth and to mete out justice impartially.

For all of the above reasons, I am of opinion that the Appeal should be allowed, the conviction set aside and a new trial ordered.

Appeal allowed, conviction quashed and acquittal directed.

Solicitor for the appellant: *W. G. How.*

Solicitor for the respondent: *A. Lacourcière.*

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*June 16, 19, 20, 21

*Nov 20

BERTHA MAYNARD (*Plaintiff*) .....APPELLANT;

AND

CECIL MAYNARD (*Defendant*) .....RESPONDENT,

AND

RUTH LILLIAN MARTIN .....DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Divorce—Alimony and Maintenance—Consent judgment to lump sum payment—Subsequent application to vary not within jurisdiction of Court to grant—Res judicata—Estoppel—The Matrimonial Causes Act, R.S.O. 1937, c. 208, ss. 1, 2.

A wife suing for divorce authorized her solicitor to accept a lump sum in full of all claims for alimony and maintenance. The trial judge queried the prudence of such an arrangement and being assured by her counsel, granted a decree *nisi* and endorsed on the record that on consent of the parties judgment was granted in the sum agreed upon. In the formal judgment the Court ordered payment of the sum as and for alimony and maintenance and the words "or until this Court doth otherwise order" were added. Subsequently the wife alleging, that the agreement as to the lump sum payment had been made without her consent and had been obtained by fraud on the part of her husband, brought an action in damages or in the alternative, for an order to set aside that part of the judgment and permit her to apply in the divorce action for an award of such alimony and maintenance as she should receive. This action (tried by Mackay J.) was dismissed, it being held that there was no fraud proven and that the wife had authorized acceptance. On appeal that decision was affirmed.

Before the judgment of Mackay J. was rendered a motion was made in the pending divorce suit to rescind or vary the Order as to maintenance and alimony and for an order directing the husband to secure to the wife such gross or annual sum of money, or in addition thereto, or in substitution therefor, to pay such monthly or weekly sum as deemed reasonable by the Court and for an inquiry as to the respective assets of the parties. The trial of an issue having been ordered and an appeal from that Order taken, the Court of Appeal held that there was no jurisdiction in the Court to award a lump sum payment except by consent of the parties but that having been given, it had power to make the award but not to vary the amount thereafter.

Held: The real issue before Mackay J. was whether, notwithstanding the agreement under attack and the paragraph of the judgment which carried the effect of it into the judgment *nisi,* there still remained a right to claim maintenance upon the making of the final decree. That question having been conclusively determined against the

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

plaintiff, she could not relitigate the matter. *Green* v. *Weatherill* [1929] 2 Ch. 213 at 221, 222. *Hoystead* v. *Commissioner of Taxation* [1926] A.C. 155 at 165.

Held: also, that the proposition that a judgment cannot take effect as *res judicata* or an estoppel unless it was given before the proceedings in which it is relied upon were commenced must be rejected. *Law* v. *Hansen* 25 Can. S.C.R. 69 at 76, applied.

Per: Rand and Kellock JJ.:—It is open to the parties to agree, as part of the adjudication of divorce, to waive the claim for alimony and maintenance in consideration of a lump sum allowance. The impugned provision in the order *nisi* constitutes evidence of the agreement and may be set aside only on grounds applicable to any agreement or judgment, or as defective as made without power or jurisdiction. If not set aside and not defective, it would be an answer to an application on the decree absolute for relief of either kind. Such an agreement is not within the ban pronounced in *Hyman* v. *Hyman* [1929] A.C. 601, and *Mills* v. *Mills* [1940], 2 All E.R. 254, would not apply because the final decree had not yet been pronounced. (Decision of the Court of Appeal [1950] O.R. 44 affirmed.)

APPEAL by special leave of the Court of Appeal for Ontario from the judgment of that court (1) allowing an appeal from the Order of Wells J. and dismissing the appellant's motion for an Order rescinding or varying the Order of Schroeder J.

Lewis Duncan K.C. and *W. B. Williston* for the appellant.

George Walsh K.C. and *Margaret E. Perney K.C.* for the respondent.

C. R. Magone K.C. for the Attorney General of Ontario.

The judgment of Kerwin, Taschereau, Estey, Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—This is an appeal by special leave of the Court of Appeal for Ontario from the judgment of that Court of the 15th of December 1949 (1), allowing an appeal from the Order of Wells J. of the 14th of April 1949 and dismissing the appellant's motion for an Order rescinding or varying paragraph 3 of the Order of Schroeder J. made in the action on the 21st of February 1946 and for other relief to be mentioned hereafter.

The appeal raises questions of general importance and, in order to understand what these questions are, it is necessary to give a short statement of the facts in chronological order.

(1) [1950] O.R. 44; 1950 2 D.L.R. 121.

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The appellant is the wife of the respondent, Cecil E. Maynard. By writ dated the 20th of December 1944 the appellant commenced the action in which the motion now in appeal was launched. The action was against the respondent and his co-defendant, Ruth Lillian Martin. The claim endorsed on the writ of summons was as follows:

> The Plaintiff's claim is for the dissolution of the marriage between the Plaintiff and the Defendant Cecil E. Maynard. That the Plaintiff may be awarded such gross sum of money or annual sum of money as may be reasonable for her support, pursuant to the provisions of the statute in that behalf. Or in the alternative a declaration that the Plaintiff is entitled to alimony from the Defendant Cecil E. Maynard and also inter-alimony (*sic.*) and the costs to which she is entitled by the practice in that behalf and that for the purpose all necessary directions may be given and accounts taken.
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> Her costs of the action, her interim disbursements.

The prayer for relief in the statement of claim is in the same terms as the endorsement on the writ with the addition of a prayer for such further and other relief as to the Court may seem meet.

Prior to the commencement of this action the appellant and the respondent had separated and were living apart from each other pursuant to the terms of a separation agreement under which the respondent was liable to pay the appellant the sum of $15 a week. The payments under the separation agreement were kept up until the trial of the action. Up to that time the appellant was employed and no application for interim alimony was made prior to the trial.

The action came on for trial before Schroeder J. without a jury at Toronto on the 21st of February 1946. The appellant was represented by the late Mr. H. B. Proudlove, and the respondent was represented by Mr. C. E. Kitchen. The defendant Martin did not appear and was not represented. At the opening of the trial Mr. Kitchen informed the Court that he was appearing only with respect to alimony and that while the parties had been unable to agree on the question of alimony they had now, subject to His Lordship's approval, reached an agreement on that matter.

Following the above statement the trial proceeded and it is obvious from the endorsement made on the record that Schroeder J. was satisfied that a case was made out

entitling the plaintiff to judgment *nisi*. The evidence taken before Schroeder J. is not in the case which is before us, but the case contains a transcript of what passed between counsel and the learned judge at the end of the trial. This may be summarized as follows. Mr. Proudlove informed the Court that he and Mr. Kitchen had agreed that there should be judgment for $700 payable by the end of February 1946 and $500 payable on the 30th of September 1946. Schroeder J. asked whether this was in addition to the payments under the Separation Agreement mentioned above. Mr. Proudlove replied: "No. That completes the payment for alimony". Schroeder J. was obviously surprised at the proposal and questioned counsel in regard to it, suggesting that it was an imprudent arrangement for the Plaintiff to make. Both counsel having assured him that the agreement was made and understood, he finally said: "You have made your own agreement among yourselves anyway." To this, Mr. Proudlove replied: "Oh, yes; she is quite competent to, my Lord." Schroeder J. then had the terms repeated to him as to amounts and dates and said "That is for alimony and maintenance of the plaintiff and the infant child until he attains the age of 16?" Mr. Proudlove replied in the affirmative and Schroeder J. then endorsed the record as follows:

> Judgment
>
> (*a*) for decree *nisi* dissolving the marriage between the plaintiff and the defendant spouse.
>
> (*b*) for custody of the infant to the plaintiff with reasonable right of access to the defendant spouse, provided that the infant is not permitted to visit the home of the defendant spouse whilst the defendants reside there in adulterous circumstances.
>
> (*c*) on consent of the parties, judgment in favour of plaintiff against defendant spouse for $500 payable September 30, 1946, and $700 payable February 28, 1946, as and for alimony and maintenance of the plaintiff and the infant until the latter attains the age of sixteen years.
>
> (*d*) costs of the action against the defendant, Maynard.

Following this, a formal judgment was signed and entered. Paragraph 1 directs judgment *nisi* in the usual terms. Paragraph 2 deals with custody. Paragraph 4 deals with costs. Paragraph 3 reads as follows:

> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant Cecil E. Maynard, do pay to the plaintiff the sum of seven hundred dollars on the twenty-eighth day of February 1946,

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and the sum of Five hundred dollars on the thirtieth day of September 1946, as and for alimony and maintenance of herself, and for maintenance of the infant son of the plaintiff and the defendant Cecil E. Maynard, which infant son is Cecil Maurice Maynard, until the said infant attains the age of sixteen years of age; or until this Court doth otherwise order.

There is nothing in the record to show at whose instance or under what circumstances the final words "or until this Court doth otherwise order" were added to paragraph 3 of the formal judgment, but neither party has taken any steps seeking to have the formal judgment amended by the deletion of these words.

Shortly after the pronouncement of judgment *nisi*, Mr. Proudlove died suddenly, and for a time the appellant was without a solicitor. It appears that Mr. Kitchen had sent a cheque to Mr. Proudlove for the $700 payable on 28th February 1946 but that this cheque could not be found. The appellant got in touch with Mr. Kitchen who furnished her with a cheque for $700 which she deposited or cashed. Before the payment of the $500 payable on 30th September 1946 fell due, the appellant consulted her present solicitors. Mr. Duncan wrote to Mr. Kitchen asking that the $500 should not be forwarded. A cheque was, however, forwarded, but was not cashed.

On the 27th of November 1946 the appellant commenced a separate action in the Supreme Court of Ontario against the respondent. The statement of claim in that action alleges the marriage of the parties in 1918, the expulsion of the appellant from their matrimonial home and her desertion by the respondent in June of 1942, the entering into a Separation Agreement in the same month under which the respondent agreed to pay the plaintiff during her life and as long as she should remain chaste the sum of $15 each week and to convey certain property to her, the bringing of the action for divorce and the judgment rendered by Schroeder J., that the agreement embodied in paragraph 3 of that judgment was induced by fraudulent misrepresentations as to the respondent's financial position, that by reason of such misrepresentations no inquiry was made at the trial and no evidence given as to the financial position of the appellant or as to the ability of the respondent to pay alimony or maintenance

or as to the conduct of the parties. There are also allegations of a successful plan to defraud the plaintiff in connection with the property which was conveyed to her pursuant to the Separation Agreement.

The Statement of Claim concludes with the following Prayer for relief:

THE PLAINTIFF THEREFORE CLAIMS by reason of the fact (*sic.*) hereinbefore pleaded, and in particular—

(1) by reason of the facts pleaded in paragraphs 1 to 10 inclusive hereof—$25,000 damages;

(2) In the alternative, by reason of the facts pleaded in paragraphs 1 to 10 inclusive hereof, an order setting aside paragraph 3 of the formal judgment bearing date the 21st day of February 1946, in the action in this Court of *Maynard* v. *Maynard and Martin,* and for an order setting aside paragraph (*c*) of the judgment in the said action as endorsed on the Record at the trial of the said action, and permitting the plaintiff to apply in the said action for an award of such alimony and maintenance as she should receive, having regard to her financial position and the ability of her husband, and the conduct of the parties;

(3) by reason of the facts pleaded in paragraphs 1, 2, 3 and 11 hereof the sum of $600 being the total of 40 payments payable under the Separation Agreement bearing date the 9th day of June 1942, at $15 a week from the 26th day of February 1946 to the 27th day of November 1946, and $15 a week in the said Separation Agreement from the 27th day of November 1946, to Judgment, and interest on the said sums at 5 per cent until Judgment, or in the alternative for alimony by order of the Court;

(4) by reason of the facts pleaded in paragraphs 1, 2, 3, 4, 5, 6, 9, 10 and 11 hereof, interim alimony of $25 per week or such sum as the Court may determine until the trial of this action; and interim disbursements;

(5) by reason of the facts pleaded in paragraphs 1 to 4 inclusive, and 13 and 14 hereof, $1,000 damages;

(6) such further and other relief as the merits of the case may require;

(7) her costs of this action.

A lengthy statement of defence was delivered denying all the allegations of fraud, pleading that the settlement for $1,200 carried into paragraph 3 of the judgment of Schroeder J. was voluntarily made and fully understood and asking that the action be dismissed with costs.

The action came on for trial in due course before Mackay J. The trial occupied 14 days. Judgment was reserved and was given on the 7th of September 1948 dismissing the action without costs. In his reasons for judgment, Mackay J. found against the allegations of fraud and misrepresentation. The reasons state in part:

I further find as a fact that the plaintiff authorized her solicitor, the late H. B. Proudlove, to accept a lump sum of $1,200 payable in amounts of $500 and $700 on specific dates, which lump sum was and was under-

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stood to be, by all parties, in full and final settlement of all claims for alimony and maintenance, such lump sum settlement to supersede and abrogate all payments under the separation agreement, Exhibit 1.

I further find that the plaintiff's solicitor, the late H. B. Proudlove, acting for and on behalf of the plaintiff and with her knowledge, approval and consent, and in her presence informed the trial Judge, Schroeder J. in open Court, that the parties had agreed upon a lump sum settlement of $1,200, the terms of which he announced to the Court. I further find as a fact that the plaintiff fully understood the terms of the lump sum settlement as explained to the Court by her solicitor, and that she consented to it and that the judgment recorded on the record by the trial Judge referable to a lump sum payment for alimony and maintenance was with the full authority and consent of both parties.

I further find that the parties, by themselves and through their solicitors were *ad idem* and that there was no mistake as to the question of a lump sum payment, i.e. $1,200 in full and complete settlement.

The appellant appealed to the Court of Appeal for Ontario from the judgment of Mackay J., and on the 6th of December 1948 the appeal was dismissed without costs. No further appeal was taken in that action.

In the meantime, on the 17th of August 1948, before the judgment of Mackay J. was delivered, the Motion which forms the subject matter of this appeal was launched in the original divorce action. The relief sought and the grounds relied upon are set out in the notice of motion as follows:

(*a*) for an Order rescinding or varying paragraph 3 of the Order of the Hon. Mr. Justice Schroeder of the 21st of February, 1946; and

(*b*) for an Order directing the Defendant Cecil E. Maynard to secure to the plaintiff such gross or annual sum of money or in addition thereto or in substitution therefor to pay such monthly or weekly sum as may be deemed reasonable by this Honourable Court and for an inquiry as to respective assets and incomes of the plaintiff and of the defendant Cecil E. Maynard; and

(*c*) for an Order restraining the defendant from alienating, encumbering or otherwise dealing with his property until the further order of this Honourable Court; and

(*d*) in the alternative, for an Order determining what portion of the sum of $1,200, referred to in the said Order of the 21st day of February, 1946, is for alimony for the plaintiff; and what for maintenance for the infant; and what for maintenance for the wife after judgment absolute; and for an Order

(*e*) granting to the plaintiff the sum of $25 per week for interim alimony pending the final judgment of this motion; and

(*f*) such other relief as the merits on the case may require.

UPON THE FOLLOWING GROUNDS:

(1) That the said Order of 21st of February, 1946, is subject to the further order of the Court;

(2) That the financial position of the plaintiff has altered since the making of the said Order;

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(3) That in so far as paragraph 3 of the said Order purports to award a lump sum for alimony and maintenance of the plaintiff and the infant, it was made without jurisdiction and contrary to the provisions of *The Matrimonial Causes Act*, R.S.O. 1937, c. 208; alternatively, that it was made on the wrong principle and contrary to public policy;

(4) That it is just and equitable that the said Order be rescinded or varied;

(5) On such other grounds as may appear;

When this motion first came before the Court it was adjourned until after Mackay J. should have given his judgment, and it was later further adjourned until the Court of Appeal should have given its judgment on the appeal from the judgment of Mackay J. After such appeal had been disposed of, the Motion finally came on to be heard before Wells J. in January 1949 and that learned judge gave judgment on the 14th of April 1949 directing the trial of an issue at the Toronto non-jury sittings, and enlarging the Motion before the judge presiding at the trial of the issue. The Order provided in part:

1. THIS COURT DOTH ORDER AND DIRECT that Bertha Maynard and Cecil E. Maynard do proceed to the trial of an issue upon oral evidence before the Judge presiding at the Non-Jury Sittings of this Court and that the said Motion bearing date the 17th of August, 1948, be enlarged before the said Judge at the trial of the said issue, and that in the said issue, the said Bertha Maynard shall be the plaintiff and the said Cecil E. Maynard shall be the defendant.

2. AND THIS COURT DOTH FURTHER ORDER that the issue to be tried shall be whether there is power to rescind or vary paragraph 3 of the Order of The Honourable Mr. Justice Schroeder of the 21st of February, 1946, or to make any alteration in the provisions for alimony and maintenance provided by the said Order and if so what provision for alimony and maintenance should be made for the said Bertha Maynard.

An appeal was taken from this order and the Court of Appeal was of opinion that the motion raised a question of law which should have been determined by Wells J. before directing any issue, that the proper course under the circumstances would be to refer the matter back to Wells J. but that both counsel having asked the Court to dispose of the point of law this was a convenient course which should be followed. The question of law was stated to be whether or not the Court had power to vary paragraph 3 of the judgment of Schroeder J. in view of the fact that the same was a consensual judgment for a lump sum settlement in full of alimony and maintenance. The Court

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of Appeal decided that the question should be answered in the negative, allowed the appeal and ordered that the motion be dismissed, without costs.

In view of the findings of fact made by Mackay J., counsel for the appellant conceded before us that he must deal with the appeal on the basis that the agreement set out in paragraph 3 of the judgment of Schroeder J. had been entered into voluntarily by the appellant, that it was untainted with fraud and that the parties were *ad idem.* He contended however that even so the plaintiff was entitled to the relief claimed in the notice of motion heard by Wells J. In support of this contention the following points were argued with great force and ability:

(i) that on a proper construction of the agreement embodied in paragraph 3 of the Order of Schroeder J., particularly having regard to the concluding words "or until this Court doth otherwise order", the plaintiff is at liberty to apply to the Court for, and the Court has reserved to itself power to grant, further alimony and maintenance;

(ii) that if paragraph 3 of the judgment of Schroeder J., properly construed, has the effect of declaring that, on payment by the respondent of the sums totalling $1,200 therein referred to, the appellant should never thereafter have any further right to claim for alimony or maintenance, then, if the matter is regarded as a judgment of the Court, Schroeder J. had no jurisdiction to pronounce it so as to effectively tie the hands of the Court in the future, and particularly on the granting of judgment absolute; and if, on the other hand, it is regarded as a judgment confirming an agreement between the parties, such agreement is unenforceable under the principles laid down in the decision of the House of Lords in *Hyman* v. *Hyman* (1).

(iii) in support of the submission first mentioned in (ii) it is argued that the Judge pronouncing judgment *nisi* has no jurisdiction to deal with maintenance and that, even if this contention is rejected, it is clear that neither under the Imperial Statutes (1857), 20-21 Victoria c. 85 s. 32 and (1866) 29-30 Victoria c. 32 s. 1, nor under the Ontario legislation, R.S.O. 1937, c. 208 ss. 1 and 2 has the Court power to order payment to the wife out and out of a

(1) [1929] A.C. 601.

lump sum, that such jurisdiction cannot be conferred by consent and that if and insofar as the case of *Mills* v. *Mills* (1), appears to hold the contrary, it is distinguishable or ought not to be followed.

(iv) in support of the submission last mentioned in (ii) it is argued that a contract otherwise invalid is not given validity merely by being incorporated in a consent judgment, citing *Great West Central Railway* v. *Charlebois* (2), and *Huddersfield* v. *Lister* (3).

(v) that if it is sought to distinguish the case at bar from *Hyman* v. *Hyman* by reason of the difference between the wording of s. 32 of *The Matrimonial Causes Act* (1857) 20-21 Victoria (Imp.) c. 85, and that of s. 1 of the *Matrimonial Causes Act,* R.S.O. 1937 c. 208, then the latter section is ultra vires of the Provincial Legislature insofar as it is in conflict with the former, which, it is contended, became part of the law of Ontario by virtue of the Dominion Act, *"The Divorce Act* (Ontario)" 1930, S. of C. c. 14. It should be pointed out that the important difference between the two sections is that the Imperial Act gives the Court jurisdiction to award maintenance (as distinguished from alimony) "on any such (i.e. final) decree", while the Ontario Act gives jurisdiction to make such award "in any action for divorce".

(vi) that giving effect to the above arguments the Court should declare that there remains in the Court in the pending divorce action power on the granting of decree absolute (or by order made prior to, but not to become effective until, the granting of such decree) to award the relief asked for in paragraph (*b*) of the notice of motion quoted above; and that the payment of the $1,200 made pursuant to paragraph 3 of the judgment of Schroeder J. (and which the appellant brought into Court in the action tried by Mackay J.) should be regarded only as one of the matters to be considered in fixing the quantum of maintenance to be ordered.

To all the above it was answered that the decision of the Court of Appeal was right upon the merits but that whether so or not the appellant is estopped by the judgment of Mackay J.

(1) [1940] 2 All E.R. 254.
(2) [1899] A.C. 114.
(3) [1895] 2 Ch. 273 at 276.

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If the respondent's contention as to estoppel is sound, it is sufficient to dispose of the appeal and I think that it should be first considered.

The main arguments against such estoppel were as follows: First, it was said that when the pleadings and the reasons for judgment of Mackay J. are examined it appears that that learned judge was not asked to deal and did not deal with the questions argued before us but only with the question whether the agreement between the parties embodied in paragraph 3 of the judgment of Schroeder J. should be set aside by reason of fraud or lack of consent; and that, while the appellant can no longer question the existence of the agreement on such grounds, it is still open to her to contend that, although existing as an agreement *inter partes,* it is no more effective to deprive the Court of its power to order maintenance as a condition of finally dissolving the marriage than was the agreement considered in *Hyman* v. *Hyman* (*supra*).

Secondly—although perhaps this is only putting the ground just stated in other words—it is said that there is no identity of issue, and that the relief sought in the proceedings before us could not have been obtained in the action disposed of by Mackay J.

Thirdly, it is argued that even if otherwise an estoppel would have existed none can exist because the judgment of Mackay J. was not delivered until after the commencement of the present proceedings.

It was not questioned that the pleadings should be examined in order to ascertain what was in issue between the parties in the earlier proceedings and I think that the judgment of this Court in *Hogg* v. *Toronto General Trusts Corporation* (1), and that of the Court of Appeal in England in *Marginson* v. *Blackburn Borough Council* (2) make it clear that the reasons for judgment may also be considered.

On comparing clauses (*a*) and (*b*) in the notice of motion in the present proceedings with paragraph 2 of the statement of claim in the former action, it appears to me that, although not expressed in identical words, they ask for the very same relief. In the former action the appellant sought

(1) [1934] S.C.R. 1. (2) [1939] 2 K.B. 426 at 437.

to set aside paragraph 3 of the judgment of Schroeder J. and, upon that having been done, to have it adjudged that she was entitled to apply in the divorce action for an award of such alimony and maintenance as, but for the existence of such paragraph, she would have been entitled to under the applicable legislation. Her claim was dismissed, the dismissal was affirmed by the Court of Appeal and that action is at an end. In the present proceeding the appellant again asks to "rescind or vary" paragraph 3 of the Order of Schroeder J. and applies for an award of maintenance.

It is argued that the appellant is not estopped from seeking to vary or rescind paragraph 3 of the Order of Schroeder J. on the grounds that it was made without jurisdiction and is unauthorized by any valid legislation as these grounds were not put forward before, or considered by, Mackay J. It is further contended that, even if the appellant is estopped from seeking to vary or rescind such paragraph, it is nonetheless open to her to claim that, notwithstanding its existence, she is entitled to claim maintenance on the ground that the paragraph in question is ineffective in law to deprive the Court of power to award maintenance to her.

Putting the matter in a different form, it was argued that all that has become *res judicata* by reason of the judgment of Mackay J. is the valid existence of an agreement *inter partes* in the terms set out in paragraph 3 of the judgment of Schroeder J. and that the appellant is not precluded, by having unsuccessfully questioned the valid existence of that agreement, from claiming any relief to which she may be by law entitled notwithstanding the agreement.

I do not think that the arguments are entitled to prevail. I do not have to decide what the result would have been if in the action tried by Mackay J. the only claim made had been one to declare void the agreement embodied in paragraph 3 of the judgment of Schroeder J. Two other claims were expressly put forward in the pleadings, (*a*) for an order permitting the appellant to apply in the pending divorce action for an award of such alimony and maintenance as she should receive, and (*b*) for payment

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of the sums due under the separation agreement from the date of the trial before Schroeder J. to the date of judgment in the action tried by Mackay J. To decide whether these claims or either of them should be allowed, it was necessary for Mackay J. to pass not merely upon the continued existence of the agreement carried into paragraph 3 of the judgment of Schroeder J. but also upon its construction and effect including the effect if any to be given to the concluding words of that paragraph "or until this Court doth otherwise order". It may be that counsel assumed that unless and until paragraph 3 of the judgment of Schroeder J. was set aside it constituted an insuperable barrier to any further claim for maintenance in the divorce proceedings and that consequently the view, so fully and ably argued before us, that notwithstanding such paragraph the Court has power to grant maintenance, was not put before Mackay J. at all. It may be that such an assumption, if it were made, was erroneous; as to that I express no opinion. It may be that some of the points of law argued before us were not thought of at that time. All this however would, it seems to me, be *nihil ad rem*. The issue now before us was, I think, expressly raised in the pleadings in the earlier proceeding and was decided by the judgment of Mackay J., dismissing that action. The appellant has submitted the same question as is now before us (although perhaps not the same arguments) to the decision of a Court of competent jurisdiction and cannot now re-litigate the matter.

The following passage from the judgment of Maugham J., as he then was, in *Green* v. *Weatherill* (1), seems to me to state concisely the principles which are applicable:

> the plea of *res judicata* is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation: see *In re May* (2); *Badar Bee* v. *Habib Merican Noordin* (3). In the latter case it may be observed that Lord Macnaghten in delivering the judgment cites from the Digest and relies on the maxim *"Exceptio rei judicatae obstat quotiens eadem quaestio inter easdem personas revocatur."* In the leading case of *Henderson* v. *Henderson* (4), there is to be found the following statement of the law by Wigram V.C.: "I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward

(1) [1929] 2 Ch. 213 at 221, 222.
(2) 28 Ch. D. 516, 518.
(3) [1909] A.C. 615.
(4) 3 Hare, 100, 114.

their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." This passage has recently been approved by the Privy Council in the case of *Hoystead* v. *Commissioner of Taxation* (1).

In the judgment of the Judicial Committee in *Hoystead* v. *Commissioner of Taxation* (1), at page 165 is the following:

> Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.
>
> If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

In my opinion the law is correctly stated in Halsbury's Laws of England (2nd Edition) Volume 13 at page 410, where it is said that the principle of estoppel applies "whether the point involved in the earlier decision, and as to which the parties are estopped is one of fact, or one of law, or one of mixed law and fact".

It remains to consider the third argument of the appellant mentioned above. This is founded on a passage in Halsbury's Laws of England 2nd Edition Volume 13 at page 449:

> It seems that a judgment cannot take effect as a *res judicata,* or an estoppel unless it was given before the proceedings in which it is relied upon were commenced.

It is said that the date of the commencement of the proceedings now before us was 17th August 1948, the date of the notice of motion which eventually came before Wells J., and the judgment of Mackay J. was not pronounced until 7th September 1948.

Three cases are referred to in the footnote to the statement from Halsbury quoted above: *Houston* v. *Marquis of Sligo* (2); *The Delta—The Erminia Foscolo* (3); and *Re Defries; Norton* v. *Levy* (4).

(1) [1926] A.C. 155 170.
(2) (1885) 29 Ch. 448.
(3) (1876) 1 P.D. 393.
(4) (1883) 48 L.T. 703.

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Support for the statement quoted from Halsbury is contained in *The Delta*. The judgment was founded also on other grounds, but no doubt Sir Robert Phillimore gave as the principal reason for his decision the fact that the judgment which it was alleged created an estoppel had not been given until after the action before him was commenced.

In *Houston* v. *Sligo* Pearson J. expressed a doubt as to this ground of decision in *The Delta* and held against the existence of an estoppel on other grounds. On appeal from his judgment the point with which we are concerned was not dealt with, as a consent order was pronounced. The effect of the decision of Pollock B. in *re Defries* is directly contrary to the statement quoted from Halsbury. The action before Pollock B. was commenced on 5th March 1881 and at the trial on 2nd May 1883 that learned judge, after hearing argument on the point, gave effect to an estoppel created by a judgment delivered on 24th July 1882.

I do not think that I have to choose between these apparently conflicting decisions, as the point appears to me to be settled so far as this Court is concerned by the judgment in *Law* v. *Hansen* (1). In that case the ground of decision in *The Delta* with which we are concerned was carefully considered and the reasoning upon which it was founded was, I think, rejected. At page 76 King J. giving the judgment of the Court said:

> No substantial objection therefore can be said to lie against the bringing forward of a defence based upon a judgment recovered after action brought.

At page 75 the same learned judge put the question:

> Why should a plaintiff in a foreign action, by commencing fresh proceedings in another country on the eve of judgment rendered, become entitled to litigate the matter anew?

In that case the judgment held to create an estoppel in the Courts of Nova Scotia was that of a foreign tribunal. It seems to me that the decision would apply *a fortiori* where the second proceeding is started in the very Court in which the issue is already standing for judgment.

So that it may not appear to have been overlooked, I should mention another argument put forward on behalf

(1) (1895) 25 Can. S.C.R. 69.

of the appellant. It was submitted that, if the argument that paragraph 3 of the judgment of Schroeder J. was made without jurisdiction is sound, then the appellant, as a matter of law, could not be estopped from asserting such lack of jurisdiction; in other words, that jurisdiction can not be acquired by means of estoppel any more than by means of consent. For the sake of argument the last stated proposition may be accepted. It is stated in Spencer Bower on *Estoppel by Representation* (1923) at page 187 as follows:

> Even the most plain and express contract or consent, *a fortiori,* therefore, any mere conduct or inaction or acquiescence, of a party litigant from which a representation may be implied such as to give rise to an estoppel, cannot confer judicial authority on any of His Majesty's subjects not already invested with such authority by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal.

This rule is, I think, concerned with cases of estoppel by representation and not with cases of *res judicata* or estoppel by record. Had the appellant in the action tried by Mackay J. expressly raised for decision the point that paragraph 3 of the judgment of Schroeder J. was invalid on the ground that it was made without jurisdiction and had that point been finally decided adversely to her it could not have been raised again in litigation between the same parties. In my view, while not raised expressly in the pleadings, the question of the validity of the order of Schroeder J. was fundamental to the decision of Mackay J. and the reason that I think the question is not now open for our consideration is not that the appellant is precluded by her consent or conduct or acquiescence in the proceedings before Schroeder J., but because Mackay J. whose judgment was affirmed by the Court of Appeal has decided the point against her.

In my view, the real issue before Mackay J. both in form and in substance was whether, notwithstanding all that had happened, including the making of the agreement under attack and the paragraph of the judgment of Schroeder J. which carried the effect of that agreement into the judgment *nisi*, there still remained in the appellant a right to claim maintenance upon the making of a final decree of dissolution. I think that question has been con-

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clusively determined against the appellant and I do not think that she can ask the Court to pass upon it again merely because she now puts forward an argument. in support of her contention that paragraph 3 of the judgment of Schroeder J. should be disregarded, which was not put forward in the action before Mackay J. I do not think it is necessary to enquire whether the arguments addressed to us as to the lack of jurisdiction of Schroeder J. were addressed either to Mackay J. or to the Court of Appeal on appeal from his judgment. I think that, applying the principles laid down in *Hoystead* v. *Commissioner of Taxation,* cited above, it was a ground which the appellant, if she wished to rely upon it, was bound to bring forward at that time.

One further matter should be mentioned. It is clear that in order for the judgment of Mackay J. to constitute an effective estoppel that learned judge must have had jurisdiction to pronounce it. I did not understand counsel for the appellant to question the jurisdiction of Mackay J. in the action before him to decide the question mentioned above as to whether there remained in the appellant a right to claim maintenance. His argument, as I understand it, was that Mackay J. did not decide the question. It might, however, be suggested that if the appellant's argument, that the question of maintenance (as distinguished from alimony) can be dealt with only on the pronouncing of decree absolute or by order made in contemplation of and only to become effective upon the granting of judgment absolute, is right, then Mackay J. had no more jurisdiction to deprive the appellant of her right to maintenance than did Schroeder J. I think that this difficulty is apparent rather than real. Mackay J. was not asked to award maintenance to the appellant. Schroeder J. was asked to award it and purported to do so. Mackay J. was asked not to fix maintenance but to say by his order that the plaintiff was still entitled to claim it in the action. In my view he had jurisdiction to decide this question in an action brought for the purpose of determining it; although it might be suggested that a more appropriate procedure would have been to move for judgment absolute and to make the claim for maintenance on such motion.

I am of opinion that this appeal fails on the ground that the appellant is estopped by the judgment of Mackay J. from asserting the claim now put forward. Having reached this conclusion, I do not think it desirable to express any opinion on the other questions argued before us. While I respectfully agree with the learned Justices of Appeal who granted leave to appeal that those questions are of great and general importance, it seems to me that once it has been decided that effect must be given to Mr. Walsh's argument based on estoppel any further discussion would be *obiter*.

Under all the circumstances, I am of opinion that the appeal should be dismissed without costs. The appellant's motion to enlarge the case by including therein further material should also be dismissed without costs.

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

RAND J.:—Accepting Mr. Duncan's contention that the law of England in relation to alimony and maintenance applies in Ontario by force of *The Divorce Act* (Ont.) (1930) S. of C. c. 14, the question reduces itself to this: can a petitioner for divorce, claiming alimony and maintenance, bind herself by an agreement with the respondent at the trial by which, in satisfaction of all rights to alimony, past or future, and to future maintenance, a lump sum is to be paid and accepted, for the payment of which, what purports to be an order, by consent, is included in the decree *nisi*?

The English law is to be found in 20-21 Vict., c. 85, s. 32 and 29-30 Vict., c. 32, s. 1, and its effect is that the Court has jurisdiction on a decree of divorce to order the husband to *secure* to the wife such gross or annual sum of money as, having regard to certain matters specified, the Court deems reasonable; or to make an order for weekly or monthly sums for maintenance during their joint lives. It is settled that the Court has no power under these provisions to order payment of a lump sum; the latter can only be "secured". As stated by Lord Greene in *Mills* v. *Mills* (1), "such payment can only be consensual."

(1) [1940] P. 124 at 134;
[1940] 2 All E.R. 254 at 261.

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Two authorities bear upon the question raised. In *Mills* v. *Mills, supra,* it was held by the Court of Appeal that after an order for maintenance had been made, the parties could agree upon a lump sum in satisfaction of all rights under it and embody the agreement in a subsequent order which at the same time discharged the original order and petition; and in *Hyman* v. *Hyman* (1), the House of Lords held a provision in a separation agreement that the wife would never assert a claim to maintenance was not a bar to an application following a decree absolute, on the ground that there was a public interest in the duty of the husband to support the wife which would be affected by the divorce, and which could not by such an agreement be defeated.

Is, then, an agreement entered into at the hearing and incorporated in the decree *nisi* within the ban pronounced in *Hyman* v. *Hyman* or is it open to the parties to agree, as part of the adjudication of divorce, to waive the claim for alimony and maintenance in consideration of a lump sum allowance? I do not see that the time of repudiation of such an agreement would affect the matter even though in *Mills* v. *Mills* the application in effect to revive the original order for maintenance was made seven years after the order approving the commutation had issued and was clearly not made "on a decree": that point could not be raised here because the final decree has not yet been granted. So made, the impugned provision in the order *nisi,* constituting the evidence of the agreement and evidencing the abandonment of the claim for alimony and maintenance, is, in my opinion, either definitive, to be set aside only on grounds applicable to any agreement or judgment, or fatally defective as made without power or jurisdiction; and if not set aside and not defective, it would be an answer to an application on the decree absolute for relief of either kind.

Must the Court, as a condition of validity in any adjudication involving the right to alimony and maintenance insist on examining all matters relating to these claims and formally adjudging a gross or annual sum to be secured or periodic payments to be made notwithstanding that the parties do not desire it? I see nothing in the policy under-

(1) [1929] A.C. 601.

lying *Mills* v. *Mills* to require that to be done, particularly as by the rule laid down, as I interpret it, they could the next day bring their agreement into Court and have the order discharged. There would, no doubt, have been placed before the petitioner the amount which the Court considered proper and further time would be gained; but are these sufficient considerations on which to ground such an exceptional requirement? If the Court is not to insist upon the enquiry, will the right of the wife be lost if she refuses, at that time, to assert it? If not, there would result an unprecedented indulgence to her as a litigant which I should say is unwarranted.

The chief and controlling interest is her interest. The legislature has not provided for the representation of the public on the hearing of a divorce action; and to impose an absolute duty upon the Court to proceed upon its own independent enquiry and adjudication in disregard of the desire of the parties would seem to me to be an extravagance in paternalism and a burden on the Court quite beyond the scope of the statute. A refusal to allow a provision in a separation agreement to defeat a jurisdiction founded in part on public policy, is based on considerations very different from those that would permit a party to a suit to repudiate a consensus openly announced in court and made part of the relief adjudged; and such a judgment can be taken to be a nullity only if there has been a failure in a duty placed on the Court itself. If the public interest were of such high concern, we could properly expect to find provision made in the legislation for its assertion by a representative of the public and not by the Court.

The clause in the order *nisi*, "or until this Court doth otherwise order", cannot preserve a jurisdiction which by the judgment has been exhausted; and the observations of the Master of the Rolls in *Mills* v. *Mills*, (*supra*) on similar language in the order in that case are directly pertinent here. The clause adds nothing to the decree and is unavailing to the support of the appeal.

The circumstances here give some colour to what I think is the reality behind the efforts that have been made to set aside the judgment now attacked. It may be that the petitioner was badly advised, or that she herself exercised

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poor judgment, in agreeing to accept the particular sum. But that occasional hardship cannot justify a departure from rules governing the course of courts which are necessary to their proper functioning; and where parties act freely, with full opportunity to ascertain all relevant facts, they must abide by that adjudication of their private quarrel to which they gave their consent.

The appeal, therefore, must be dismissed, but without costs. The motion made at the hearing should likewise be dismissed.

The appeal and the motion to enlarge the case by including therein further material are both dismissed without costs.

Solicitors for the appellant: *Duncan & Bicknell.*

Solicitor for the (Defendant) Maynard, respondent: *Margaret E. Perney.*

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

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*June 21, 22
Nov 20

MATHEW HANSON and TEKLA HANSON, (DEFENDANTS) ..... } APPELLANTS;

AND

THE CANADA TRUST COMPANY and WILLIAM D. GLENDINNING, (PLAINTIFFS) ..... } RESPONDENTS;

AND

BONDHOLDERS' RE-ORGANIZATION COMMITTEE and H. S. BLACK *et al* ..... } RESPONDENTS;

AND

J. M. HICKEY ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgage—Proposed Sale of Property subject to Bond Mortgage—for Consideration other than Cash—Condition governing Bond Holders and Court's approval—What "fair and reasonable" to all parties interested—The Judicature Act, R.S.O. 1937, c. 100, s. 15(i).

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

Default having been made on bonds secured by a mortgage or trust deed, a meeting of the bondholders was held to consider a plan submitted on behalf of the mortgagors which provided for the sale of the equity of redemption to a company to be formed, payment to the bondholders of the full amount of their capital investment but not of the interest in default, and preservation of an equity to the mortgagors. The majority of the bondholders having voted approval an order was obtained from the Court under the provisions of s. 15(*i*) of *The Judicature Act*, R.S.O. 1937, c. 100, approving the terms of the proposed sale. The decision of the Court of Appeal reversing the Order was appealed to this Court.

Held: That the appeal should be dismissed.

Held: also by the majority of the Court that:

(1) The proposed arrangement was in substance a sale for a consideration other than cash within the terms of s. 15(*i*) and the judge of first instance was right in entering upon the merits of the proposal but the section does not enable the Court to sanction a sale on terms which will yield the mortgagor a substantial part of the sale price while yielding the mortgagee only a portion of the mortgage debt and having regard to the value of the property the terms of the sale could not be held to be fair and reasonable within the meaning of the Act.

(2) The majority bondholder in voting in favour of the plan was influenced by motives of benevolence and a regard for the moral claims of the mortgagors rather than by a consideration of the interests of the bondholders as a class and therefore the resolution approving the plan could not stand. *British American Nickel Corp. v. O'Brien* [1927] A.C. 369; *Ex Parte Cowen. In re Cowen* L.R. 2 Ch. App. 563, applied.

Locke J. agreed with the majority of the Court that the appeal should be dismissed but on the ground that the sale referred to in s. 15(*i*) is a sale under the power of sale contained in a mortgage, and as the matter was one of jurisdiction, the Court was without power to make the Order approving the proposed sale.

APPEAL from a judgment of the Ontario Court of Appeal (1), setting aside an order of Urquhart J. (2), approving the sale of the mortgaged property. Affirmed.

R. F. Wilson K.C. and H. F. Gibson for the appellants.

J. J. Robinette K.C. for the respondents, the Bondholders Re-Organization Committee and certain bondholders.

J. D. Arnup for J. M. Hickey, the majority bondholder.

E. G. Arnold for the respondents, The Canada Trust Co. and W. D. Glendinning.

(1) [1949] O.W.N. 803; [1950] 1 D.L.R. 375; 30 C.B.R. 126.

(2) [1949] O.W.N. 630; [1949] 4 D.L.R. 657; 30 C.B.R. 1.

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The judgment of Taschereau and Cartwright JJ. was delivered by

CARTWRIGHT J.: This is an appeal from the judgment of the Court of Appeal for Ontario (1) setting aside an order of Urquhart J. (2), made under section 15 (*i*) of *The Judicature Act* of Ontario, ordering and approving the sale of an apartment house property in the City of Kingston to Hanson Apartments Limited.

The appellants are the owners of the equity of redemption in the property in question. In 1929 when the apartment house was in course of construction, the appellants arranged with United Bond Company Limited to underwrite a bond issue of $135,000 6½ per cent first mortgage bonds, secured by a mortgage and trust deed dated 20th June 1929 made by the appellants as mortgagors to The London and Western Trusts Company Limited and Howard C. Wade as mortgagees. The plaintiffs are successors to these trustees. The trust deed is not in the material before us but we were informed by counsel that it is made pursuant to the *Short Forms of Mortgages Act,* contains the mortgagors' covenant to pay, creates a fixed and specific charge in favour of the trustees and contains an express power of sale, in the usual short form, on one month's default and one month's notice. It contains no provision for the holding of meetings of bondholders and no provision enabling a majority of the bondholders to sanction a sale, transfer or exchange of the mortgaged premises for a consideration other than cash. Unfortunately, United Bond Company Limited went into receivership with the result that the appellants although liable to pay bonds totalling $135,000 actually received only $86,700, an amount insufficient to complete the building. They succeeded in completing the building by using their own resources and by obtaining a loan of $60,000 from the Ontario Equitable Life Insurance Company secured by a first mortgage on the property, to which the bond mortgage was postponed by order of the Supreme Court of Ontario dated 27th January 1931. As collateral security to this $60,000 mortgage, life insurance policies totalling $100,000 were taken and assigned to the Ontario Equitable Life Insurance Company. It was stipulated that default in payment of the life insurance premiums

(1) [1949] O.W.N. 803. (2) [1949] O.W.N. 630.

would be regarded as default under the mortgage. The first two interest coupons on the bonds were duly paid on 20th December 1929 and 20th June 1930, respectively, but no further interest was paid until 1943. Since June 1943 substantial payments on account of interest have been made to the bondholders. On 12th November 1930 an action was commenced in the Supreme Court of Ontario by the then trustees under the bond mortgage against the defendants to enforce the security. That action is still pending and the order of Urquhart J. is styled in that action and "In the matter of section 15 (*i*) of *The Judicature Act* R.S.O. 1937 c. 100".

Since 18th December 1930 the respondent, The Canada Trust Company, and its predecessor, have been in possession of the mortgaged premises as receiver.

In or about the year 1933 the appellants bought in bonds of the face value of $63,900 and surrendered them to the trustees. In 1939 an unsuccessful effort to re-finance and end the receivership was made.

In 1949 the appellants put forward the plan which was approved by Urquhart J. The plan is signed by the appellants under date of 7th March 1949 and the following statement is appended to it duly sealed by Hanson Apartments Limited and signed by its proper officers:

HANSON APARTMENTS LIMITED hereby authorizes and approves the offer and plan contained in the within letter and undertakes and agrees to effectually complete the same forthwith upon approval being given in accordance with the provisions of The Judicature Act.

WITNESS the seal of the Company under the hands of its proper officers at Kingston, this 12th day of May, A.D. 1949.

On 30th May 1949 Barlow J. made an order upon motion of the appellants and the trustees, and with the consent of The Canada Trust Company in its capacity as receiver, directing The Canada Trust Company to summon a meeting of the bondholders on 20th June 1949

for the purpose of considering, and if thought fit approving and sanctioning with or without modification or amendment, FIRST, a certain plan proposed by the defendants, Mathew Hanson and Tekla Hanson dated the 7th day of March, 1949, being Exhibit "A" to the said affidavit of Mathew Hanson and Tekla Hanson filed, providing for the sale, transfer or exchange of the said property and assets for a consideration wholly or in part other than cash, all as therein set out; SECONDLY, in default of approval of the said plan either as proposed by the defendants Mathew Hanson and Tekla Hanson or as modified or amended, any other plan that may be proposed at the said meeting or at any adjournment thereof

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for the sale, transfer or exchange of the said property and assets for a consideration wholly or in part other than cash; and for the purpose of transacting such other business as may be incidental, consequential or supplemental thereto;

The order contained directions as to procedure at the meeting, and provided that upon the termination of the meeting or any adjournment thereof the minutes should be filed with the Court and that the Canada Trust Company might apply for further directions.

At the date of the offer the property in question was encumbered as follows:

Ontario Equitable Life Mortgage	$57,500.00
Bonds outstanding—principal	71,100.00
Interest owing on bonds	93,082.52

The life insurance policies held as collateral security by the Ontario Equitable had a cash surrender value of $26,825.

Hanson Apartments Limited was incorporated under the Ontario Companies Act with an authorized capital of fifteen hundred 4 per cent non-cumulative preference shares of the par value of $50 each and twelve hundred common shares without par value. The plan was stated to contemplate:

(1) The purchase by the above company of the equity of Mathew and Tekla Hanson in the New Annandale property together with any and all rights, interest, choses in action, claims and demands they may have against the Trustees under the Trust deed, the Receiver and Manager, The Equitable Life Insurance Company of Canada, any bondholder, bondholders, or other person, persons or corporations arising out of the ownership and financing of the New Annandale Building, to be paid for by the allotment to the said Mathew and Tekla Hanson, or their nominees, of the 1,200 common shares.

(2) A loan by Hanson Apartments Limited in an amount sufficient for the purposes later enumerated secured by

(*a*) a first mortgage on the New Annandale property, and

(*b*) an assignment to the mortgagee of the four Equitable Life Insurance Company policies having recently a cash surrender value of $26,825.

(3) Retirement of the $71,100 in bonds and a discharge of the trust mortgage by giving to the bondholders the option of,

(*a*) preference shares in an amount equal to the face value of bonds held or,

(*b*) cash for the face value of the bonds held.

(4) The proceeds of the first mortgage loan to be used,

(*a*) to pay off the present Equitable Life Mortgage now amounting to $57,500;

(b) to pay those bondholders who elect to take cash, or part cash, for their second mortgage bonds; to set up a reserve for missing bonds; and to provide for disbursements incidental to carrying out the plan of re-financing.

The meeting was duly held. Of the $71,100 bonds outstanding $66,950 were represented. Bonds totalling $35,650 were voted in favour of the plan and $31,300 against it. All of the bonds voted in favour of the plan were owned by the respondent J. M. Hickey. Those voted against it were owned in varying amounts by one corporation and nine individuals. Following the meeting the appellants moved before Urquhart J. for an order approving the sale. The trustees took a neutral position. The minority bondholders opposed the motion.

The material before Urquhart J. disclosed the facts set out above and also the opinion of three valuators as to the value of the mortgaged premises. The valuations varied from a low of $165,000 to a high of "$250,000 if not a forced sale or $225,000 if the property were sold at a forced sale". Mr. Colin Drever, an architect practising his profession in Kingston, in an affidavit filed on behalf of the appellants, placed the value at $175,000.

Urquhart J. granted the motion. The formal order of the Court ordered and approved "the sale to Hanson Apartments Limited" of the mortgaged premises "for the consideration and upon the terms of the offer of Hanson Apartments Limited set out in the plan submitted by the defendants Mathew Hanson and Tekla Hanson dated the 7th day of March 1949, a copy of which appears as Schedule "A" to this order and is declared to be a part hereof". Paragraphs 2 and 3 of the order provided:

AND THIS COURT DOTH DECLARE that such sale for the consideration and upon the terms aforesaid is fair and reasonable having regard to the interests of all parties interested in the premises and property so mortgaged or charged by the aforesaid Mortgage and Deed of Trust AND DOTH ORDER THE SAME ACCORDINGLY.

AND THIS COURT DOTH FURTHER ORDER that leave be reserved to the parties hereto to apply for a further and subsequent Order or Orders making provision in such manner on such terms in all respects as to this Court may seem proper for the transfer to and the vesting in the purchaser or its assigns of the whole of the right, title and interest of the Plaintiffs in their capacities aforesaid and of the plaintiff The Canada Trust Company as Receiver and Manager, in the said property, assets and undertaking of the Defendants, and for the transfer to and vesting in the purchaser or its assigns of the whole of the right, title

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and interest of the Defendants in the said property, and for the distribution or other disposition of the proceeds of such sale, and for the protection of any or all persons whose interests are affected by such Order, and for all such incidental, supplemental and consequential matters as the Court may deem just.

The Court of Appeal, in allowing the appeal, dealt with only one ground which is stated in the reasons as follows:

Nor do I think it necessary to consider the merits of the scheme of re-financing proposed to be completed if the order of approval of Urquhart J. stands. Suffice it to say that the sale in question is one arranged solely by the defendants (the mortgagors) and is to a Company organized by the defendants and in which they would hold all or the greater part of the stock.

In my opinion, it is beyond question that the proposed sale is not a sale under the power of sale in the mortgage or trust deed.

The sole question, therefore, for determination on this appeal is: Is the jurisdiction conferred on the Court by sec. 15 (*i*) of *The Judicature Act*, confined to the sanctioning of sales for other than cash only in proceedings to realize under a power of sale contained in a trust deed or mortgage securing bonds or debentures?

In my opinion a reading of the terms of sec. 15 (*i*) requires an affirmative answer to such question. To paraphrase the provisions of that section, it will be noted that "the Court may in such action order and approve such sale". Now what is "such sale"? Is it "the" sale which has been sanctioned and approved by the holders of such bonds and debentures and is "the" sale which is "for a consideration wholly or in part other than cash"? Referring further to the words of the section, what is "the" sale which bondholders may sanction and approve? Is it "the" sale which may arise where "any action shall have been brought or shall be brought for the purpose of enforcing or realizing upon any such mortgage or charge", i.e. upon a mortgage or charge securing bonds or debentures? This can only be a sale by the mortgagee in realizing upon the security and in my opinion cannot refer to a sale by a mortgagor attempting to salvage his equity of redemption. There is no pretence that the sale in question in this matter is one under the power of sale provision of the trust deed.

In the section prior to the 1935 amendment which was then repealed and had substituted therefor the present section 15 (*i*), it is more abundantly evident that the power of the Court to approve was only in an action brought by the mortgagee or trustee to realize upon the mortgage security by a sale for a consideration other than cash.

* * *

The present scheme which the Court has been asked to approve is in effect a compromise or adjustment put forward by the debtors to arrange and re-adjust their liabilities with their various creditors. Failing the unanimous consent of all creditors it, is not a matter for the Court's approval.

On the foregoing ground alone, which goes to the very root of the order appealed from, the appeal must succeed.

With the greatest respect to the learned Justices of Appeal, if I had reached the conclusion that the order of

Urquhart J. should be upheld upon the merits I would hesitate to give effect to the objection to the Court's jurisdiction upon which the judgment of the Court of Appeal is based.

The conditions necessary to give jurisdiction to the Court to approve a sale under section 15 (*i*) of *The Judicature Act*, so far as they are relevant to the case at bar, appear to me to be as follows:

(*a*) the existence of bonds secured by a mortgage;
(*b*) an action shall have been brought for the purpose of enforcing such mortgage;
(*c*) both of the above conditions being fulfilled the Court shall have ordered a meeting of the bondholders to be summoned;
(*d*) the holders of the bonds by a vote at such meeting of not less than fifty per cent in principal amount of the total bonds outstanding shall have sanctioned the sale, transfer or exchange of the property mortgaged for a consideration wholly or in part other than cash.

If all the above conditions are fulfilled the Court has, I think, jurisdiction to approve of the sale so sanctioned. Nothing is contained in the section to guide the Court as to how that jurisdiction shall be exercised except the provision that if the sale is approved it must be "on such terms in all respects as the Court shall think fair and reasonable having regard to the interests of all parties interested in the premises and property so mortgaged".

It is clear that, in this case, conditions (*a*), (*b*) and (*c*) mentioned above have been fulfilled. Whether or not condition (*d*) has been fulfilled depends upon whether the arrangement which is contained in the order of Urquhart J. can properly be described as a sale of the mortgaged premises for a consideration wholly or in part other than cash.

Such arrangement is clearly not a sale under the power of sale contained in the mortgage. It could not be, because the mortgage contains no power to sell for a consideration other than cash. But one of the purposes of the section appears to be to enable such sales to be made under mortgages containing no such power.

I agree with Mr. Wilson's submission that the validity of the sale is not to be tested by the origin of the proposal, but to enable it to derive validity from section 15 (*i*) it must be a sale of the mortgaged premises. Had the order of Urquhart J. been carried out the result would have been

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that Hanson Apartments Limited would have become the owner of the mortgaged premises, subject only to the first mortgage to the Ontario Equitable Life. All title previously held by the trustees or by the appellants would have been vested in Hanson Apartment Limited. The consideration passing from it would have been 1,200 fully paid shares of its common stock and $71,100 paid in cash or by the allotment and issue of fully paid preference shares or partly in cash and partly by the issue of such shares. This seems to me to be in substance a sale of the mortgaged premises for a consideration wholly or in part other than cash. There is one marked dissimilarity between the proposed arrangement and an ordinary sale by a mortgagee. In the latter case the whole consideration would be paid to the mortgagee and the owners of the equity would receive only the surplus, if any, remaining after the mortgage debt was fully satisfied, while under the proposed arrangement a definite portion of the consideration is to pass to the owners of the equity. I do not think that this goes to jurisdiction. The section is not designed to cover ordinary sales by mortgagees but rather special cases where the circumstances are such as to move the Court to approve a sale for a consideration other than cash even though no power to make such a sale is contained in the mortgage. The fact that the consideration is other than cash renders it necessary for the Court to consider how such consideration should be apportioned between the mortgagee and the mortgagor. The fact that the parties tentatively make this apportionment in the proposal does not, I think, take the case out of section 15 (*i*) so as to deprive the Court of jurisdiction; although unreasonableness in the proposed apportionment would move the Court to refuse its approval.

In my view the proposed arrangement may properly be regarded as being, in substance, a sale of the mortgaged premises to Hanson Apartments Limited for a consideration wholly or in part other than cash within the terms of section 15 (*i*) of *The Judicature Act* and Urquhart J. was right in entering upon a consideration of the merits of the proposal; but, with the greatest respect, I differ from the conclusion which he reached.

Before dealing with the details of the proposed arrangement I think it desirable to consider the interpretation of section 15 (*i*). That section reads as follows:

(*i*) (i) In case bonds or debentures are secured by a mortgage or charge by virtue of a trust deed or other instrument and whether or not provision is contained in the trust deed or other instrument creating such mortgage or charge giving to the holders of such bonds or debentures or a majority, or a specified majority of them, power to sanction the sale, transfer or exchange of the mortgaged or charged premises for a consideration other than cash, and in case any action shall have been brought or shall be brought for the purpose of enforcing or realizing upon any such mortgage or charge, or for the execution of the trusts in any such trust deed or other instrument with or without other relief, the court may order a meeting or meetings of the holders of such bonds or debentures to be summoned and held in such manner as the court may direct, and if the holders of such bonds or debentures shall sanction or approve the sale, transfer or exchange of the property so mortgaged or charged for a consideration wholly or in part other than cash, the court may in such action order and approve such sale on such terms in all respects as the court shall think fair and reasonable having regard to the interests of all parties interested in the premises and property so mortgaged or charged, and in such order or by any subsequent order may make provision in such manner, on such terms in all respects as to the court may seem proper, for the transfer to and vesting in the purchaser or his or its assigns of the whole or any part of the premises and property so mortgaged or charged and so sold, and for the payment of the proper costs, charges and expenses and remuneration of any trustee or trustees under such trust deed or other instrument and of any receiver or receiver and manager appointed by the court, and of any committee or other persons representing holders of such bonds or debentures, and for the distribution or other disposition of the proceeds of such sale, and for the protection of any or all persons whose interests are affected by such order, and for all such incidental, consequential and supplemental matters as the court may deem just.

(ii) The approval of the holders of any such bonds or debentures may be given by resolution passed at a meeting, by the votes of the holders of a majority in principal amount of such bonds or debentures represented and voting in person or by proxy, and holding not less than fifty per centum in principal amount, or such lesser amount as the court under all the circumstances may approve, of the issued and outstanding bonds or debentures in question. 1935, c. 32, s. 22.

Urquhart J. has construed the section as enabling the Court to sanction a sale on terms which will yield the mortgagors a substantial part of the sale price while yielding the mortgagees only a portion of their debt. It is well settled that statutes which limit or extend common law

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rights and which detract from rights of ownership must be expressed in clear and unambiguous language (*vide* Halsbury's Laws of England, 2nd Ed., Vol. 31, p. 502, s. 645, and cases there cited). I can find no words in the section which are apt to bring about so revolutionary a change in the respective rights of mortgagees and mortgagors on a sale of the mortgaged premises.

The effect of the section is, I think, to create a new procedure in an action on a bond mortgage. It enables a majority of the bondholders to bind all the bondholders by the terms of a sale of the mortgaged premises for a consideration wholly or partly other than cash, but the power so given is made subject to the safeguard that it may be exercised only upon the Court being satisfied that the terms are fair and reasonable having regard to the interest of all parties interested in the premises. I find nothing in the section, certainly nothing in express words, to suggest that the consideration received shall be dealt with, as between the mortgagee and the mortgagor, in any manner other than that long established in equity; that is to say the mortgagee is entitled to receive the full amount of his debt and must account to the mortgagor only for the surplus, if any, remaining thereafter.

In the case of a sale for cash this is a mere matter of accounting; but when the sale is for other than cash it is necessary to determine what portion of the consideration is a fair equivalent of the mortgage debt and should therefore become the property of the mortgagee and what, if anything, remains for the mortgagor. No doubt cases may arise where there is room for difference of opinion as to whether the portion of the consideration proposed to be treated as payment of the mortgage debt is a fair equivalent of that debt, and in such cases the bona fide opinion of the majority bondholders may well be allowed to govern the minority. The owners of the equity also have a vital interest in the matter if it can be suggested that the total consideration is of greater value than the amount of the mortgage debt. Considerations such as these, and the list is not intended to be exhaustive, would seem to give meaning to the words of the section stressed by Urquhart J. "having regard to the interests of all parties interested in the premises and property so mortgaged". I do not think

that these words should be interpreted as enabling the Court to sanction the appropriation of part of the consideration for the sale to the owners of the equity in a case where it is clear that part only of the mortgage debt is being satisfied.

In the case at bar, if the lowest figure mentioned in any valuation is taken, the mortgaged premises would appear to be worth $165,000. If from this is deducted the difference between the amount of the first mortgage and the cash surrender value of the life insurance policies held as collateral thereto, there remains a net value of $134,325. Under the proposal put forward the mortgage debt, which with interest amounts to $164,182.52, is to be extinguished by the payment of $71,100 in cash or paid up preference shares and the balance of the consideration is to go to the owners of the equity. It was not suggested that the four per cent non-cumulative preference shares could be reasonably regarded as worth more than their par value.

On its face the proposal does not seem attractive from the bondholders' point of view nor such as should be forced upon an unwilling minority. It is said, however, that the majority of the bonds have been voted in favour of the proposal and that the Court should not, in the words of McTague J. "substitute its judgment for the business judgment of reasonable men voting in their own interest" (*Montreal Trust Co.* v. *Abitibi Power & Paper Co.* (1). On the material in this case, I do not think that the proposal could be held to be reasonable having regard to the interests of the minority bondholders.

It will be remembered that all the bonds voted in favour of the proposal were owned by Mr. J. M. Hickey. It is conceded by all counsel that Mr. Hickey has acted throughout in good faith; but I can find no support in the material for the finding of Urquhart J. that Mr. Hickey "thought what he did was the best in his own interest" or that the rejection of the proposal would "put his holdings in jeopardy".

Two affidavits made by Mr. Hickey appear in the material but neither of them touches on his motives for supporting the plan, although they negative any sugges-

(1) [1938] O.R. 81 at 92.

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tion that he was acting as agent of the appellants. It seems to me that Mr. Hickey's motive is to be inferred from the wording of the plan. The plan points out that most of the outstanding bonds were acquired by their present holders for a fraction of their face value so that if the bonds are now surrendered on payment of the principal only the investment will have been a profitable one for the bondholders; that the bondholders' position has been greatly improved by the action of the appellants in purchasing and surrendering $63,900 of the bonds; that the appellants have made a total investment in the property of a very large amount all of which they are in danger of losing if the bondholders insist on their full legal rights; that the appellants have had no income from their investment during a period of twenty years while the total interest payments to the bondholders have been very substantial and that the present comparatively satisfactory condition of the investment is the result of the strenuous, prolonged and unrewarded efforts of the appellants. Following the recital of these facts the plan contains the following:

> We appeal to your sense of justice and fair play. We ask you to conscientiously review the facts that we have given you. If you do that we are confident you will give this plan your support.

The plan is, I think, a frankly worded appeal to the generosity and fair-mindedness of the bondholders. It does not attempt to disguise the fact, which would appear from the figures as to the value of the premises quoted above to be self-evident, that, if minded to do so, the bondholders can obtain payment of a substantially greater proportion of the mortgage debt than is offered by the plan.

This is not a case in which we are considering findings of fact made by the judge of first instance after hearing *viva voce* evidence. The application was argued and decided on affidavits and an appellate court is in as good a position as was the learned judge who heard the motion to draw inferences from the facts deposed to. I think the proper inference is that Mr. Hickey was moved to vote as he did by generosity and by an appreciation of the strong moral claims put forward by the appellants. Having reached this conclusion I think that we are bound by authority to hold that a resolution passed by votes cast

with such a motive cannot stand. I think that the principle to be applied is set out in the following passages from the judgment of the Judicial Committee in *British America Nickel Corporation* v. *O'Brien* (1). At page 371 Viscount Haldane says:

> Before their Lordships proceed to consider the somewhat involved circumstances in which the question arises, it will be convenient that they should refer to the principle to be applied in weighing the outcome of these circumstances.
>
> To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s. 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share. The distinction does not arise in this case, and it is not necessary to express an opinion as to its ground. What does arise is the question whether there is such a restriction on the right to vote of a creditor or member of an analogous class on whom is conferred a power to vote for the alteration of the title of a minority of the class to which he himself belongs.

Viscount Haldane then proceeds to discuss the cases of *Northwest Transportaton Company* v. *Beatty* (2) and *Burland* v. *Earle* (3) and continues:

> It has been suggested that the decision in these two cases on the last point is difficult to reconcile with the restriction already referred to, where the power is conferred, not on shareholders generally, but on a special class, say, of debenture holders, where a majority, in exercising a power to modify the rights of a minority, must exercise that power in the interests of the class as a whole. This is a principle which goes beyond that applied in *Menier* v. *Hooper's Telegraph Works* (4), inasmuch as it does not depend on misappropriation or fraud being proved. But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may

(1) [1927] A.C. 369.
(2) (1887) 12 App. Cas. 589.
(3) [1902] A.C. 83.
(4) (1874) L.R. 9 Ch. 350.

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vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly.

I think that the words of Lord Cairns in *Ex parte Cowen. In re Cowen* (1) are applicable to the case at bar. The effect of the judgment is accurately summarized in the head-note as follows:

> The power given by the 192nd section of the *Bankruptcy Act*, 1862, enabling the majority of creditors assenting to a deed of arrangement to bind the non-assenting minority, is a statutory power, and must be exercised *bona fide* for the benefit of all the creditors.

At page 570 Lord Cairns says:

> But even without any ingredient of fraud, if the creditors, from motives of charity and benevolence, which might be highly honourable to them, were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the Act requires, and would not bind the non-assenting minority.

I cannot find on the material that Mr. Hickey exercised his voting power for the purpose of benefiting the class of bondholders as a whole although, if I may borrow the words of Lord Cairns, I think that his motives were highly honourable to him.

For the above reasons I think that the resolution approving the plan cannot stand and that this appeal should be dismissed.

I should mention that while it appears to have been argued in the Courts below that section 15 (*i*) of the *Ontario Judicature Act* is *ultra vires* of the Provincial Legislature, no such argument was addressed to us and for the purposes of this appeal I have assumed, without deciding, that the section is valid. I do not mean by this form of expression to suggest that I entertain any doubt of its validity in a case where no question of insolvency is raised.

Ordinarily, when we are dismissing an appeal we should not, I think, vary the order as to costs made by the Court of Appeal; but I understood all counsel to assent to the view expressed by Mr. Wilson at the conclusion of his able

(1) (1867) L.R. 2 Ch. App. 563.

opening argument that, regardless of the outcome of the appeal, all costs should be ordered to be paid out of the assets in the possession of the Canada Trust Company as receiver and I think that under the peculiar circumstances of the case this is a proper course to follow. I would therefore dismiss the appeal and direct that the costs of all parties of the motion before Urquhart J., of the appeal to the Court of Appeal and of the appeal to this Court be paid forthwith after taxation thereof by the Canada Trust Company out of the property and assets in its possession as receiver and manager, the costs of the plaintiffs as between solicitor and client.

RAND J.:—As I apprehend it, the judgment of the Court of Appeal centres on the view that, as the effect of section 15 (*i*) of *The Judicature Act* is to enlarge a power of sale under a trust deed or similar instrument by annexing to it authority to sell for a consideration in whole or part other than cash, the sale proposed here, being that of the equity of redemption and not under the power, is unauthorized.

The provision, in the statute, for terms which the Court "shall think fair and reasonable having regard to the interests of all parties interested in the premises", and "for the protection of any or all persons whose interests are affected by such order", including those of the mortgagor, particularly as contrasted with the language of the subsection as enacted in 1917 and repealed by the amendment now in force, makes it clear, whether the power is viewed as purely statutory or as an addition to that provided by the deed, that in such a transaction, the senior security holders and the Court may approve of benefits to junior interests: and I see no reason why it should not extend to the case where the mortgagor is an individual.

The language of the proposal is not as apt and precise to the form contemplated as it might be; but that it is intended to propose a disposal appropriate to and made under the relief claimed in the proceedings is, I think, unquestionable. There is nothing technical necessary to its language and why any interested party should not be at liberty to make it has not been made apparent. What must be looked at

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is the arrangement as a whole and the object in view. In the preliminary stages of meetings and approval, there was no doubt in the minds of any of those now objecting of what was being put before them, and there is equally no doubt of that in my mind: it was and is a sale in the proceedings on the terms presented, and the proceedings are within the very words of the section.

That being the case, can the terms be said to be fair and reasonable? The conditions in which this legislation was enacted are a matter of common knowledge. We were in the depths of a worldwide depression, which, in this country, reached unexampled proportions. The terms are to be "fair and reasonable". What is "fair" to the mortgagee? to the mortgagor? This is not an oft-used word in the ordinary statutory vocabulary relating to mortgages; and the question which meets us at the outset is, can the existing balance sheet between the two parties be deliberately altered in favour of the mortgagor?

That question is one of difficulty, but I have been driven to the conclusion that where, as against a sale for cash, the terms could not prejudice the mortgagor and could not add to the benefit or interest of the mortgagee, the obligation cannot be altered for the purpose of transferring a possible benefit to the mortgagor. No one here suggests a sale for cash; the interest of both mortgagee and mortgagor seems to lie in working out the debt over a long term; but in that form, to require the mortgagee to surrender part of his claim is to transfer a possible benefit from him to the mortgagor. If, in the end, only the amount as reduced should be realized, the mortgagee would take all; if any more were realized, he would so far be prejudiced to the advantage of the mortgagor.

The ordinary rule is that such a right can be impaired only by clear and precise language of legislation, but that is not the nature of the language before us. The bonds have the entire solvency of the mortgagor to support them, and to cut the amount down except by a discharge in bankruptcy has uniformly been looked upon as an exceptional exercise of legislative power. The conduct of the mortgagor in relation to this matter has admittedly been most meritorious; his appeal for consideration is corre-

spondingly strong; and one may be without any sympathy whatever with the action and attitude of the mortgagee. But the desirability of adjusting the interests of these parties in the "fair and reasonable" manner conceived by Urquhart J. is one that must be decided by the legislature and declared, not by general words which leave the long established underlying rules of interpretation untouched but, as in the case of the *Farmers' Creditors Arrangement Act*, S. of C., 1934, c. 53, by words which are unmistakable in intent.

I am, therefore, unable to find that the proposed terms are within the section, and the appeal must be dismissed. The costs of all parties will be paid out of the property.

ESTEY J.:—This is an appeal from an order of the Court of Appeal in Ontario reversing an order approving a sale of property under s. 15 (*i*) of *The Judicature Act*, R.S.O. 1937, c. 100.

Mathew and Tekla Hanson, with a view to the construction of the new Annandale Apartments in the City of Kingston, under date of June 20, 1929, arranged with United Bond Company Limited to underwrite a bond issue of $135,000 with interest at 6½ per cent secured by a first mortgage.

On November 12, 1930, the mortgagors having made default, action was commenced by writ of summons in the Supreme Court of Ontario to enforce the mortgage dated June 20, 1929, for $135,000, and for the appointment of the London and Western Trust Company Limited as receiver and manager. On December 18, 1930, the said Trust Company was appointed receiver and manager and it or its successor, The Canada Trust Company, has been in receipt of the rents and profits at all times since that date. The apartment at that time was 75 per cent completed. It was finished by virtue of a further loan of $60,000 from the Ontario Equitable Life Insurance Company of Canada secured by a mortgage which was given priority over that for the $135,000 securing the bonds.

On May 30, 1949, Mr. Justice Barlow in the foregoing action authorized under s. 15(*i*) the holding of a meeting

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of the bondholders to consider the sale of the property for a consideration other than cash. The meeting was held on June 20, 1949. At that time there were $71,100 of the original $135,000 bonds outstanding, of which $66,500 were represented at the meeting. The proposed sale was approved by a vote representing $35,650 in favour, while the holders of $30,850 voted against it. (This figure of $30,850 was later corrected to read $31,300, and the total therefore represented at the meeting was $66,950.) One person owned all the bonds voted in favour of the sale.

On June 20, 1949, the first mortgage in favour of the Ontario Equitable Life Insurance Co. amounted to $57,500 with a cash surrender value in the four insurance policies held as collateral thereto of $26,825. The net mortgage position was therefore $30,675 plus $71,100 of bonds and unpaid interest on these bonds of $93,082.50, or a total in mortgage indebtedness of $194,857.50 of the original mortgage indebtedness of $195,000.

The proposed purchaser, Hanson Apartments Limited, is a corporation of which the mortgagors obtained the incorporation for the purpose of concluding the proposed sale. The capital stock consists of (*a*) 1500 4 per cent non-cumulative preference shares par value of $50 each, (*b*) 1200 common shares without nominal or par value.

The proposal is that Hanson Apartments Limited would purchase "the equity of Mathew Hanson and Tekla Hanson in the New Annandale property" and would pay therefor 1200 common shares. Hanson Apartments Limited would borrow upon the security of the New Annandale property and the cash surrender value in the policies of insurance above mentioned a sum sufficient to pay off the $57,500 of the first mortgage to the Ontario Equitable Life Insurance Company of Canada, and such further amount as might be required to pay to those holders of the $71,100 bonds who desired to be paid cash. These bondholders might elect to take either cash or the 4 per cent non-cumulative preference shares. The plan provided for the retirement of the preference shares, but so long as they were held by the bondholders, the latter would share equal voting rights with the common shareholders.

The mortgagors in presenting the proposal described it as "eminently fair and equitable." These bonds they emphasized were quoted in the 1930's as low as $200 a thousand and had gradually increased until the end of 1948 "the quoted bid price had increased to $920 a thousand." This, it was suggested, was due largely to the fact that the mortgagors had purchased these bonds which, in terms of par value, totalled $63,900 and had, in 1931, surrendered them to the trustees. They point out that had they not done so the present "offer of a full return of capital on second mortgage bonds would be impossible"; that there are very few of those who purchased bonds originally who are now the holders thereof and that the great majority of the present holders purchased them as a speculative investment and, in particular, those who had purchased bonds at less than $680 have, since 1943, received an "impressive" rate of interest; that over the 20 year period the bondholders had received 3 per cent simple interest on the par value of the bonds, while the mortgagors' investment of $150,000 had remained frozen without income and in continual jeopardy. The plan concluded:

> We appeal to your sense of justice and fair play. We ask you to conscientiously review the facts that we have given you. If you do that we are confident you will give this plan your support.

The minority bondholders contend that the sale is not fair and reasonable. They point to their contractual rights and the mortgage position of the premises; that the first two coupons were paid on the respective due dates December 20, 1929, and June 30, 1930. No. 3 coupon was not paid until June 20, 1943. Thereafter coupons were apparently paid as and when funds permitted. Since 1943 nine coupons have been paid in full and there is still outstanding a total of over $93,000 of unpaid interest; that, in fact, the mortgagors have no equity in the premises and through this sale seek to acquire an immediate equity about equal to the arrears of interest in an amount of over $93,000.

Sec. 15(*i*) provides that after the bondholders have approved of the sale then

> the court may in such action order and approve such sale on such terms in all respects as the court shall think fair and reasonable having regard to the interests of all parties interested in the premises and property.

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The first mortgagee (The Equitable Life Insurance Company of Canada) would, under the plan, be paid in full and has taken no part in this application. The parties whose interests, therefore, must be considered are the bond-holders and mortgagors.

The provisions of sec. 15(*i*) require consideration of the terms of the proposed sale rather than its origin or purpose. Wherever or however the sale may originate, the approval authorized by the Statute is of a sale the terms of which are "fair and reasonable having regard to the interests of all parties interested in the premises and property." Many of the factors which have been urged in support of this plan may be of importance if the matter were to be considered from another point of view, but they do not assist in determining whether the sale is fair and reasonable within the meaning of the Statute.

Affidavits were filed in which the deponents expressed their respective opinions as to the value of this property and these varied from $165,000 to $250,000. If a valuation approximating $200,000 be accepted, a sale for that amount would discharge the mortgage indebtedness of about $195,000 in full. At the hearing it seemed to be the opinion that either that amount or some amount approximating $225,000 would be a fair value. If the property was sold at the latter amount the equity of the mortgagor would be approximately $30,000. Under the present plan the bond-holders forego over $93,000 of interest and, if they accept bonds, their interest rate is reduced from 6½ per cent to 4 per cent and it would seem that the benefit of this reduction would pass to the mortgagors who, if the plan worked out as contemplated, would ultimately own the shares in Hanson Apartments Limited.

A statement of receipts and disbursements was filed for the 7½ year period from January 1, 1941, to June 15, 1949. It disclosed that for that period the property had not earned sufficient to pay the carrying charges and the interest in full. No attempt, however, was made to break down or analyze the 7½ year financial statement, or to compute,

upon the basis thereof, what the property ought to realize at a sale. Moreover, one of the valuators stated:

> The apartments are attractive and I should consider they would always be in demand * * * It seems to me that the rentals of all the apartments are low, particularly the upper five-room apartments.

He suggested the low rents were due to rent control.

S. 15(*i*), in providing for a sale in judicial proceedings for a consideration other than cash, effects a change in the common law. Apart from this express change it would appear the Legislature intended the sale here contemplated should retain all its other common law attributes. When, moreover, the section provides "a Court may * * * order and approve such sale on such terms in all respects as the Court shall think fair and reasonable having regard to the interests of all parties interested in the premises * * *", it clearly expresses the factors that ought to be considered upon an application for the Court's approval.

Under the terms of the proposed sale the mortgagees forego the items above indicated and the mortgagors, through Hanson Apartments Incorporated, benefit thereby. This is sought to be justified upon the basis that the history of the property and the contribution of the mortgagors have been such that the mortgagees ought to accept this sale as "eminently fair and equitable." A sale supported only upon that basis is not contemplated by the statute. Then when regard is had to the valuation of the premises filed as a part of this record, as well as the desirability of the premises and the low rents that have been realized, there is absent in the material the evidence which would support a conclusion that the sale is fair and reasonable within the meaning of s. 15.

The respondent bondholders not only opposed the approval of the sale on the basis that it is not fair and reasonable, but that the approval of the majority bondholder is not, in the circumstances, valid within the meaning of the section. They do not suggest bad faith on his part. They do contend, however, that in casting his vote he did not exercise a sound business judgment *qua* bondholder, but rather was unduly influenced to do so out of consideration for the mortgagors. The record discloses

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that this bondholder has acted as solicitor for the mortgagors on other occasions, in particular upon a similar but unsuccessful application in this action in 1939. He acquired a number of these bonds in his own right and, as he deposed:

> In 1948, finding myself with a substantial investment in Annandale bonds but not with the majority of the bonds outstanding, I purchased some bonds at a premium over par for the purpose of holding the majority of the bonds to protect my investment.

Moreover, the appellants point to the fact that in submitting this plan to the bondholders the mortgagors ask that those bondholders who were favourable to the plan and who propose to vote by proxy should nominate the majority bondholder as their proxy.

The authority of the majority to bind the minority is contained in s. 15(*i*) and the relevant principle to be applied is stated by Viscount Haldane:

> But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interests directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly. *British America Nickel Corporation* v. *O'Brien* (1).

And at p. 378 (1128 D.L.R.):

> But as that vote had come to him as a member of a class he was bound to exercise it with the interests of the class itself kept in view as dominant.

That such must be the dominating factor is emphasized by Lord Cairns in *Ex parte Cowen* (2):

> But even without any ingredient of fraud, if the creditors, from motives of charity and benevolence, which might be highly honourable to them, were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the Act requires, and would not bind the non-assenting minority.
>
> But if not * * * that these assenting creditors, being connected with the debtor, or his personal friends, and wishing to shew kindness and generosity to him, were content to take this nominal composition, and to give him his discharge. In that case, although the transaction

(1) [1927] A.C. 369 at 373; [1927] 1 D.L.R. 1121 at 1124

(2) (1867) L.R. 2 Ch. 563 at 570.

might not amount to a fraud, yet it was not a *bona fide* bargain, and could not bind the minority. In either view of the case, therefore, the Commissioner was right, and the appeal must be dismissed with costs.

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The majority bondholder acquired, in 1948, sufficient additional bonds at a price above par in order that he might have a majority thereof for the purpose of protecting his investment, and in 1949 cast his vote in favour of the approval of a sale that, in effect, cancelled all arrears of interest upon these bonds and reduced his return from 6½ per cent to 4 per cent if he accepted preferred shares, while the other bondholders holding a very substantial proportion of the bonds opposed the sale. Without in any way doubting his good faith, these circumstances, unexplained as they are, support the view that the majority bondholder, in voting in favour of the plan, was prompted to do so by reasons of benevolence rather than those business considerations which one would take into account when determining a vote in the interests of the bondholders.

The appeal should be dismissed, the costs of all parties to be paid by the Canada Trust Company out of the assets in its possession as receiver and manager of the property in question. The trustees will have their costs on a solicitor and client basis.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario reversing an order of Urquhart J. made under the provisions of section 15(*i*) of *The Judicature Act*, R.S.O. 1937, c. 100, approving the sale of the New Annandale Apartments in Kingston, the property of the appellants, under the following circumstances.

By a mortgage and deed of trust dated the 20th day of June, 1929, the appellants mortgaged and charged the property in question in favour of the London and Western Trusts Company Limited and Howard C. Wade to secure the payment of an issue of bonds in the principal amount of $135,000 payable over a period of seven years, together with interest at 6½ per cent per annum. The purpose of the bond issue was to finance the building of the apartment block but, while bonds to the full amount made their way into the hands of the public, only a portion of the amount realized was received by the mortgagors, owing mainly to

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the subsequent insolvency of the fiscal agents employed in marketing the bonds, and the amounts received were insufficient to complete the building. Defaults having been made under the mortgage the trustees on November 12, 1930, issued a writ, endorsed with a claim to enforce the deed of trust, for the appointment of the London and Western Trusts Company Limited as receiver and manager, and for possession. By an order of the Supreme Court of Ontario made on December 18, 1930, the trust company was appointed receiver and manager of all the property and assets covered by the mortgage on behalf of the mortgagees and the holders of first mortgage bonds. On January 27, 1931, a further order was made granting liberty to the receiver to borrow a sum of $60,000 from the Ontario Equitable Life and Accident Insurance Company for the purpose of completing the building and permitting the appellants to execute a mortgage to secure the amount, such mortgage to constitute a first charge upon the property and assets in priority to the mortgage of June 20, 1929. With these further moneys the building was completed: the London and Western Trusts Company Limited continued in possession as receiver, collecting the rents and managing the property until the acquisition of the undertaking and assets of that company by the respondent the Canada Trust Company early in the year 1947: since that time these duties have been performed by the last named company. By an order of October 31, 1947, it was directed that the action commenced in November 1930 be continued in the name of the said Canada Trust Company and the respondent Glendinning who, by an order made in February, 1932, had been substituted as trustee in the place of Wade. The result of the operation of the property by the receiver up to the date of the present application of the appellants has been to reduce the principal amount of the first mortgage to the Ontario Equitable Life and Accident Insurance Company to the amount of $57,500 to maintain in force life insurance policies taken out in 1931 as additional security for the said company's loan then having a cash surrender value of $26,825 and to maintain the property. The appellants during this period have purchased and

retired bonds of the principal amount of $63,900 of the original issue of $135,000 leaving bonds to the amount of $71,100 outstanding.

On March 7, 1949, the appellants made a written proposal to the remaining holders of the bonds for what was in effect a compromise of their indebtedness. As expressed in the proposal, the plan was for the sale to a new company named Hanson Apartments Limited of the equity of Mathew and Tekla Hanson in the New Annandale property, the retirement of the outstanding bonds and discharge of the second mortgage by paying to the bondholders at their option either the principal amount of their bonds in cash or preference shares bearing a four per cent non-cumulative dividend to their face amount: the carrying out of the plan involved paying off the Equitable Life mortgage and the surrender to the new company of the cash surrender value of the insurance policies. On May 30, 1949, the trustees applied to the Supreme Court of Ontario for an order directing that a meeting of the holders of the bonds be convened to consider this offer and an order was made directing that such a meeting be held at the City of Toronto for the purpose of considering the plan proposed by the Hansons, and alternatively in default of the approval of that plan, either as proposed or as modified or amended, any other plan that might be proposed at the said meeting for the sale, transfer or exchange of the property and assets for a consideration wholly or in part other than cash. Pursuant to further directions in the order the Canada Trust Company gave written notice to the parties interested of a meeting called for the purpose of considering first "a certain plan proposed by the said Mathew Hanson and Tekla Hanson dated the 7th day of March, 1949, providing for the sale, transfer or exchange of the property and assets described in the said mortgage and deed of trust for a consideration, wholly or in part, other than cash, all as therein set out;" and secondly, in default of the approval of such offer, any other plan that might be proposed at the meeting. The meeting so called was held on June 20, 1949. At that time there were large arrears of interest payable on the outstanding bonds so that the cash offer represented less than the amounts due to the bondholders

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and, assuming the preference shares offered would have been worth no more than par, their value also was less. While the question as to whether the offer of the appellants was a fair offer of compromise is not, in my opinion, decisive of the matter, it is to be noted that the amount required to discharge the first mortgage of the Equitable Life after crediting the cash surrender value of the insurance policies was $28,350 and the principal amount outstanding on the bonds $71,100 a total of $99,450. The fair value of the property as shown by an affidavit filed in the proceedings on behalf of the present appellants was $175,000 while a valuator employed by the respondents considered that it would realize at a forced sale $225,000. The arrears of interest upon the outstanding bonds approximated $93,000 and the appellants' proposal involved a release of their indebtedness for this amount. Even if the personal covenants of the appellants had been without value, it is apparent that the bondholders would have realized a substantial amount of their claim for interest had the property been sold under the power of sale in the mortgage. The holders of the majority of the outstanding bonds, however, favoured the acceptance of the offer and the proposed sale was approved by the order of Urquhart J. made on September 15, 1949.

The judgment of the Court of Appeal proceeds upon the ground that subsection (*i*) of section 15 of the *Judicature Act* does not authorize the approval of a sale of mortgaged or charged premises other than one which is proposed to be made under the power of sale contained in a mortgage or trust deed. While the London and Western Trusts Company Limited had commenced action in 1930 to enforce the mortgage, for the appointment of a receiver and for possession and a receiver and manager had been appointed, no further steps had been taken in that action by the delivery of a statement of claim or otherwise, except an application made in the year 1939 which was dismissed and the present application to approve proposed sales of the property. While the present application was made in the name of the Canada Trust Company, it was not to approve a sale made under the power of sale contained in the mortgage but simply for the approval of a sale by the Hansons of their

equity of redemption in the property to the new company upon the defined terms. Subsection (*i*) of section 15 was originally introduced into the *Judicature Act* (though not in its present form) by section 17 of the *Statute Law Amendment Act,* 1917 (Ont.) c. 27. That amendment provided that when debenture holders were entitled to a charge by virtue of a trust deed and under its terms a majority of them were given power to sanction the sale or exchange of the mortgaged premises for a consideration other than cash, the court should have power in any action brought for the purpose of realizing upon such mortgage or the execution of the trusts to sanction any such sale and to give the necessary directions for the purpose of carrying the same into effect and to direct the trustee to exercise all or any of the powers conferred by the trust deed. By *The Judicature Amendment Act,* 1935 this subsection was repealed and there was substituted therefor a subsection which, in so far as relevant, provides that in case bonds or debentures are secured by a mortgage or charge by virtue of a trust deed or other instrument and whether or not provision is made in such instrument giving to the holders of the bonds or a majority of them power to sanction the sale of the mortgaged premises for a consideration other than cash, and in case any action shall have been brought for the purpose of realizing upon the mortgage or for the execution of the trust in any trust deed, the court may order a meeting of the holders of the bonds to be summoned and, if they sanction or approve the sale of the property for a consideration wholly or in part other than cash, the court may in such action order and approve such sale on such terms as it may think fair and reasonable and may make provision for the transfer of the property to the purchaser, for the payment of the proper costs, charges and expenses of the trustee, for the distribution of the proceeds of such sale and for all such incidental, consequential and supplemental matters as it may deem just. It is further provided by the amendment that the approval of the holders of any such bonds may be given by resolution passed at a meeting by the votes of the holders of a majority

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in principal amount of such bonds or debentures and holding not less than fifty per cent of the issued and outstanding bonds.

In the present case the mortgage is expressed to be made in pursuance of the *Short Forms of Mortgages Act* (R.S.O. 1937, c. 160) and contains the statutory power of sale. The bonds secured by it and which are held by the respondents contain the covenant of the appellants to pay their principal amount and interest at the stipulated rate. In neither instrument is there any provision for calling meetings of the bondholders or giving to them or a specified majority of them power to sanction a sale of the premises, whether for cash or for a consideration other than cash, or enabling any such majority to authorize a sale of any kind. The contention of the appellants is that when the holders of a majority in principal amount of the bonds represented and voting at a meeting and holding not less than fifty per cent in principal amount approve a sale at such figure and upon such terms as they may approve, the court may authorize such a sale under the subsection even though, as in the present case, it involves depriving all of the bondholders of a substantial part of their claims. I do not think that any such power is vested in the court. Subsection (*i*) of section 15, as enacted by the amendment of 1917, appears to me to have been enacted solely for the purpose of providing a means whereby in proceedings by the mortgagee named in the mortgage and deed of trust to realize upon the security the court might sanction a sale for a consideration other than cash when under the terms of the trust deed the debenture holders or a majority of them were empowered to sanction such a sale and had exercised such power. As amended in 1935 the subsection vested this power in the court in proceedings by such a mortgagee to realize the security when the instrument did not contain provisions vesting this right in the debenture holders and I think that nothing more was intended. That amendment provides that in case the bonds are secured by a mortgage which does not contain any provision giving to the holders of the bonds or the majority of them power to sanction a sale of the mortgaged premises for a consideration other than cash, and in case an action has been brought

for the purpose of realizing upon the security if the requisite majority of the bondholders approve a sale for such a consideration: "the court may in such action order and approve the sale."

I think the clear meaning of this language to be that the sale referred to is a sale under the power contained in the mortgage. I find nothing in the subsection to indicate that it was intended to vest in the court power of the nature given to bankruptcy courts to enforce a compromise of debts against the will of the creditors or any part of them. The question as to whether or not the proposal is a fair one does not enter into the matter: the matter is one of jurisdiction and I respectfully agree with Mr. Justice Hope that the court was without power to make the order of September 15, 1949.

The appeal should be dismissed. I agree with the order as to costs proposed by my brother Cartwright.

Appeal dismissed.

Solicitor for the appellants: *H. F. Gibson.*

Solicitor for the respondents: *J. S. D. Tory.*

Solicitor for the Bond Holders Re-Organization Committee and certain Bondholders: *A. G. McHugh.*

The majority Bondholder, J. M. Hickey, in person.

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*Feb. 6

THE SHIP *"SPARROWS POINT"* (DEFENDANT) ..... APPELLANT;

AND

GREATER VANCOUVER WATER DISTRICT (PLAINTIFF) ..... RESPONDENT-APPELLANT

AND

NATIONAL HARBOURS BOARD (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT.

Shipping—Damage to water mains caused by ship's anchor—Whether ship failed to comply with regulations governing passage of ships under bridges at Vancouver—Whether ship remained "at safe distance" —Whether operators of bridge at fault—Jurisdiction of Exchequer Court in claim against bridge.

The regulations governing the passage of ships under the Second Narrows bridge at Vancouver, B.C., provided that every vessel, desiring the lift span of the bridge to be raised, should give a signal to be repeated until acknowledged by a red light and remain at a safe distance from the bridge until a green light, indicating that the span had been raised, had replaced the red.

The ship *"Sparrows Point"*, after having received the acknowledgment light, proceeded to a point beyond which, still not having seen the green light, she could not safely go on, and thereupon dropped her anchor damaging the respondent Water District's water mains laid there under statutory authority and marked on the navigation charts. The trial judge found that the ship had been negligent and exonerated the operators of the bridge. The ship appealed to this Court against this finding of negligence and the Water District appealed against the exoneration of the Harbours Board.

Held: That the ship, in disregard of her duty to the Water District mains, committed a negligent act by approaching so close to the bridge without having seen the green signal, thus incurring the risk of having to anchor in the area occupied by the mains.

Held (Locke J. dissenting), that the operators of the bridge were also at fault, in neglecting to switch off the red light and switch on the green after the span had been raised; but (Rand and Locke JJ. contra) the easement provision in the agreement under which the mains were laid precluded the Water District from claiming against the Harbours Board for the damage.

Held (Locke J. expressing no opinion), that under the *Admiralty Act* (S. of C. 1934, c. 31) the Exchequer Court had jurisdiction to deal with the claim of the Water District against the Harbours Board.

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

Per Locke J. (dissenting in part): The trial judge having heard the evidence of the two operators of the span his finding that the green light was displayed as sworn to by them should not be disturbed, and therefore the appeal of the respondent, Water District, should be dismissed as against the National Harbours Board. (*Arpin* v. *The Queen* 14 Can. S.C.R. 736, *Granger* v. *Brydon-Jack* 58 Can. S.C.R. 491, *Powell* v. *Streatham* [1935] A.C. 243 and *Watt* v. *Thomas* [1947] 1 A.E.R. 583 referred to).

APPEALS from the judgment of the Exchequer Court of Canada, British Columbia Admiralty District (1).

Alfred Bull K.C. and *D. S. Montgomery* for the appellant.

Douglas McK. Brown K.C. and *John J. Urie* for Greater Vancouver Water District.

F. D. Smith K.C. and *J. I. Bird* for National Harbours Board.

The judgment of the Chief Justice and of Taschereau and Kellock JJ. was delivered by

KELLOCK J.:—The ship appeals on the ground that there was no negligence on the part of anyone for whom it is chargeable, while the Water District appeals against the finding of the trial judge (1) in exoneration of the Harbours Board.

As to the ship, it is clear on the evidence that both the pilot and the captain were aware of the existence and location of the mains here in question, and that they were also aware of the position of the ship at all relevant times.

The ship had blown for the bridge when it was opposite Berry Point, one and one-half miles east of the bridge. Almost immediately thereafter, the red light on the bridge appeared. Both the pilot and the captain gave evidence that in their experience the invariable practice was for the red light to be followed "shortly after" by the green, indicating that the span was up. On the occasion in question, however, according to the evidence of those on the ship, the green light did not appear as formerly, and for that reason the whistle signal was repeated a number of times, the ship meanwhile proceeding slowly along the channel which was progressively becoming narrower and

(1) [1950] Ex. C.R. 279.

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more dangerous for a ship of that size, should she have to anchor. The mains occupy some 550 feet between a point 1,100 feet east and 1,650 feet east of the bridge.

Both the captain and the pilot say that the visibility was good. However, those in charge of the ship knew, or should have known, that if the green signal continued to be delayed in its appearance, the time would come when the ship could safely proceed no farther. In my view, it was negligent for the ship to proceed to the point it did before stopping or casting its anchor. In so proceeding, the ship was voluntarily incurring the risk of having to anchor in the area occupied by the mains. There was no necessity for such a course. She could and should have anchored to the east. I think the language of Willes J. in the *Sub-Marine Telegraph Company* v. *Dickson* (1), is applicable:

> It is the duty of the persons navigating so to exercise their rights as to do no damage to the property of others . . . No one is justified in wilfully or by culpable negligence injuring property of another, whether above or under water.

With respect to the respondent, National Harbours Board, the learned trial judge accepted the evidence of the bridge operators to the effect that the span over the channel was raised immediately after the showing of the red light, but that fog existing at the upper level shrouded the light to such an extent that it was not visible to those navigating the ship. He also found that those on board the ship, including the pilot, were mistaken when they testified that they continued to see the red light until after the anchor had been dropped.

The learned trial judge did not base his finding as to the green light on credibility. On the contrary, his finding that the pilot was mistaken in testifying that he continued to see the red light until it was changed to green, was on the ground that he was *honestly* mistaken. The learned judge says that the pilot was undoubtedly a man of very great experience and that he gave his evidence in such a satisfactory and seamanlike fashion as to win his admiration. He said he felt that the witness was perfectly

(1) (1864) 15 C.B. (N.S.) 759 at 779.

straightforward and that from his career he knew more about navigation under the Second Narrows Bridge than anybody else in the world.

I think it must be taken that, so far as honesty is concerned, the learned trial judge had a similar view about the other witnesses on the ship who testified as to the lights on the bridge, as he puts his conclusion with regard to their evidence on the same basis as that of the pilot, namely, mistake. The reason he gives for accepting the evidence of the operators of the bridge as to the fog at the upper level of the bridge and as to the green light having replaced the red, is because he saw "no ground why I should doubt the accuracy of the evidence of the bridge operators." In these circumstances, an appellate court is in as good a position as the trial judge to draw the proper inference from the evidence. As put by Viscount Simon in *Watt* v. *Thomas* (1):

> It not infrequently happens that a preference for A's evidence over the contrasted evidence of B is due to inferences from other conclusions reached in the judge's mind rather than from an unfavourable view of B's veracity as such. In such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the materials admit of this, and, if the appellate tribunal is convinced that these inferences are erroneous and that the rejection of B's evidence was due to the error, it will be justified in taking a different view of the value of B's evidence.

Lord Thankerton said at p. 587:

> The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

In the case at bar, there is no controversy about the fact that the red light on the bridge was switched on at approximately 0414, and that it was seen by those on board the ship. This is expressly so found by the learned trial judge who says:

> After the *"Sparrows Point"* whistled, the bridge showed its red light so that the ship knew her signal had been heard.

It took approximately three minutes for the bridge span to be raised, and the entry in the bridge log indicates that the span was raised at 0417. The learned trial judge does not say when those on board the ship became mistaken,

(1) [1947] 1 All. E.R. 582 at 584.

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but on the evidence and his finding it is clear that they saw the red light for at least three minutes after it first appeared. Presumably, in the view of the learned trial judge, the mistake arose when the bridge with the light ascended into the fog which the bridge operators say existed at the upper level, but the learned judge does not indicate how the mistake could have arisen. There was no other red light with which that on the bridge could have been confused, and this is not suggested by the learned judge.

Counsel for the Harbours Board very properly makes much of some evidence given by the Chief Officer of the ship to the effect that he saw the red light before the ship whistled initially. This evidence is so clearly erroneous that I do not think it is of any value one way or the other in the determination of the matters in issue. Clearly the red light did not go on except in answer to the ship's signal, and the witness's memory as to the time he first observed it is at fault.

Accordingly, just how those on board the ship could have been mistaken and honestly mistaken in continuing to see the red light is left unexplained. The ship was continuously getting closer to the bridge and the view of those on board would continue to improve, and the mistake, if mistake there was, must have lasted for some ten minutes, from 0417 when the span went up, until 0427 after the ship had anchored. The trial judge finds that it was the sight of the green light which caused the ship to weigh anchor and proceed through the bridge even before the operators of the bridge say they saw the ship. In these circumstances and on these findings, I am unable to see any more ground for doubting the accuracy of the evidence of those on board the ship who testified to seeing the red light than for doubting the accuracy of the evidence of the bridge operators. In fact, acceptance of the evidence of the latter on the ground upon which it is put presents the tribunal of fact with the much greater difficulty of making some explanation as to how those on board the ship could have been mistaken in thinking that the red light, which they undoubtedly saw for the first three minutes after its appearance, continued within their vision,

the forward movement of the ship continually narrowing the distance between them and the point where the light was situated.

Although not of itself sufficient, it is of considerable significance in the light of the considerations mentioned above, that the conduct of the ship is entirely consistent with the evidence of those on board. When the green light did not appear within the customary period, the ship continued to blow its whistle to indicate that fact to the bridge operators, and the ship continued to approach the bridge, a fact which would be patent to them. As to the evidence of the bridge operators, that they advised the ship over the loud-speaker that the span had been raised, the witnesses on board the ship, honest witnesses according to the learned trial judge, say that they heard all that was said except the statement that the span had been raised. No motive is alleged or can be imagined why the ship would not have proceeded through the bridge if it had been apprised of the fact that the way was clear. No one suggests that there was any fog between the piers where the ship had to pass, nor anywhere except at the upper level, some 120 feet above the water. The bridge operators themselves admit that if those on board the ship could hear the loud-speaker at all, they could hear everything that was said, and it is significant that two independent witnesses who lived on the south bank of the channel, one 400 yards and the other 500 yards east of the bridge, heard what those on board the ship heard, and nothing else.

In these circumstances, I think there is more ground for doubting the accuracy of the evidence of the bridge operators than that of those on board the ship. I think the conclusion must be that the mistake was on the part of the bridge operators in neglecting to switch off the red light and switch on the green after the span was raised, and that this omission was realized by them only when they realized that the ship was not going through but was anchoring. In my opinion, there was a duty on the Board not to do or omit to do anything which might unnecessarily result in damage to the water mains. In the present instance, I think there was a breach of that duty.

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The question was raised during the argument as to the jurisdiction of the Admiralty Court to deal with the claim of the Water District against the Harbours Board. It is clear, I think, that the court has no jurisdiction beyond that conferred by the statute; c. 31 of the statutes of 1934; *Bow McLachlan and Co.* v. *The Ship "Camosun"* (1). The statute has been changed since that decision, but the principle is still applicable. The answer to the question raised depends upon the meaning of the words "damage by any ship" in s. 22(1) (iv) of Schedule A to the statute of 1934, which reproduces s. 22 of the *Supreme Court of Judicature Consolidation Act* (1925) c. 49, the language of which is "any claim for damage done by a ship." There have been a number of decisions since the enactment of the original statute of 1861, 24 Vic. c. 10, s. 7.

In the *"Uhla"* (2), and in the *"Excelsior"* (3), jurisdiction was exercised in the case of damage done by a ship to a dock, and in *Mayor of Colchester* v. *Brooke* (4), jurisdiction was exercised in the case of damage to oyster beds.

In the case of the *"Bien"* (5), the plaintiff, lessee of an oyster bed, sued the conservators of the River Medway and the owner of a ship for damage sustained to an oyster bed caused by a ship when acting under orders of a harbour master. That case was, of course, decided after the Judicature Acts when the jurisdiction of the Admiralty Division was no longer limited to that formerly exercised by the Court of Admiralty. The circumstances in question in the present proceedings are analogous. If the claim against the Harbours Board cannot be entertained in the Admiralty Court, the result is that the Water District ought to have brought two actions, the one on the Admiralty side of the Exchequer Court against the ship, and the other elsewhere.

In my opinion, the statute, which prima facie confers jurisdiction upon the Admiralty Court in a case of this kind, should be construed so as to affirm the jurisdiction, at least in a case where the ship is a party. There is no authority to the contrary to which we have been referred

(1) [1909] A.C. 597.
(2) (1867) Asp. M.C. 148.
(3) (1868) L.R. 2 A. & E. 268.
(4) (1845) 7 Q.B. 339.
(5) (1911) P. 40.

or which I have been able to find, and every consideration of convenience requires a construction in favour of the existence of such a jurisdiction.

In the *"Zeta"* (1), Lord Herschell, in referring to s. 7 of the Act of 1861, said at p. 478:

> It is enough to say that the proposition that the Act of 1861 applies to damage done by a ship to persons and things other than ships has been well established by many authorities, the correctness of which I see no reason to question.

With respect to the earlier Act of 1840 (damage to a ship), he said at p. 485:

> Even if its operation, when the words are construed according to their natural meaning, be to enlarge the jurisdiction of the Court of Admiralty in the case of damage received by a ship upon the high seas, there is nothing in the frame of the enactment to indicate that this was not the intention of the Legislature, though, no doubt, its chief object may have been to extend the jurisdiction which existed in the case of damage received by ships upon the high seas to damage received in the body of a county. It does not provide in terms for an extension, to cases where the occurrence is within the body of the county, of the jurisdiction which would exist if the occurrence had been upon the high seas; but it gives jurisdiction in certain cases 'whether the ship may have been within the body of a county or upon the high seas'.

It is true that it has been held that s. 7 of the original Act does not extend to permit a pilot to be sued in the Admiralty Court, but these decisions stem from the judgment of Dr. Lushington in the *"Urania"* (2), in which no reasons were given for such a construction. In the later case of the *"Alexandria"* (3), Sir Robert Philimore, while deeming himself bound by the earlier decision, said that had the question been *res integra,* he would have considered an action against a pilot as within the statute. These decisions were followed by the Court of Appeal in *The Queen* v. *The Judge of the City of London Court* (4). This decision was in turn approved by Lord Macnaghten in the *"Zeta"* (5), but the majority of their Lordships in that case expressed no opinion on the point, Lord Herschell stating at p. 486 that

> In that and the other cases relating to suits instituted in respect of the negligence of pilots, stress was laid on certain considerations which do not touch the case with which your Lordships have to deal.

The considerations referred to, as stated by the Master of the Rolls (4) in (1892) 1 Q.B. at p. 298, are that a pilot,

(1) [1893] A.C. 468.
(2) (1861) 10 W.R. 97.
(3) (1872) L.R. 3 A. & E. 574.
(4) (1892) L.R. 1 Q.B. 273.
(5) [1893] A.C. 468.

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sued in Admiralty in respect of a collision which has occurred through his negligence, would be deprived of the common law defence of contributory negligence, and that originally the pilot's liability in the Admiralty Court was unlimited although the owners of the ship would have had a limited liability only.

In such a case as the present, these considerations do not apply. As to the effect of a finding of contributory negligence, it was pointed out by Lord Herschell L.C. in the *"Zeta"* that the rule as to division of damages in Admiralty applied only in the case of collisions between ships. In the present case, if the Harbours Board were sued in the ordinary courts, it would seem that contributory negligence of the plaintiff would be a defence. Under its statute, 1 Ed. VIII c. 42, s. 3(2), the Board is a corporation, and for all purposes of the Act, the agent of His Majesty. By subsection (3) it is given capacity to contract and to sue and be sued in its own name. By s. 10, all property acquired or held by the Board shall be vested in His Majesty. I think, in the presence of these provisions, the existence of a cause of action in tort is to be governed by the same principles as apply in the case of a claim in tort against the Crown. A bridge vested in the Crown and operated by an agent of the Crown is a "public work" within the meaning of s. 19(*c*) of the Exchequer Court Act and as a cause of action for negligence of a servant of the Crown on a public work is and was liable to be defeated on the ground of contributory negligence, long before the passing in 1925 of the *British Columbia Contributory Negligence Act,* the result would be the same in the provincial courts in such a case as the present. The other consideration as to the limits of liability of a pilot has no application.

On the other hand, all claims arising out of the damage occasioned by the ship should be disposed of in one action so as to avoid the scandal of possible different results if more than one action were tried separately. I therefore think that the statute is to be construed as clothing the Exchequer Court on its Admiralty side with the necessary jurisdiction.

In my opinion, however, the claim of the Water District with respect to the damage to all the mains other than No. 6 is excluded by the provisions of P.C. 319:

1. The Corporation agrees to assume all responsibility for the laying, construction and maintenance of the water mains or for any damage which may be done to the water mains by vessels fouling them, or for any damage which may be done by the said water mains to vessels, provided that nothing herein shall deprive the Corporation of any legal recourse it may have against any person or persons damaging the said water mains wilfully or through negligence.

2. It is distinctly understood and agreed that nothing herein contained shall operate to render His Majesty or his officers, servants or workmen liable directly or indirectly for damage which may be done from any cause to the said water mains.

In the first place, it is to be pointed out that the Crown is the owner of the bed of the harbour, and that, by the order-in-council the right to lay and maintain the mains was granted to the predecessor in title of the Water District. Accordingly, the latter could suffer damage to the mains by trespass, whether wilful or not, as well as by negligence; the *"Swift"* (1). It is plain from the provisions of paragraph 1 above, that damage from all three causes was in the contemplation of the draftsmen. Under that paragraph, taken by itself, the grantee is to assume all responsibility for damage to the mains "by vessels fouling them," but by force of the proviso, recourse against "any" person or persons is preserved or provided for in the case of wilful or negligent damage. Any person or persons would include servants of the Crown.

I think the intention of paragraph 2 is to provide that negligence of Crown servants is not to be taken as excepted out of the broad language of paragraph 1 by reason of anything in the proviso. Put another way, the proviso does operate to render Crown servants liable, as it excepts them from the broad exemption granted by the earlier language of the paragraph. To read paragraph 2 otherwise in relation to damage to the mains "by vessels fouling them" would, in my opinion, render the paragraph nugatory. I do not think it should be so read, and giving it the operation which I think should be given, the effect is to preclude the Water District from claiming against the Crown in respect of the damage to any of the mains other than No. 6. This main was laid prior to the license

(1) [1901] P. 168 at 171.

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granted by P.C. 319, and is not affected by it. It is not shown under what authority this main was laid, but that it was rightfully there is recognized by the order-in-council itself, as it is shown on the plan attached thereto. The easement agreement, to which reference is made, does not apply to this main.

I think, therefore, that the Water District is entitled to recover against the Harbours Board in respect of the damage to main No. 6, and to that extent its appeal should be allowed against the Board with costs throughout. The appeal of the ship should be dismissed with costs.

RAND J.:—The determinative question in the facts of this controversy is whether or not the red light on the bridge was seen by those on board the vessel, as they assert, up to the time of anchoring.

There is no dispute that the sole purpose of the vessel was to pass through the bridge in safety and with the least delay; that the signal for the draw had been given at 4:14 a.m. at 1½ miles from the bridge and had been at once answered by the red light; and that the vessel was then seen by those on the bridge and the bridge light from the vessel: the conflict begins as from the hour 4:17. The bridge tender asserts that at that moment the draw had been raised to a height of 120 feet, the red light switched off and the green on; while from the vessel it is insisted that the red light continued until about a minute after the anchor dropped. That action was a serious step and was taken only in what was considered to be an emergency; and there can be no doubt that the pilot and ship's officers did not, up to that time, see the green light.

Then followed these significant occurrences: within approximately a minute of anchoring, the noise of which was clearly heard on the drawbridge, the green light appeared, the anchor was at once raised, and the vessel proceeded to pass through the draw without further incident. She was said not to have been seen from the bridge at anchor, and to have been first observed about 1,000 feet from the bridge, approximately 500 feet west from the anchorage, as emerging from fog. The explanation of the

one light being seen and the other not may be that the light on the bridge is more powerful than that on the vessel.

Of those on board whose testimony is to be considered, there was, first, the pilot. This man, MacKay, is one of the senior pilots of Vancouver, who was said by Smith J. (1) to know the harbour and its navigation probably better than anyone else. His veracity is unquestioned; but the trial judge, accepting the statements of the men operating the draw, finds that the pilot must have been mistaken in thinking he saw the red light, either it seems to be, as to its colour or its identity. On the ship's bridge with the pilot were the captain, the third officer and the quartermaster: all gave evidence to the same effect as the pilot. The first officer was stationed on the fo'c's'le and although his primary duty was in relation to the anchor, he likewise saw the red light up to the moment of anchoring. His statement that he saw it before the first signal of approach, admittedly erroneous, was probably an inadvertence.

In this conflict, I reconstruct the situation as follows: the signal for the draw was made at 4:14, it was at once answered by the red light, which was seen by the vessel, and the draw raised as claimed; the tender overlooked changing from the red to the green signal, a double operation carried out by separate switches; this condition continued until he and his assistant were startled to hear the anchor chain running out, an occurrence unusual so near the bridge and one which would arouse them to a realization that something was wrong; checking their own operations, they discovered the red light still burning and swiftly made the change seen by those on the vessel. It may be, as they say, that there was some fog or mist conceivably generated at the higher level by the air of the cabin and that they had lost sight of the ship; that may explain the use of the megaphone, for otherwise its use would appear purposeless. They may have thought, also, that the fog or mist extended to the water, which it did not; but it was not any clearing of fog that brought about the vessel's movement from anchorage.

(1) [1950] Ex. C.R. 279.

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The unchallenged matters exclude, I think, the possibility that the officers of the vessel, including the pilot, bent on their navigation, could have been mistaken in the continued perception of the red light, after first seeing it appear at the moment when admittedly it did appear; if the trial judge means, mistaken as to having seen it at all, a fortiori, I would be forced to disagree with him: the fact that the ship's light was seen from the drawbridge would seem to me to be conclusive against such a view. The suggestion that it might have been a light either on the north or south shore beyond the bridge was only faintly pressed, and is ruled out by the evidence of the pilot: certain lights on what was called the Navy Dock along the north shore had in fact been seen by him, and those on the south shore would be outside his line of vision. What seems to me to be the overwhelming probability is that the controlling circumstance was not a mistake in vision by the pilot, but the oversight of the persons on the bridge to switch from red to green.

On that view of the navigating facts, what is the responsibility of either or both of the defendants for the damage done? The ship must be charged with knowledge that the pipes were rightfully on the harbour bed; and the Water District was not negligent in exercising the license by failing to place them in trenches. The mode adopted is not in itself unreasonable; it is indicated on the plans approved by the orders made; and, for about forty years that condition of some of them has been known by all concerned. The notation on the navigation chart used by the vessel is a warning of their presence of which the pilot and captain were aware: and the Commission had full knowledge of the installations.

By the regulations of the Commission relating to signals, the green light is necessary before the bridge can be approached beyond "a safe distance," and until that signal is seen a vessel proceeds in contemplation not only of risks to the bridge and navigation generally but also to property which the incidents of navigation may give rise to. The dangers inherent in an uncertain right of navigating the narrow channel approaching the bridge should have been apparent; and to allow the vessel to hazard

them on the chance that passage would be cleared before emergency measures should become necessary was a disregard of the duty owing to the Water District.

On the other hand, the movement of the vessel was under the actual control not only of the pilot and the ship's officers, but also of the bridge tender. The recognition signal of the approach and the continued absence of a stand-off warning left it to the vessel to proceed cautiously while the draw was being made ready. The single red light represented normal conditions to prevail, that the machinery was in order, and that the vessel had the right of way over any other through the draw. It was, for some considerable time, wholly reasonable for the pilot to expect momentarily that the green signal would appear, for which the contention that it was shown at 4:17 is the strongest justification. The megaphone was used in fact to aid the vessel in moving through what was thought to be fog; but in conjunction with the single red light and the absence of the double red lights, it added to the confusion and led to dropping the anchor. Anticipating the green light, anxious to avoid an unnecessary delay in anchoring, being warranted in his expectation and approaching the indefinite point of a safe distance, how can it be said that what he did was so gross or reckless as no prudent pilot could have been led into and as outside and beyond any reasonable or probable consequence of negligence in the drawbridge signalling? The bridge tenders must, in such circumstances, contemplate that their neglect in giving the green signal may draw a vessel too far down the harbour and into hazardous waters, and that is what happened. The actual navigation was thus the product of the joint negligence of the persons operating the signals on the drawbridge and of those in charge of the vessel: *Brown* v. *B. & F. Theatres* (1).

In its statutory assumption of the direction of navigation through the drawbridge, the Commission has undertaken to operate the signals with the customary care and skill where interests are committed to reliance on the discharge of this sort of duty by others. Since it had full knowledge of the existence and the placement of the pipes, that

(1) [1947] S.C.R. 484.

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responsibility would extend to foreseeing that negligence in signalling might in the ordinary course of things bring about emergency action in the channel by which property of various kinds might be affected. There was, thus, a direct obligation on the Commission toward the Water District to avoid bringing that situation about negligently: *The "Mystery"* (1).

For the first time in the proceedings, the objection is taken, on behalf of the Harbour Commission, that the Admiralty jurisdiction of the Court does not permit the joinder of the Commission, and it calls for some consideration. It is based on the fact that the claim is for damage to property on land within the body of a county and is by and against a person other than the owner of a ship. In *The Queen* v. *Judge of City of London Court* (2), it was held by the Court of Appeal that the Admiralty Court had no jurisdiction to entertain an action in personam against a pilot in respect of a collision on the high seas caused by his negligence. That decision limited the causes *in personam* that could be brought under the statutory jurisdiction which included damage done "by a ship". It followed the ruling of Sir Robert Phillimore in *The "Alexandria"* (3), which, likewise, was a proceeding against a pilot for damage done through his negligence on the Mersey. In the course of his reasons, however, Sir Robert stated that if the question had been *res integra,* he should have been of opinion that under the provisions of sections 7 and 35 of 24 Vic. c. 10, the Court had jurisdiction. Section 7 imports causes for damage done "by a ship" and 35 provides for actions in personam as well as in rem. On the other hand, in *The "Zeta"* (4), the House of Lords seems to have expressed the view that a ship is entitled to bring action in Admiralty against a Dock Authority for damage done "to a ship" through collision with a pier caused by the negligence of the Authority; and in *The "Swift"* (5), the owners of oyster beds were upheld in an action against a ship for damage done their property by negligent grounding. Whether a distinction between the

(1) [1902] P. 115.
(2) (1892) L.R. 1 Q.B. 273.
(3) (1872) L.R. 3 A. & E. 574.
(4) [1893] A.C. 468.
(5) [1901] P. 168.

jurisdiction in cases of damage "by a ship" and "to a ship" can be drawn from the statute remains, apparently, undecided.

As the jurisdiction of the Exchequer Court for this purpose is the Admiralty jurisdiction of the High Court in England, if the action had been brought against the Harbour Commission as for an individual tort, the point taken might be formidable; but the cause of action alleged is, strictly, one against joint tort feasors: *The "Koursk"* (1); i.e. both the vessel and the Commission have concerted in directing and controlling the movement of the vessel down the harbour: it was a single act with joint participants. In such a case, a judgment against one merges the cause of action and would be an answer to an action brought against the other in another court.

The Water Authority is entitled to assert a remedy in Admiralty both against the vessel, *in rem,* and against the ship owners, *in personam;* and the law administered would be Admiralty law. The limitation of the scope of proceedings so as to deny the joinder of the Harbour Commission would deprive the Authority of one of those remedies if it desired also to pursue its claim against the Commission. Every consideration of convenience and justice would seem to require that such a single cause of action be dealt with under a single field of law and in a single proceeding in which the claimant may prosecute all remedies to which he is entitled; any other course would defeat, so far, the purpose of the statute. The claim is for damage done "by a ship"; the remedies *in personam* are against persons responsible for the act of the ship; and I interpret the language of the statute to permit a joinder in an action properly brought against one party of other participants in the joint wrong.

It seems to have been assumed by counsel that the provincial *Contributory Negligence Act* applied as between the respondents, but I am unable to agree that it does. There is here a special situation. By the *National Harbours Act* the Commission is declared for all purposes of its administration of this harbour to be the agent of the Crown. Although that *Act* creates a duty on the Commission, by

(1) [1924] P. 140.

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its commitment, in such a case, to the Admiralty Court, the law of that Court becomes applicable; and from the judgment of the House of Lords in *The "Devonshire"* (1) the maritime law, in this respect, is seen to be the same as the common law. It follows that there can be no contribution between the defendants.

It is contended finally by the Commission that the Water District is unable to assert such a claim by reason of an undertaking contained in the licence under which the pipes were laid. It was given by the City of Vancouver, and is recited in Order-in-Council P.C. 319 of 1926 as follows:

> It is distinctly understood and agreed that nothing herein contained shall operate to render His Majesty or his officers, servants or workmen liable directly or indirectly for damage which may be done from any cause to the said water mains.

What is "herein contained" is a licence to install the pipes on the harbour bed; what is excluded is the existence of any duty arising from the status of licensor. How that relation in any way tends or operates to render the Commission, representing His Majesty, liable for the damage caused by negligence in the operation of the drawbridge I am quite unable to see. The language is not at all apt to meet the case before us. If it had been intended that under no circumstances connected with the administration of the harbour should His Majesty be liable directly or indirectly for damage to the water mains, it would have been easy to provide so. But whatever was in the mind of the draftsman, the language he has used makes it impossible to extend it to the facts here.

I would, therefore, dismiss the appeal of *"Sparrow's Point"* with costs to the Water District and allow the appeal of the Water District with costs against the Harbour Commission in both Courts.

LOCKE J. (dissenting in part):—The occurrences which gave rise to the present proceedings are sufficiently stated in the judgment (2) from which this appeal is taken. At the outset the appellant ship is faced with the finding of fact by the learned trial judge that upon hearing the signal of the vessel at 4.14 a.m. when she was off Berry's

(1) [1912] A.C. 634. (2) [1950] Ex. C.R. 279.

Point, the operators of the bridge turned on one red light, the required signal to indicate that the whistle of the vessel had been heard, proceeded to raise the span to the height of 120 ft. and then extinguished the red light and turned on the green light to indicate to the approaching vessel that the span was open, and that it was due to the superstructure of the span being obscured from the vessel's view by fog or overcast that the signal was not visible from the vessel. The appellant, Greater Vancouver Water District, which had succeeded against the ship at the hearing but failed against the Harbours Board, while not in the first instance appealing against that portion of the judgment later obtained leave to appeal, is faced with the same difficulty. Unless this finding of fact is to be reversed in this Court, it appears to me to be decisive against both of the appellants.

The evidence of Clohosey, an employee of the defendant Harbours Board and the operator in charge of the bridge on the night in question, and of Robert Brassell, his assistant, is to the effect that the signal lights were examined by them when they came on duty about midnight of December 25 and found to be in order: that they had received a telephone message about 3 o'clock on the following morning informing them that the *Sparrows Point* was coming out on the tide and so were on the lookout for her and that when they heard three blasts of her whistle, the regular signal of an approaching vessel requiring the span to be opened, the single red light was turned on and the traffic gates of the bridge lowered, the span was at once raised to its full height of 120 feet and the red light then extinguished and the green light, which would indicate to the vessel that the span was raised, turned on and remained on until the time when the ship, after dropping her anchor and causing the damage complained of, passed through the bridge. Both say that when the ship's whistle was first given the visibility was fair but that when the span was raised, carrying with it the machinery house in which they carried on their operations, they found themselves in a dense fog. Being then unable to see the approaching vessel and apparently assuming that the green light situate near the upper part of the span would not be visible to the vessel,

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they attempted by using a loud speaker to give information to the ship that the span was open. According to the pilot, the master and other ship's officers, however, the green light was not seen until after the anchor had been dropped, their inability to discern it being caused, if the story of Clohosey and Brassell be true, by the fog at the upper level. The bridge operator was required by his instructions to keep a record of occurrences on the bridge, which Clohosey referred to as a log, and the original of this document in his handwriting shows the ship's signal heard at 4.14 a.m. and the span raised at 4.17 a.m., entries which he said he made at the time of these occurrences. In Clohosey's report of the accident to his employer, written in pencil on a form apparently provided for such occurrences, which was put in evidence by the appellant ship with its *de bene esse* evidence, the following appears:

> At 04·14 I received a signal for the span to raise. I went outside and saw a ship in the distance coming from east. I answered signal at once and began to operate bridge. When bridge was open or raised I gave signal green light at 04·17 but could not see ship as fog has come down. The ship began signalling for the span to open. I began using the loud speaker and did not see ship until she was about the pipe line. I heard her dropping anchor and assistant who was listening heard some one say "there is the bridge." Passed through at 04·35 and changed course to port about 4 when signalled down to almost zero and about 2 when vessel passed bridge.
>
> At the time the *Sparrows Point* signalled for the span the visibility was about 4. Could see ship. At the time the span was raised I could not see ship. Fog set in between 04·14 04·17. Vis. bad or about 100 yards. About 2 minutes before she came through around 04·33. I was talking on loud speaker before anchor dropped. Vessel continued to signal for bridge after signal span open given. I saw the vessel when on this side of pipe line no one spoke from the vessel.

In the appropriate places on the form under the heading "Weather" there appears the words "foggy, spotty" and under the heading "Visibility" "poor, Fog, about 4 when signalled down to almost zero and about 2 when vessel passed bridge."

This evidence was flatly contradicted by that of a number of witnesses including the pilot. According to the latter, the vessel left the British American Oil dock in Burrard Inlet at 3.02 a.m. intending to proceed through the second Narrows Bridge to Coal Harbour. When they reached a position opposite Roche's Point they ran unexpectedly into a bank of fog, whereupon they took the way

off the ship and stopped: after a few minutes the fog bank clearing they proceeded towards Berry's Point and shortly after 4 o'clock, when opposite that place, blew three long blasts of the whistle for the bridge. This witness said that the red light then appeared and continued plainly visible until the ship reached a point something more than 400 yards to the east of the span when, the green light not being shown in spite of their having given repeated blasts from the whistle, it was necessary for the safety of the ship to drop the anchor. This evidence was supported by that of McElroy, the quartermaster of the vessel who was at the wheel, and by Captain Nilsen who was on the bridge, Ralph Kuhn, chief officer who was on the foc'scle head, together with the boatswain and two lookout men and by Arthur Costan, the third mate who was also upon the bridge. Of these witnesses, Nilsen, Kuhn and Costan gave their evidence *de bene esse*: McElroy, as well as the pilot, appeared at the trial. The boatswain and the two lookout men who had been in the foc'scle with Kuhn were not called. In addition to these witnesses who had been on the ship, evidence was given by some residents living on the south shore of the inlet shortly to the east of the bridge and by others who lived on the north side, who said that the visibility towards the bridge at or about the time of these occurrences was good: some of them had heard a voice speaking through the loud speaker but they were definite that it did not say that the bridge or the span was open, and several of the witnesses from the ship gave evidence as to this to the like effect.

The learned trial judge, however, believed Clohosey and Brassell. In his reasons delivered at the conclusion of the trial he said that he could see no ground for doubting the accuracy of their evidence and accepted it, that the atmospheric conditions that night were peculiar, there being fog banks lying around, and that, in his opinion, at a higher level at the bridge at the relevant time the fog was denser and heavier than elsewhere. As to the pilot whose honesty he clearly accepted and whom he described as a man of very great experience, he said that his evidence had been given in such a satisfactory and seamanlike fashion as to win his admiration, but that he thought he was mistaken

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in thinking that he saw the red light up to and as late as the moment when he ordered that the anchor be dropped. In further reasons delivered at a later date he again stated that he accepted the evidence of the bridge officers "who in the course of their duties noted in their log book what occurred" and found that three minutes after hearing the ship's signal they had raised the span to its full elevation of 120 feet, the red light had been succeeded by the green light and all was in order for the ship to pass through, but that the dense fog on the upper level had prevented those on the ship from seeing the green light and that there was no fault on the part of the operators. As to the other witnesses from the ship who had testified that they continued to see the red light until the anchor was dropped, he said that he was satisfied that they were mistaken and that since both the red and green lights rose with the span into the fog above they could see neither.

While the witnesses who were on the ship may have been mistaken in thinking that they had seen a red light continuously from the time they passed Berry's Point until the time of anchoring, conceivably confusing other lights visible in the harbour with that of the bridge, there can be no mistake on the part of Clohosey and Brassell as to the principal matters sworn to by them: these were either true or false and if false the entries in the log and the accident report concoctions of Clohosey. If their stories were untrue, there can be no doubt they were deliberately so. The log, so-called, maintained on the bridge bears as its first entry on December 26, 1946, the information as to the time of the raising of the span for the *Sparrows Point*, an entry which is signed by Clohosey in the appropriate place and this is followed by entries made by other employees engaged on the bridge recording other occurrences later on the same day and bears on its face nothing to indicate that it is not what it purports to be, a record made at the time. It is also the undoubted fact, as shown by the evidence of the witnesses for the ship, that there had been patches of fog in the harbour that morning: the *Sparrows Point* had itself been halted by such a fog near Roche's Point and when she passed through the bridge at 4.35 a.m. she again encountered fog in the anchorage to the west of the bridge, and that there was fog at the

upper level to which the span was raised has been accepted as a fact by the learned trial judge. In *Arpin* v. *The Queen* (1), this Court said that where a judgment appealed from is founded wholly upon questions of fact it would not reverse it unless convinced beyond all reasonable doubt that it was clearly erroneous. The judgment of Taschereau J. in *North British and Mercantile Insurance Company* v. *Tourville* (2), where concurrent findings of fact were reversed, made it clear that it was not intended to depart from the rule as thus stated. In *Granger* v. *Brydon-Jack* (3), Anglin J. adopting the statement of Viscount Haldane in *Nocton* v. *Ashburton* (4), said that it was, in his opinion, a rash proceeding on the part of a court of appeal to reverse a judgment on an issue of pure fact, the finding of a trial judge necessarily and expressly made to depend upon the credit to be given to the conflicting evidence of the parties to the transaction whom he saw and heard testify. In *Hontestroom* v. *Sagaporack* (5), Lord Sumner said in part that not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge and unless it could be shown that he had failed to use or had palpably misused his advantage the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own views of the probabilities of the case. In *Powell* v. *Streatham* (6), Lord Wright in referring to what had been said by Lord Sumner and noting that it was in an Admiralty appeal said (p. 265) that, in his opinion, the same principles applied in ordinary common law cases and that two principles were beyond controversy: first, that in an appeal from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen the court must, in order to reverse it, not merely entertain doubts whether the decision below was right but be convinced that it was wrong and that the court of appeal had no right to ignore what facts the judge had found on his impression of the credibility of the wit-

(1) (1888) 14 Can. S.C.R. 736.
(2) (1895) 25 Can. S.C.R. 177 at 193.
(3) (1919) 58 Can. S.C.R. 491 at 499.
(4) [1914] A.C. 932 at 945.
(5) [1927] A.C. 37 at 47.
(6) [1935] A.C. 243.

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nesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing. The subject has been discussed at further length by Lord Greene, M.R. in *Yuill* v. *Yuill* (1), and by Viscount Simon in *Watt* v. *Thomas* (2).

I think the present case was one where to see the witnesses Clohosey and Brassell and their demeanour as they gave evidence was of the utmost importance in determining whether they were telling the truth. Both men were aware that their statements had been flatly contradicted by the witnesses whose evidence had been taken *de bene esse* and by the pilot and others, and were cross-examined at length by able and experienced counsel. The learned trial judge has had the advantage which I have not of seeing these men and closely observing their bearing in the box and has come to the conclusion that their evidence is the truth. I can see no justification for interfering with that finding.

I respectfully agree with the further conclusion of the trial judge that for the ship to approach under the existing circumstances to a distance of not more than 400 or 500 yards from the bridge without having seen the green signal, thus placing herself in a position of jeopardy where it was apparently necessary for her own safety to drop the anchor, was a negligent act. The location of the water mains in the bed of the harbour at the place in question is clearly shown on the marine maps and their presence and approximate location were known both to the pilot and the master. Had those in charge of the ship, when they could not see the green light, stood off at a distance of 600 yards or more to the east of the bridge, anchoring if necessary, no damage could have resulted. It was the duty of the ship in these circumstances to refrain from damaging the mains by a negligent act (*Sub-Marine Telegraph Company* v. *Dickson* (3), per Willes J. at 779). Other considerations would, in my opinion, apply if, by way of illustration, a storm arose suddenly making it necessary in the ordinary course of navigation to drop the anchor to prevent the destruction of the ship, or if such a step were rendered necessary by some other force majeure

(1) [1945] 1 All. E.R. 183 at 188, 190.

(2) [1947] 1 All. E.R. 583, 584.

(3) (1864) 15 C.B. (N.S.) 759.

not attributable to a voluntary act of those in charge of the vessel. Here, however, it was a direct result of what appears to me to be the failure of those in charge to exercise reasonable care in the circumstances which led them to drop the anchor and damage the property of the Water District. I am further of the opinion that a claim founded upon negligence is not affected either by the terms of the undertaking entered into by the predecessor in interest of the Water District or of the Orders-in-Council which authorized the works.

The appeal of the appellant ship should be dismissed and since, in my opinion, the finding of fact at the trial that the green light was shown under the circumstances stated by Clohosey and Brassell should not be disturbed, I would dismiss the appeal of the Water District. The respondents should have their costs of the appeal by the appellant ship and the respondent Harbours Board its costs as against the respondent Water District of the appeal of the latter from the judgment at the trial.

Appeal of the ship dismissed with costs; and appeal of Water District allowed in part with costs.

Solicitor for the appellant: *D. S. Montgomery.*

Solicitor for the respondent Water District: *Douglas McK. Brown.*

Solicitor for the respondent Harbours Board: *D. M. Owen.*

FRED JAMES BLACKWELL *(Appellant)* ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE *(Respondent)* ..... RESPONDENT.

1950
*Nov. 29, 30
*Dec 28.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Excess Profits Tax—Whether commissions paid commercial traveller by several firms exempt—Whether such traveller carrying on a "profession" "mainly dependent upon personal qualifications"—The Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, as amended, ss. 2(1), 3(1) and 7(b).

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

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BLACKWELL v. MINISTER OF NATIONAL REVENUE

The Excess Profits Tax Act 1940, S. of C. 1940, c. 32, s. 7(*b*) provides that the following profits shall not be liable to taxation: "The profits of a profession carried on by an individual * * * if the profits of the profession are dependent wholly or mainly upon his * * * personal qualifications and if in the opinion of the Minister little or no capital is employed; provided that this exemption shall not extend to the profits of a commission agent or person any part of whose business consists in the making of contracts on behalf of others * * * unless the Minister is satisfied that such agent is virtually employed in the position of an employee of one employer in which case the exemption shall apply and in any case the decision of the Minister shall be final and conclusive."

The appellant, a commercial traveller, solicited orders for several firms and was paid by each a commission based on the amount of the orders secured by his efforts and paid for. His authority was confined to obtaining and transmitting orders. He was a free agent who maintained no office and employed only sufficient capital to operate a motor car and pay his travelling expenses. His claim for exemption from excess profits taxes under s. 7(*b*) was disallowed by the decision of the Minister of National Revenue and the Exchequer Court of Canada affirmed that decision.

Held: that the profits of a profession not liable to taxation under s. 7(*b*) of *The Excess Profits Tax Act, 1940* apply to a profession where the profits are dependent wholly or mainly upon personal qualifications. The finding of the Court below that the profits of the appellant did not either wholly or mainly depend upon his personal qualifications were supported by the evidence in the case and could not be disturbed and for that reason alone the appeal failed.

Held: also, that as it had not been contended that the Minister's decision, that he was not satisfied that the taxpayer was virtually employed in the position of an employee of one employer, was arbitrarily reached upon a wrong principle; that decision must stand.

(Decision of the Exchequer Court of Canada [1949] Ex. C.R., 391 affirmed.)

APPEAL from a judgment of Thorson J., President of the Exchequer Court of Canada (1), dismissing the appeal of the appellant from the decision of the Minister of National Revenue affirming assessments levied upon the appellant for the years 1942, 1943 and 1944 under the provisions of *The Excess Profits Tax Act.*

J. C. Osborne for the appellant.

W. R. Jackett K.C. and *E. S. McLatchey* for the respondent.

(1) [1949] Ex. C.R. 391.

The judgment of the Chief Justice, Taschereau, Rand and Estey, JJ. was delivered by:

THE CHIEF JUSTICE:—It is unnecessary to recite the facts in this appeal. They are fully stated in the judgment of the learned President of the Exchequer Court (1) and at Bar counsel for the appellant declared that he accepted them as stated in that judgment.

The appellant is a commercial traveller and during the material years he represented several mills, or business houses. He did not make sales or contracts for the concerns for whom he acted, his authority being confined to obtaining orders for them and transmitting such orders to them. He assumed all expenses for the carrying out of his calling and in no year could it be said that his commissions came from only one concern. He was free to go and solicit orders as he saw fit for any one of the business concerns for whom he acted. He operated from his own house and selected his own customers, his remuneration depending on his own efforts and their results. He was not subject to the direction or control of any one of the business houses. He was independent of them and absolutely his own master. The learned President found that the merchandise for which the appellant solicited orders was the most important factor in his success.

The question is whether, under these circumstances, the appellant was properly assessed for Excess Profits Taxes and the learned President held that he was, on appeal from the decision of the Minister of National Revenue.

The decision of the Minister affirmed the assessment on the ground that "the profits of the taxpayer have been correctly assessed for Excess Profits Tax", adding that "the Minister is not satisfied that the taxpayer is virtually in the position of an employee of one employer and he is therefore not exempt from tax under the proviso to paragraph (*b*) of Section 7 of *The Excess Profits Tax Act.*"

By force of Section 3 (1) of that Act, in addition to any other tax or duty payable under any other Act, "there shall be assessed, levied and paid a tax in accordance with the rate set out in the Third Part of the Second Schedule to this Act, during the taxation period." By section 2 (1)

(1) [1949] 1 Ex. C.R. 391. (2) [1949] C.T.C. 362.

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(*g*) "profits" in the case of a taxpayer other than a corporation or joint stock company, for any taxation period, means the income of the said taxpayer derived from carrying on one or more businesses, as defined by section three of the *Income War Tax Act,* and before any deductions are made therefrom under any other provisions of the said *Income War Tax Act.*

Now, although there is no definition of the word "business" in either the *Income War Tax Act,* or *The Excess Profits Tax Act,* it is easy to understand the meaning of the word "business" in the latter Act by the context of the *Income War Tax Act.* Of course, the appellant cannot be considered as exercising a "profession" within the meaning of that word in the usual language, but he relies on the use of the word "profession" in section 7 (*b*) of the Act, and he claims to be entitled to the exemption therein provided. As it can be said that it is important to consider every word of that section for the purpose of deciding the present appeal, the section is quoted in full:

> 7. The following profits shall not be liable to taxation under this Act:
> (*b*) the profits of a profession carried on by an individual or by individuals in partnership if the profits of the profession are dependent wholly or mainly upon his or their personal qualifications and if in the opinion of the Minister little or no capital is employed: Provided that this exemption shall not extend to the profits of a commission agent or person any part of whose business consists in the making of contracts on behalf of others or the giving to other persons of advice of a commercial nature in connection with the making of contracts unless the Minister is satisfied that such agent is virtually in the position of an employee of one employer in which case this exemption shall apply and in any case the decision of the Minister shall be final and conclusive.

It will be noted from the wording of that section that the exemption applies first to a "profession" and by no means can the appellant, in the ordinary sense, be held to exercise a "profession". But, moreover, it is not "all professions" that can claim the exemption. It must be a "profession" where the profits are dependent wholly or mainly upon his personal qualifications; and the finding of the learned President that the profits of the appellant in the present case do not either wholly or mainly depend upon his personal qualifications but that, on the contrary, his merchandise is the most important factor in his success,

cannot be disturbed upon the evidence in the case. For that reason alone, therefore, the appellant would fail to bring himself under the exemption of section 7(*b*). Of course, in order to claim the exemption, the appellant had first to show that his profits depended entirely, or at least mainly, upon his personal qualifications, but the proviso in the section must also be considered. He is not a commission agent, nor, as we have seen, does his business consist in the making of contracts on behalf of others, nor in the giving to other persons advice of a commercial nature in connection with the making of contracts. In these several respects the proviso does not apply to him.

Finally, he was not able to satisfy the Minister that he was virtually in the position of an employee of one employer —the evidence is decisive on the point that he is not such an employee. The decision of the Minister states that he was "not satisfied that the taxpayer is virtually in the position of an employee of one employer and he is therefore not exempt from tax under the proviso to paragraph (*b*) of section 7 of *The Excess Profits Tax Act.*" On that point the section enacts:

> In any case the decision of the Minister shall be final and conclusive.

In this case, the decision of the Minister is to that effect. Therefore, as it has not been contended that the decision of the Minister was arbitrary and reached upon a wrong principle, it follows from all points of view that section 7(*b*) does not relieve the appellant.

The appeal should be dismissed with costs.

CARTWRIGHT J.:—This is an appeal from a judgment of the President of the Exchequer Court pronounced on the 26th of October, 1949, affirming the decision of the Minister holding the appellant liable to taxation under *The Excess Profits Tax Act* in respect of his earnings as a commercial traveller during the years 1942, 1943 and 1944.

The following findings of fact made by the learned President are accepted by both parties:

> The appellant is a commercial traveller and resides in London, Ontario. During the years in question he represented several mills or business houses, nine altogether in 1942 and 1943 and eight in 1944. His activities consisted in travelling throughout his territory with samples of the merchandise of the business concerns he represented, calling on customers,

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displaying the samples and soliciting and obtaining orders for the merchandise. When he obtained such orders he sent them to the credit manager of the mill or business house concerned. If the order was accepted the merchandise was shipped to the customer and thirty days after the date of such shipment the appellant was paid a commission based on its amount. He received no salary, wages or remuneration from any of the mills or business houses except these commissions and if a customer did not pay for the goods the commission that had been paid to him thereon was charged back to him. He did not make sales or contracts for the concerns for whom he acted, his authority being confined to obtaining orders for them and transmitting such orders to them. He had no office or office staff and no telephone, typewriter or stationery of his own. The samples he carried belonged to the concerns he represented. In the course of his activities he incurred expenses for such items as hotels and meals, baggage and sample rooms, telephone, telegrams and tips, rail fares and excess baggage, car, gasoline, oil, etc. He did not send in any expense accounts in respect of these items to any of his mills or business houses or apportion them amongst them but assumed them all himself. The particulars of his commissions with the amount received from each mill or business house for each of the years in question appear in his income tax returns. In no year could it be said that they came virtually from one concern.

It was admitted at the trial by counsel for the respondent that the appellant employed capital only to the extent sufficient to maintain a car and to pay his expenses on the road. One further finding of fact made by the learned President is as follows:

The appellant has not shown that his profits, even if it were conceded that they are those of a profession, depended wholly or mainly upon his personal qualifications. When he was asked what his success as a commercial traveller depended upon he mentioned his personality, his ability to show his merchandise to the best advantage, his health and his experience but on cross-examination he stated that his merchandise was the most important factor in his success.

In my view this finding is supported by the evidence.

The main grounds relied upon in support of the appeal were, first, that the appellant's earnings were not "profits" within the meaning of the charging provisions of *The Excess Profits Tax Act* and secondly, that even if such earnings fell *prima facie* within the terms of such charging provisions they were exempt under the terms of section 7(*b*) of the Act.

It was submitted by counsel for the respondent that on the pleadings the first point was not open but I think it desirable to deal with the appeal on the assumption, but without deciding, that the point is properly before us.

By section 3 of *The Excess Profits Tax Act* the tax claimed is levied upon the profits of every person residing or ordinarily resident in Canada or who is carrying on business in Canada. The relevant definition of "profits" is contained in section 2(*g*):

> (*g*) "Profits" in the case of a taxpayer other than a corporation or joint stock company, for any taxation period, means the income of the said taxpayer derived from carrying on one or more businesses, as defined by section three of the *Income War Tax Act*, and before any deductions are made therefrom under any other provisions of the said *Income War Tax Act;*

The relevant words of section 3 of the *Income War Tax Act* are as follows:

> 3. (1) For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including * * *

It is suggested that section 3 of the *Income War Tax Act* divides all earned income into three classes according to whether it is received from (i) any office or employment or (ii) any profession or calling or (iii) any trade, manufacture or business, and that the words in section 2(*g*) of *The Excess Profits Tax Act* "Income derived from carrying on one or more businesses" refer to income received from source (iii) to the exclusion of that received from sources (i) and (ii); and that the income earned by a commercial traveller is more aptly described as being derived from a "calling" than from a "business". It is suggested that the words in section 3 of the *Income War Tax Act* "profits from a trade, or commercial or financial or other business or calling" also show that the word "business" is used in contradistinction from the word "calling". It seems to me from reading the last mentioned section as a whole that the purpose of Parliament was not to subdivide earned income into classes according to its source but rather to use words which would embrace earned income from every

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source. I do not think that the words "business" or "calling" are used in the section as terms of art intended to define mutually exclusive categories of sources of income but in the popular and ordinary sense and, so used, I think that the words "profits derived from a commercial or financial or other business" are wide enough to include the earnings of a commercial traveller.

It was further argued in support of the first ground of appeal that when *The Excess Profits Tax Act* is read as a whole it appears that the intention of Parliament was to tax only such persons as employ capital in their businesses and that the whole scheme of the Act contemplates the taxation of abnormal return on capital received during the life of the Act. It appears to me that the words of the charging section are too wide to permit so restricted an application. If the matter were doubtful, a consideration of the words of section 7(*b*) would seem to indicate that the fact that little or no capital is employed by a person is not alone sufficient to create an exemption from taxation under the Act.

In my view the earnings of the appellant fall within the terms of the charging provisions and are liable to tax unless specially exempted.

It now becomes necessary to examine the second main ground of appeal, that the appellant is entitled to exemption under the terms of section 7(*b*) reading as follows:

> 7. The following profits shall not be liable to taxation under this Act:
> (*b*) the profits of a profession carried on by an individual or by individuals in partnership if the profits of the profession are dependent wholly or mainly upon his or their personal qualifications and if in the opinion of the Minister little or no capital is employed: Provided that this exemption shall not extend to the profits of a commission agent or person any part of whose business consists in the making of contracts on behalf of others or the giving to other persons of advice of a commercial nature in connection with the making of contracts unless the Minister is satisfied that such agent is virtually in the position of an employee of one employer in which case this exemption shall apply and in any case the decision of the Minister shall be final and conclusive * * *

Assuming, without deciding, that the appellant's occupation falls within the meaning of the word "profession" as used in this clause, and without passing upon the submission of counsel for the respondent that the opinion of

the Minister that little or no capital is employed has not been obtained, I think that this argument cannot prevail. It is a condition of the operation of the exemption that the profits of the person claiming it be dependent wholly or mainly upon his personal qualifications. On this question of fact the learned President has found against the appellant and, as stated above, I think this finding is supported by the evidence. I therefore do not find it necessary to consider the proviso to the clause.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Raymond, Spencer, Law & MacInnes.*

Solicitor for the respondent: *R. S. W. Fordham.*

1950
*May 4, 5
*June 9
*Oct. 16, 17, 19

1951
*Feb. 6

THE ATTORNEY GENERAL OF ALBERTA AND THE MINISTER OF LANDS AND MINES OF ALBERTA *(Defendants)* ..... APPELLANTS;

AND

HUGGARD ASSETS LIMITED *(Plaintiff)* ..... RESPONDENT,

AND

THE ATTORNEY GENERAL OF CANADA ..... INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA APPELLATE DIVISION

Crown (Dom.) grant—In fee simple of surface rights including petroleum and natural gas—Reservation of royalty "from time to time prescribed"—No royalty existing at time of grant—Interest of Crown transferred to Alberta by statute—Whether province can impose royalty—Rent service—Condition subsequent.

In 1913, by a grant authorized by Order in Council, respondent's predecessor in title acquired from His Majesty in the right of Canada, the surface rights to certain lands in Alberta including the petroleum

*PRESENT: Rinfret C.J. and Kerwin, Rand, Kellock, Estey, Cartwright and Fauteux JJ. On Jun. 9, the Court ordered a rehearing which took place on Oct. 16, 17 and 19. Judgment was delivered on Feb. 6, 1951.

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and natural gas rights. The habendum clause of the patent read: ". . . to have and to hold the same unto the grantee in fee simple" while the reddendum provided for the payment of "such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations . . ." At the time of the grant there was no specific royalty existing. In 1930, by the Alberta Natural Resources Act, 1930, c. 3 (Can.), transfer of the then remaining lands and interests, including royalties, of the Dominion was made to the province.

Held: the Chief Justice, Kerwin and Fauteux JJ. dissenting, that the reddendum is ineffective as a basis for subjecting the petroleum and natural gas taken from the said lands to a royalty imposed subsequent to the patent and is void as being a rent service lacking in certainty. Neither can a provision, void as a reservation, constitute a valid condition subsequent.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), affirming, on an equal division of opinion, the decision of the trial judge granting respondent a declaration that the Government of Alberta had no right to impose any royalty with respect to the petroleum and natural gas found under his lands.

G. H. Steer K.C. for the Attorney General of Canada.

H. J. Wilson K.C. and W. Y. Archibald for the appellants.

S. W. Field K.C. for the respondent at the first hearing.

Christopher Robinson K.C. for the respondent at the second hearing.

The dissenting judgment of the Chief Justice and of Kerwin and Fauteux JJ. was delivered by

KERWIN J.:—The respondent, Huggard Assets Limited, commenced an action in the Supreme Court of Alberta against the Attorney General and the Minister of Lands and Mines of Alberta for a declaration that the Lieutenant Governor in Council of the Province is not entitled to exact any royalty with respect to petroleum and natural gas produced from certain lands. The trial judge granted the respondent's claim and his judgment was affirmed by the Appellate Division (1) on an equal division of opinion. The defendants now appeal and on a reargument in connection with certain points directed by the Court, the

(1) [1950] 1 D.L.R. 823; 1 W.W.R. 69.

Attorney General of Canada was allowed to intervene when he supported the position taken by the appellants.

The lands in question are included in a Crown patent, dated August 25, 1913, issued on behalf of the Deputy Minister of the Interior at Ottawa to Northern Alberta Exploration Company, Limited, the respondent's predecessor in title. After reciting that the lands are Dominion lands within the meaning of *The Dominion Lands Act,* and that the Company had applied for a grant and, after due investigation, had been found entitled thereto "in the terms herein embodied", the patent proceeds to grant to the Company the surface rights in 1296·3 acres, including petroleum and natural gas rights, and the under rights in 1320.5 acres (the additional 24.2 acres being land covered by the waters of the Horse and Hanging Stone Creeks), reserving certain rights in, over and upon navigable waters, rights of fishery, and all mines and minerals except natural gas and petroleum,

TO HAVE AND TO HOLD the same unto the grantee in fee simple. Yielding and paying unto Us and Our Successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of Our Governor in Council, it being hereby declared that this grant is subject in all respects to the provisions of any such regulations with respect to royalty upon the said petroleum and natural gas or any of them, and to such regulations governing petroleum and natural gas as were in force on the First day of September in the year of Our Lord one thousand nine hundred and nine, and that Our Minister of the Interior of Canada may by writing under his hand declare this grant to be null and void for default in the payment of such royalty or for any cause of forfeiture defined in such regulations, and that upon such declaration these presents and everything therein contained shall immediately become and be absolutely null and void.

The lands were part of Rupert's Land and the North West Territories, which, as of July 15, 1870, had been transferred to the Dominion by Imperial Order in Council of Her Majesty, dated January 23, 1870, passed in pursuance of the provisions of the *British North America Act, 1867.* By section 5 of the *Dominion North West Territories Act* (c. 3 of the Statutes of 1869) "all the laws in force in Rupert's Land and the North Western Territory, at the time of their admission into the Union shall, so far as they are consistent with 'the British North America Act, 1867' . . . remain in force until altered by the Parliament of Canada or by the Lieutenant Governor

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under the authority of this Act." At the date of the Crown patent, the *North West Territories Act* was R.S.C. 1906, c. 62, and sections 12 and 13 thereof are as follows:

12. Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or are not hereafter, as regards the Territories, repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom or of the Parliament of Canada, applicable to the Territories, or by any ordinance of the Territories.

13. All laws and ordinances in force in the Territories, and not inconsistent with this Act, or repealed by the operation of the Act passed in the third year of His Majesty's reign, chapter sixty-one, and intituled An Act respecting the Revised Statutes of Canada, shall remain in force until it is otherwise provided or ordered by the Parliament of Canada, or by the Governor in Council or the Commissioner in Council.

The Crown in right of the Dominion was the allodial owner of all the land in the Territories and by the law of England as it existed on July 15, 1870, and in so far as it was applicable to the Territories, there was nothing to prevent the Crown granting lands in free and common socage whereby the estate granted might either be created or be defeated upon a certain event. This statement requires amplification and the matter will be adverted to later. However, in accordance with constitutional practice and law, the Crown could only dispose of the land, or any interest in it, upon being authorized by statute. The first question therefore is whether there was any such authority for the Crown Patent.

At the date of the patent, August 25, 1913, *The Dominion Lands Act*, referred to in one of the recitals in the patent, was chapter 20 of the Statutes of 1908. Sections 37 and 76(*k*) thereof read as follows:

37. Lands containing salt, petroleum, natural gas, coal, gold, silver, copper, iron or other minerals may be sold or leased under regulations made by the Governor in Council: and these regulations may provide for the disposal of mining rights underneath lands acquired or held as agricultural, grazing or hay lands, or any other lands held as to the surface only, but provision shall be made for the protection and compensation of the holders of the surface rights, in so far as they may be affected under these regulations.

76. The Governor in Council may—

* * *

(*k*) make such orders as are deemed necessary to carry out the provisions of this Act, according to their true intent, or to meet any cases which arise, and for which no provision is made in this Act; and further make any regulations which are considered necessary to give the provisions of this section full effect;

Subsequent to the enactment of *The Dominion Lands Act of 1908,* no relevant regulations were made dealing generally with the sale of lands containing petroleum or natural gas, but prior thereto there had been several made under the authority of the *Dominion Lands Acts of 1886 and 1906,* put in at the trial as Exhibit 7. The case has proceeded on the basis that the regulations appearing in this office consolidation fall within the very words of the patent, which states it is subject to such regulations governing petroleum and natural gas as were in force on September 1, 1909.

It is admitted that at the date of the patent no royalty had been prescribed by regulation and the respondent contends that, while the office consolidated regulations were in force as of September 1, 1909, they are not relevant to the determination of this appeal in view of a certain order in council of March 21, 1913. Before turning to that and two others referring specifically to one Israel Bennetto or his assignee Northern Alberta Exploration Company, Limited, it will be convenient to set out the substance of the consolidated regulations.

While the earlier paragraphs mention only petroleum, the final one provides that regulations for the reservation and sale of petroleum lands shall apply also to the reservation and sale of lands for natural gas purposes. Paragraph 1 provides that unappropriated Dominion lands shall be open to prospecting for petroleum, with power to the Minister to reserve for an individual or company who has machinery on the land to be prospected, an area of 1920 acres for such period as he may decide. By paragraph 2, this tract may be selected as soon as machinery has been placed on the ground but the length of such tract shall not exceed three times the breadth thereof. Where the circumstances of the case appear to be exceptional, the Minister may permit the selection to be made in areas of not less than a quarter-section or a fractional quarter-

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section. By paragraph 4, the Minister is empowered to make a preliminary reservation of an area of 1920 acres for a period of four months for the purpose of allowing an applicant sufficient time to install on the land the required machinery.

Paragraphs 5 and 6 provide:

5. Should oil in paying quantities be discovered by a prospector on any vacant lands of the Crown, and should such discovery be established to the satisfaction of the Minister of the Interior, an area not exceeding 640 acres of land, including the oil well, will be sold to the person or company making such discovery at the rate of $1.00 per acre, and the remainder of the area reserved, namely, 1,280 acres, will be sold at the rate of $3.00 per acre. The patent for the land will convey the surface and the petroleum but will exclude all other minerals.

6. A royalty at such rate as may from time to time be specified by Order in Council will also be levied and collected upon the sales of the petroleum, and it will be necessary for the person operating the location to furnish the Agent of Dominion Lands within whose district it is situated, with sworn returns monthly, or at such times as the Minister of the Interior may direct, accounting for the full quantity of oil obtained and sold, and pay the royalty thereon at the prescribed rate.

By paragraph 8:

8. The patent which may be issued for petroleum lands will be made subject to the payment of the above royalty, and provision will be made therein that the Minister of the Interior may declare the patent to be null and void for default in the payment of the royalty on the sale of the petroleum.

It should next be noted that by order in council of March 11, 1910, for the disposal of petroleum and natural gas rights, the regulations included in the Office Consolidation of 1906 were rescinded and that, under paragraph 17 of the new regulations which came into force May 2, 1910, it was provided that should oil or natural gas in paying quantity be discovered in the leasehold to the satisfaction of the Minister, the lessee will be permitted to purchase, at the rate of ten dollars an acre, whatever area of the available surface rights of the tract described in the lease the Minister may consider necessary for the efficient operation of the rights granted him.

It was under these circumstances that Order in Council P.C. 1263 was passed on May 31, 1911. From this it appears that the Minister stated that on January 1, 1906, reservation was made under the *late* petroleum regulations of a certain tract of land to enable Israel Bennetto to carry on prospecting operations thereon; that this reservation,

which was extended from time to time would expire June 17, 1911; that active boring operations were carried on upon the location in the summer of 1910; that there had been filed an assignment of Bennetto's rights to the Northern Alberta Exploration Company, Limited, and that an application had been submitted by the latter asking for a renewal of the reservation. The Minister observed that the lands included within the tract reserved were, as to surface rights, claimed by a number of bona fide squatters upon the river lots and that it was not felt that the Department would be justified in continuing the reservation but, in view of the large expenditure incurred, the Minister recommended that reservation be made for a period of two years from June 17, 1911, in favour of the Company of the available petroleum and natural gas rights upon certain lands, and that reservation be also made of the available surface rights over the entire area for a period of one year, and that the available surface rights of a certain portion be reserved for two years from the same date. It continues:

> Should oil or natural gas be discovered in paying quantities within the period of one year from the 17th of June, 1911, the Minister also recommends that he be authorized to sell to the company, *under the provisions of the old petroleum regulations,* all the lands contained within the entire area above-mentioned both as regards the surface and petroleum and natural gas rights, and that if oil in paying quantities is discovered after the expiration of the first year, but before the 17th of June, 1913, he be authorized to sell to the company the petroleum and natural gas rights under the entire area reserved and the surface rights of that portion lying between the southerly boundary of the McMurray Settlement and Horse Creek.

The words in italics indicate the intention to give the Company the benefit of and subject it to the old petroleum regulations.

By Order in Council P.C. 627, dated March 2, 1913, relied upon by the respondent, the Acting Minister of the Interior submitted that the *old* petroleum regulations provided that the Minister might reserve for an individual or company who had machinery on the land to be prospected, an area of 1920 acres, and in case oil in paying quantities were discovered, an area not exceeding 640 acres would be sold to the discoverer at the rate of $1.00 an acre and the remaining 1,280 acres at $3.00 an acre, the

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patent to convey the petroleum and natural gas but to exclude all other minerals; the activities of Bennetto and the Company were then set out as in the order in council of May 31, 1911. In view of the very large expenditure of at least $75,000 which the Company had incurred for the purpose of demonstrating the existence or otherwise of petroleum, which demonstrations must be of very great public benefit, and in view of the fact that the location first reserved for the application was lost to the applicant through the encroachment of squatters, the Minister recommended "that the above company be permitted to purchase the petroleum and natural gas rights under the entire area reserved for them by the Order in Council dated the 31st of May, 1911, together with the available surface rights thereof, at the rate of $3.00 an acre, subject, however, to such rights as may be established under the provisions of the Dominion Lands Act and the regulations, by any persons in a position to show that they have in the meantime squatted upon these lands."

The only other order in council referred to by the parties is one of June 6, 1914, which after reciting the order in council of March 21, 1913, and the granting of a patent thereunder for the petroleum and natural gas rights and the available surface rights, and the representation that a portion of the surface of the tract so acquired was covered by a deposit of tar-sand or asphalt, proceeded to state that the Minister recommended that, as asphalt would appear to be a product of petroleum and there appeared to be some ground for the contention that it formed a portion of the surface of the land, he be authorized to issue supplementary letters patent conveying the right to the asphalt which might be upon those lands. The circumstance, relied upon by the respondent, that this order in council made no provision for a royalty has no significance.

P.C. 1263 (May 31, 1911) and P.C. 627 (March 2, 1913) must be read together and in the light of section 76(*k*) of the *Dominion Lands Act of 1908*. So read, the Crown Patent was issued under the old regulations as they appeared in the 1906 Office Consolidation but varied as

to the purchase price. If the new regulations of March 1910 applied, the price per acre would be materially increased but, after taking into consideration the substantial sums expended for exploration by the Company, it was considered fair and equitable that the price should be $3.00 per acre throughout instead of $1.00 per acre for the first 640 acres and $3.00 per acre for the remainder of the area reserved. The old regulations (para. 6) provided for a royalty "at such rate as may, from time to time, be specified by order in council" and hence the reddendum in the Crown Patent. In my opinion there was statutory authority for the patent.

Chapter 24 of 12 Car. II (1660), requires attention. At page 47 of the first edition of Armour on Real Property, which was based on Leith and Smith's edition of the second volume of Blackstone's Commentaries (in a chapter omitted in the second edition to make room for more practical matter), the author points out that the effect of this statute was to destroy the military tenures with all their heavy appendages, and in Challis's Real Property, 3rd edition, pp. 59-60, it is pointed out that by that statute all tenures, with irrelevant exceptions, were reduced to free and common socage but that from certain modifications which the law permitted to be imposed upon it were derived determinable fees, conditional fees. In the second edition of Armour, at page 159 (which is the same as on page 161 of the first edition), an estate on condition expressed in the grant itself is dealt with as follows:

> 3. Express Conditions.
>
> An estate on condition expressed in the grant itself, is where an estate is granted either in fee simple or otherwise, with an express qualification, annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. Or, as defined in the Touchstone (P.117), "it is a modus, a quality annexed by him that hath estate, interest, or right, to the land, etc., whereby an estate, etc., may either be created, defeated, or enlarged, upon a certain event. And this doth differ from a limitation, which is the bounds or compass of an estate, or the time how long an estate shall continue." Or, "a condition is a qualification or restriction annexed to a conveyance of land, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or grantee does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated" (Cru. Dig. Tit. 13, s. 1).

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In Cheshire's Modern Real Property, 6th edition, at page 29, it is stated:

> a grantor exhausts his powers of alienation when he grants a fee simple, for the law is ignorant of any greater estate, but he may annex a condition to the grant, so as to make the estate come to an end on the occurrence of a certain event.

And at page 515:

> An interest upon condition subsequent arises where a qualification is annexed to a conveyance, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or the grantee does or omits to do a particular act, the interest shall be defeated.

As defined by the pleadings, the precise issue to be determined is whether or not the Crown had the right to impose a royalty and not whether the Crown had the right to declare the grantee's estate forfeited for failure to pay the royalty. Yet these two matters are interwoven and the general rule may be taken to be that expressed by the maxim *id certum est, quod certum reddi potest.* Coke upon Littleton, 96*a.*, puts it thus:

> It is a maxim in law, that no distresse can be taken for any services that are not put into certaintie, nor can be reduced to any certainty; for, id certum est, quod certum reddi potest; for oportet quòd certa res deducatur in judicium: and upon the avowry, damages cannot be recovered for that which neither hath certainty, nor can be reduced to any certainty. And yet in some cases there may be a certainty in uncertainty; as a man may hold of his lord to sheere all the sheepe depasturing within the lord's manor; and this is certaine enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this incertainty, being referred to the manner which is certaine, the lord may distrain for this uncertainty. Et sic de similibus.

This is quoted with approval by Lord Denman in *Daniel* v. *Gracie* (1).

In *Cooper* v. *Stuart* (2), the Judicial Committee had to deal with a clause in a Crown grant in New South Wales "reserving to His Majesty, his heirs and successors . . . any quantity of land not exceeding ten acres in any part of the said grant as may be required for public purposes." Although the precise point was not argued, their Lordships had no difficulty in deciding that the reservation was valid. In my view the royalty reserved in the present case is certain within the meaning of the rule. Before leaving the case of *Cooper* v. *Stuart* (2), it should be noted that the

(1) (1844) 6 Q.B. 145 at 152. (2) (1889) 14 A.C. 286

decision is authority for the proposition that the rule in *Forbes* v. *Git* (1), that if in a deed an earlier clause is followed by a later one which destroys altogether the obligation created by the earlier clause, the latter is to be rejected as repugnant and the earlier clause prevail, does not apply where the reservation takes effect in defeasance of the estate previously granted and not as an exception.

The judges in the Courts below who decided in favour of the respondent considered that, on construction, the case was determined by the decision of this Court in *Attorney General of Alberta* v. *Majestic Mines Limited* (2). The wording in the patent in question in that case, however, is quite different from the one before us. Here, the words are "Yielding and paying unto us and our successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of Our Governor in Council." The words "from time to time prescribed" do not appear in the grant considered in the *Majestic Mines Case* (2) and I agree with Mr. Justice Parlee, speaking on behalf of himself and Mr. Justice Ford, that they are prospective.

This is a power or right which by a contract, lease or other arrangement was reserved to the Governor in Council within the meaning of clause 3 of the Agreement for the Transfer of the Natural Resources of Alberta, scheduled to the *Alberta Natural Resources Act,* chapter 3 of the Dominion Statutes of 1930 and therefore transferred to the Province. As stated by Sir Lyman Duff, speaking on behalf of the Court, in *Reference re Refund of Dues paid under Section 47(f) of Timber Regulations* (3), with reference to clause 2 of the same agreement:

> The subject of the clause comprises two classes of arrangements, (1) contracts "to purchase or lease any Crown lands, mines or minerals," and (2) "every other arrangement whereby any person has become entitled to any interest therein as against the Crown."
>
> It is quite impossible, of course, to contend that the second class includes only arrangements which are strictly contracts, because if that had been the purpose of the clause, the word "contract" would have been used, instead of "arrangement," to describe the kind of transactions falling within it.

(1) [1922] 1 A.C. 256.
(2) [1942] S.C.R. 402.
(3) [1933] S.C.R. 616.

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The decision of this Court in that case was affirmed by the Judicial Committee (1), and Lord Wright, at page 197, states:

> The word "arrangement" is as Parke B. said in *Manning* v. *Eastern Counties Ry. Co. "a very wide and indefinite one"*.

In Re Timber Regulations for Manitoba (1), the Judicial Committee decided that the Transfer Agreement with Manitoba amounted to a statutory novation and that case was followed as to the Province of Alberta, by this Court, in *Anthony* v. *Attorney General for Alberta* (2). Leave to appeal to the Judicial Committee was refused.

It is alleged that the present respondent took title without notice of the reddendum in the patent but this cannot avail it in view of the provisions of section 61 of *The Land Titles Act,* R.S.A. 1942, chapter 205:

> 61. (1) The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to,
>
> (*a*) any subsisting reservations or exceptions contained in the original grant of the land from the Crown:

The certificates of title relied upon by the respondent have an endorsement stating that the land or mines and minerals are subject to this implied provision. The word "reservation" is wide enough to include the provision for royalty.

Finally, as Mr. Justice Parlee points out, there is no evidence that would entitle the plaintiff to rectification of the patent. The appeal should be allowed, the action dismissed and the appellants entitled to judgment on their counter-claim. By arrangement, there are to be no costs.

RAND J.:—This appeal raises the question whether the Lieutenant Governor in Council of Alberta is entitled to exact a royalty in respect of petroleum and natural gas produced from certain lands owned by the respondent in that province. They were granted in fee simple in 1914 by Letters Patent under the Great Seal of Canada. The grant was authorized by orders-in-council made under the *Dominion Lands Act,* R.S.C. (1886) c. 54, as amended in

(1) [1935] A.C. 184. (2) [1943] S.C.R. 320.

1892 by c. 15. Section 100 of c. 55, R.S.C. (1906) provided generally for the disposal of the western Crown lands:

100. Dominion lands, as the surveys thereof are duly made and confirmed, shall, except as otherwise herein provided, be open for purchase, at such prices, and on such terms and conditions as are fixed, from time to time, by the Governor in Council; but no purchase shall be permitted at a less price than one dollar per acre, and, except in special cases in which the Governor in Council otherwise orders, no sale to one person shall exceed a section, or six hundred and forty acres.

Section 6(i) authorized regulations:

6. The Governor in Council may,

(i) make such orders as are deemed necessary, from time to time, to carry out the provisions of this Act, according to their true intent, or to meet any cases which arise, and for which no provision is made in this Act; and further make and declare any regulations which are considered necessary to give the provisions in this section contained full effect; and, from time to time, alter or revoke any order or orders or any regulations made in respect of the said provisions, and make others in their stead;

Section 159 dealt with mineral lands:

159. Lands containing coal or other minerals, including lands in the Rocky Mountains Park, shall not be subject to the provisions of this Act respecting sale or homestead entry, but the Governor in Council may, from time to time, make regulations for the working and development of mines on such lands, and for the sale, leasing, licensing or other disposal thereof.

The first regulation governing petroleum was approved by His Excellency on August 6, 1898; it provided for the reservation for a period of six months of an area not exceeding 640 acres for prospecting purposes, and that if oil was found in paying quantities, the land and mineral might be sold at the rate of $1.00 per acre, reserving a royalty of 2½ per cent upon the sales; its application was confined to lands situated south of the Canadian Pacific Railway in the district of Alberta. This was replaced by one of May 31, 1901 extending the application to unappropriated lands in Manitoba, Northwest Territories and Yukon Territory; providing a royalty at such rate as might from time to time be specified by order-in-council on the sales of the petroleum and for sworn monthly returns; and stipulating that the patent would be made "subject to the payment of the above royalty", and to forfeiture on default in payment. Further amendments were made in 1902, 1904, 1905 and 1906, but, except as they were extended to natural gas, they do not affect the question before us.

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In 1908 c. 55 R.S.C. 1906 was repealed and replaced by c. 20 of the statutes of that year. In 1910 new regulations restricted the disposal of mineral lands to leasehold interests.

Application for the lands was made by Israel Benneto on January 1, 1906, and in the course of the next five years substantial work was done by way of exploration and the sinking of a well. By 1911 approximately $75,000 had been expended, and by an order-in-council of May 31 of that year special provisions were made. The order recited the application and reservation, the operations carried on, the assignment of rights to the Northern Alberta Exploration Company Limited, and the request for a further renewal of the reservation; but that it had appeared that within the original tract squatters had acquired rights which, in the opinion of the Department, presented an obstacle to the renewal as requested. In view, however, of the large sum expended, the order provided for a reservation for two years to expire on June 17, 1913 of petroleum, natural gas and surface rights over another area of 1920 acres which embraced a portion of the former tract; that should oil or gas be discovered in paying quantities within one year from June 17, 1911 the Minister was empowered to sell the entire acreage under the earlier regulations; but that if the discovery should not be made until after that date though before June 17, 1913, to sell the available oil and gas rights in the tract and the surface rights of a described portion of it. Following this, and under the authority of a further order-in-council of March 21, 1913, by patent dated the 18 of March, 1914, the available surface rights to the extent of 1296 acres, and the available mineral rights for 1320 acres, were conveyed to the company at the rate of $3.00 an acre. The difference in acreage resulted from the retention of the surface area of a creek running through the tract. The grant is seen to have been made on the authority of and subject to cumulative and modified provisions of orders-in-council, all of which had been advertised in the *Canada Gazette* as required by sec. 8 of the Act.

The patent reserved certain rights in and over navigable waters, certain rights of fishery with incidental privileges,

all mines and minerals except gas and petroleum, and all rights acquired by squatters. Then followed a reddendum clause:

> YIELDING and paying unto Us and Our Successors such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of Our Governor in Council, it being hereby declared that this grant is subject in all respects to the provisions of any such regulations with respect to royalty upon the said petroleum and natural gas or any of them, and to such regulations governing petroleum and natural gas as were in force on the First day of September in the year of Our Lord one thousand nine hundred and nine, and that our Minister of the Interior of Canada may by writing under his hand declare this grant to be null and void for default in the payment of such royalty or for any cause of forfeiture defined in such regulations, and that upon such declaration these presents and everything therein contained shall immediately become and be absolutely null and void.

I construe that language to describe a royalty that from time to time after the issue of the patent might be provided by regulations: there was no specific royalty so existing at the time of the grant.

As of July 15, 1870, Rupert's Land and the Northwest Territories were transferred to the Dominion. By sec. 21 of the *Alberta Act of 1905*, creating the province, all public lands and real interests were retained by the Dominion. In 1930 by the *Alberta Natural Resources Act* the then remaining lands and interests of the Dominion were transferred to the province, the effect of which, as to rights and obligations, was to establish a statutory novation: *In re Timber Regulations for Manitoba* (1). Up to that moment, the retained proprietary rights were within the administration of the Dominion for the purposes of the Dominion and in all respects subject to the jurisdiction of Parliament: *In re Natural Resources of Saskatchewan* (2); *A.G. Alberta* v. *A.G. Canada* (3). But from the creation of the province it is clear that any interests disposed of by the Dominion would automatically come under its exclusive jurisdiction through the force of sec. 92 of the *Confederation Act*.

By sec. 11 of the *Dominion Lands Act, 1906*, the administration of the lands was entrusted to the Minister of Interior, to be carried out subject to the provisions of the Act and regulations made by order-in-council. What was

(1) [1935] A.C. 184.
(2) [1932] A.C. 28.
(3) [1928] A.C. 475.

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the nature of these regulations? They were intended, clearly, to be administrative and so far legislative in character; but in relation to grants, I am unable to discover any power to introduce by them new incidents of land ownership by reservation or otherwise in the ordinary instrument of conveyance. Conceivably they might regulate from time to time royalties payable on leases or even patented lands prior to the establishment of the province; but as legislation, from and after that time they could have no application to granted lands or interests; nor could any such sub-legislation authorize grants creating reservations which, under the existing law of real property, would be invalid.

Interpreting the patent, then, in the light of that law, I am forced to the conclusion that the reservation of royalties purporting to be made is void for uncertainty. As the statute of Quia Emptores did not apply to the Crown, such a reservation is strictly a rent service, that is "a retribution" made to the Crown by the beneficiary of the grant. But by the statute of 1660, c. 24, all tenures, with minor exceptions not relevant here, were converted into that of free and common socage, a provision of law which, by the *Northwest Territories Act of 1875* as amended in 1886, became law for the western lands; and under that tenure it was essential that the service should be certain. Blackstone, in Book II, cap. 5 of Lewis's Edition, emphasizes this special necessity in socage tenure: after contrasting the uncertainties of knight-service, and after dwelling somewhat on the scutage, or "escuage", which had it "been a settled invariable sum, payable at certain times, it had been neither more or less than a mere pecuniary rent; and the tenure, instead of knight-service would have been of another kind, called socage, of which we shall speak in the next chapter," describes socage as denoting a tenure by any "certain and determinate service." This he illustrates by the examples of "fealty and 20s. rent" or "homage and fealty without rent" or "certain corporal service as ploughing the Lord's lands for three days;" and observes: "It was the certainty, therefore, that denominated it a socage tenure, and nothing sure could be a greater liberty or privilege than to have the service ascertained

and not left *to the arbitrary calls of the lord* as the tenures of chivalry." He observes that the "grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained; it will include under it all other methods of holding free lands by certain and invariable rents and duties;" of a "certain established rent;" and finally, in his summary, at page 86, that "in the military tenure, or more proper feud, this was from its nature uncertain, in socage, which was a feud of the improper kind, it was certain, fixed and determinate (though perhaps nothing more than bare fealty) and so continues to this day." The reservation here, by leaving the rate in money or in kind at which the royalty from time to time should be levied, in the discretion of the Crown, embodies the essence of the evil which led to the legislation of 1660.

Assuming this, Mr. Steer argues that the patent itself was void on the ground that as the regulations stipulated for such a reservation, a patent could issue only if it carried out effectively their terms. The *Dominion Lands Act* doubtlessly exhausts the prerogative power to dispose of Crown lands. That is clear whether we treat the statute of 1702, which limited the disposing power of the Crown over lands in England, to have been introduced into the Northwest Territories by the Act of 1875 or not. The circumstances in which the statute of 1702 was enacted are not at all comparable with those of a colony, the initial development of which must necessarily be one of the main functions of executive government; and certainly it was not observed by the colonial administration prior to Confederation. But sec. 100 recognizes that residual power so far as the provisions of the statute do not fetter it; and secs. 6(i) and 159 neither require the regulations to be of any particular or general nature nor exclude special provisions for special cases where no prohibition is infringed. The patent was, undoubtedly, issued as the conclusion of an application made under the regulations; but assuming the incorporation of the latter in the transaction as a whole, if, so far as they professed to provide for novel incidents of property in the patent, they were

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beyond the power of the Governor-in-Council to make they must be disregarded, and the conveyance, otherwise within the statutory authority, held valid.

The lands, including the oil and gas rights, then, having been conveyed, nothing remained to pass to the province in 1930 except the right of escheat; and since the claim for royalty under the provincial order-in-council is based on a reservation, transferred in 1930, that failing, the claim fails.

I do not understand the statement of claim to allege an intention on the part of the province to seek by order-in-council to subject the lands to a condition based on the language of the reservation of royalty, but taken apart from its effectiveness as such. As contained in the grant, the condition obviously assumes a valid reservation and it would fall with the latter. But considered even as detached from the reservation, it is fatally defective. That conditions must be certain, precise and ascertainable from the terms of the instrument is a rule with ancient roots in the common law; it was applied by this Court as late as last year in *Noble* v. *Alley* (1); and a condition, the substance of which lies within the will of the grantor, is outside of that requirement.

I would, therefore, dismiss the appeal. There will be no costs.

KELLOCK J.:—The patent here in question was granted subsequent to 7-8 Ed. VII, c. 20, by s. 37 of which it is provided that

> lands containing salt, petroleum, natural gas . . . may be sold or leased under regulations made by the Governor in Council.

This legislation replaced s. 159 of R.S.C. 1906, c. 55, which read:

> Lands containing coal or other minerals . . . shall not be subject to the provisions of this Act respecting sale or homestead entry, but the Governor in Council may from time to time make regulations for the working and development of mines on such lands and for the sale, leasing, licensing or other disposal thereof.

By s. 6 of the same *Act*, the Governor in Council was authorized to

> (i) make such orders as are deemed necessary from time to time to carry out the provisions of this Act according to their true intent or to meet any cases which arise and for which no provision is made in this Act . . .

(1) [1951] S.C.R. 64.

S. 76(*k*) of the Act of 1908 reproduces this provision. Regulations which had been passed under earlier legislation were in force at the time of the passing of the Act of 1908, and the order-in-council authorizing the patent had reference to these regulations. The patent itself is an express grant in fee simple, and it contains the provision relied upon by the appellant which in turn is in conformity with the regulations.

While Parliament, as the unitary legislature for the territory in question, could, doubtless, have created estates not then known to the law, it is plain that, apart from such legislation, "the King cannot make law or custom by his grant;" Chitty on Prerogatives of the Crown, p. 386. I find nothing in the above legislation which contemplates disposal of mineral lands so as to create estates therein of a novel character. The question, therefore, in the case at bar is as to whether the provision in the patent, authorizing the grantor to exact "such royalty . . . from time to time prescribed by regulations of our Governor in Council" upon the petroleum and natural gas, was a valid provision under which an interest remained in the Dominion and passed to the province by virtue of the *Natural Resources Act of 1930*. The case for the appellant is exclusively rested on this basis and not upon any legislative jurisdiction in either the Dominion or the province apart from the terms of the patent. In my opinion, the provision in question is not effective for such a purpose but is void as repugnant to the grant.

Anciently, according to Blackstone Vol. 2, p. 60 ff., there were four principal species of lay tenures, the grand criteria of which were the nature of the several services or "renders" that were due to the lords from their tenants. These services in respect of their quality were either free or base, and in respect of their quantity and the time of exacting them, were either certain or uncertain. Free services were such as were not unbecoming the character of a soldier or a freeman to perform, while base services were such as were only fit for peasants or persons of a servile rank. "Certain" services, whether free or base, were such as were stinted in quantity and could not be exceeded on any pretext; for example, to pay a stated annual rent or

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to plough such a field for three days. "Uncertain" services depended upon unknown contingencies; as, in the case of free services, to do military service in person or pay an assessment in lieu of it when called upon; or, in the case of base services, to do whatever the lord should command.

Where the service was free but uncertain, as military service with homage, the tenure was called tenure in chivalry, or knight service. Where the service was not only free but also certain, as by fealty only, by rent and fealty, etc., that tenure was called free socage. Tenure by knight service was abolished by the statute of 12 Car. II, c. 24, and turned into free and common socage. This statute expressly extended to the Crown. At p. 78 Blackstone, in speaking of the services in the case of free socage, says that they were

> such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the statute of Charles the Second) almost every other species of tenure.

The author goes on at p. 80 to state that

> It was the certainty, therefore, that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege, than to have the services ascertained, and *not left to the arbitrary calls of the lord,* as the tenures of chivalry.

At p. 81:

> As therefore the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties.

As the statute Quia Emptores did not apply to the Crown, of whom the tenant in fee simple holds his lands, rent payable to the Crown in such cases is a rent service which, as distinguished from a rent charge, requires a tenure to support it.

It has been held that royalties of the nature of that here in question are true rents; *Reg.* v. *Westbrook* (1); *Daniel* v. *Gracie* (2); *Barrs* v. *Lea* (3); *Edmonds* v. *Eastwood* (4); 20 Halsbury, 2nd Edition, 158. Being rent, it is essential in every case that the element of certainty exist in order to its enforcement. As stated in Halsbury Vol. 20, 2nd Edition, at p. 160:

> The rent must be certain, or must be so stated that it can afterwards be ascertained with certainty. For this purpose it is sufficient if by

(1) (1847) 10 Q.B. 178, 203.
(2) (1844) 6 Q.B. 145.
(3) (1864) 33 L.J. Ch. 437.
(4) (1858) 2 H. & N. 811 at 819

calculation and upon the happening of *certain events* it becomes certain; and provided it can be so ascertained from time to time, it is no objection that the rent is of fluctuating amount.

Apart from authority, it is difficult to see on principle how a rent, dependent upon nothing but the will of the grantee, can be said to be certain. No authority has been cited which supports the appellant's position, and I think there is authority to the contrary. Halsbury, in a note to the citation last mentioned above, refers to what is said in Coke upon Littleton at 96*a*, namely,

> It is a maxim in law, that no distresse can be taken for any services that are not put into certaintie, nor can be reduced to any certainty; for, *id certum est, quod certum reddi potest* . . . And yet in some cases there may be a certainty in uncertainty; as a man may hold of his lord to sheere all the sheepe depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this incertainty, being referred to the mannor which is certaine, the lord may distrain for this uncertainty. *Et sic de similibus.*

This is cited by Lord Denman in *Daniel* v. *Gracie, ubi cit.*, in which, under a demise of a marl pit and brick mine, the tenant to pay 8d. per solid yard for all the marl he got and 1s. 8d. per thousand for all the bricks he made, it was held that the rent was certain as it was capable of being ascertained with certainty. At p. 153, Lord Denman said:

> In the present instance, however, the rent is reserved in money; and the amount is, according to the criterion of Lord Coke, capable of being ascertained, *"certum reddi potest"*, by the number of cubic yards of marl and slack got in the one case, and of bricks made in the other.

There is nothing in this case which suggests that rent at a rate not stated may be made certain by the exercise of the will of the grantor or lessor. Nor in my opinion, with respect, does the illustration given by Lord Coke go so far. The number of sheep would be determined each year by the number actually depasturing on the land at the relevant date. I think it is clear upon the authorities that the certainty must be capable of ascertainment by reason of some collateral event apart from the mere will of the grantor. As put in 10 Halsbury, 2nd Edition, at p. 446:

> But the rent is certain if by calculation and upon the happening of certain events, it becomes certain.

Reference is made in the text to *Ex parte Voisey* (1). In that case, Brett L.J., as he then was, said at p. 458:

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> Now it is true that, if that which is agreed upon as the payment is uncertain, it is not a rent. It must be certain. But the rent is certain if, by calculation and upon the happening of certain events, it becomes certain . . . But here it seems to me that, upon the happening of the condition named, the rent *fixes itself* and is therefore a certain rent.

The point is made very clear, it seems to me, by Lord Chief Baron Gilbert in his treatise on rents at p. 9, where he says:

> When the services are expressed in the contract, the *quantum* must be either certainly mentioned, or be such, as *by reference to something else* may be reduced to a certainty.

The same idea is expressed in Woodfall, 24th Edition, at p. 307, as follows:

> The reservation of rent, however, ought to be certain as to the amount and the time when payable; although if there be anything *in the reservation* by which the amount of the rent may be ascertained, this will be as good as if the sum itself were clearly specified, in accordance with the maxim *Id certum est quod certum reddi potest.*

In my opinion, therefore, the provision here in question lacks the necessary certainty. It is in effect a throwback to the old days of tenures by knight service which permitted rent services based on the "arbitrary calls of the lord."

The appellant, however, seeks to support the clause in question on the ground of common law condition subsequent. Counsel referred to a number of definitions, all to the same effect, and it will be sufficient to refer to that contained in Cheshire's Modern Real Property, 6th Edition, at p. 515:

> An interest upon condition subsequent arises where a qualification is annexed to a conveyance, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or the grantee does or omits to do a particular act, the interest shall be defeated.

I am content to take it that the provision in the patent here in question falls within the words of this definition. By the express terms of the patent, the grant may be declared void for default in payment of

> such royalty upon the said petroleum and natural gas, if any, from time to time prescribed by regulations of Our Governor in Council.

(i.e., default in payment of royalty at any rate which may in future be imposed).

However, if the reservation of future royalty is void for uncertainty, as in my opinion it is, it must follow that the

(1) (1882) 21 Ch. D. 442.

forfeiture for breach of a condition which is founded upon such a reservation, must fall with the latter.

The appellant relies upon the decision of the Privy Council in *Cooper* v. *Stuart* (1), which was concerned with a Crown grant of land in New South Wales containing a right to resume any quantity of the lands granted not exceeding ten acres as might be required for public purposes. This was held valid.

What was actually decided in that case is thrown into relief when contrasted with the decision in *Pearce* v. *Watts* (2) which was concerned with a contract for the sale of an estate, the vendor reserving "the necessary land for making a railway" through the estate to Prince Town. The suit, which was for specific performance, failed, it being held that the reservation was void for uncertainty. In his judgment, Sir George Jessel M.R. considers the situation which would have existed had there been a conveyance, in the following language at p. 493:

> If the conveyance were executed in this form, it is obvious, according to the present law, the whole land would pass to the purchaser, the reservation being void for uncertainty.

It may well be that the reservation in the above case was not a true reservation but rather an exception, but in either view it is essential that the parcel which is the subject of the reservation or exception should have certainty. In *Cooper's case,* it was fixed in amount, namely, ten acres, whereas in *Pearce's case* there was complete uncertainty and it could not be rendered certain by the grantor's election to have what he considered necessary for a railway.

I think, therefore, that it does not assist the appellant to invoke the doctrine of condition subsequent. In my opinion, the purported reservation of royalty in the patent is void, and the grant is absolute in the hands of the grantee. The principle is very old and is stated in Blackstone at p. 156 as follows:

> These express conditions, if they be . . . contrary to law, are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant.

I would dismiss the appeal. It was agreed there should be no costs.

(1) (1889) 14 A.C. 286.

(2) (1875) L.R. 20 Eq. 492.

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ESTEY J.:—I am in agreement with the reasons expressed by my brothers Rand and Kellock.

The appeal should be dismissed without costs.

CARTWRIGHT J.—For the reasons given by my brothers Rand and Kellock I would dismiss the appeal, without costs.

Appeal dismissed; no costs.

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

Solicitor for the appellants: *H. J. Wilson.*

Solicitors for the respondent: *Field, Hyndman, Field and Owen.*

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Oct. 19, 20

1951

Feb. 6

RAYMOND N. STUDER and GERALD L. STUDER and the CANADIAN NATIONAL RAILWAYS (DEFENDANTS) ..... APPELLANTS;

AND

BERNICE AVIS COWPER, an infant suing by FREDERICK COWPER, her next friend, and the said FREDERICK COWPER (PLAINTIFFS) .. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Automobiles—Injury to Gratuitous Passenger—"Gross Negligence or wanton and wilful misconduct"—Construction of phrase as used in The Vehicles Act, 1945 (Sask.) c. 98, s. 141 (2).

The terms "gross negligence" and "wilful and wanton misconduct" as used in s. 141(2) of *The Vehicles Act,* 1945 (Sask.) c. 98, do not mean the same thing. Each phrase is to be construed as standing alone and neither is to be taken as connoting criminal negligence.

Per: Kerwin J.—Where by statute the liability of a municipal corporation has been limited to cases of gross negligence, this Court has declined to define that expression other than to say that it might be given the meaning of "very great negligence". *Kingston* v. *Drennan,* 27 Can. S.C.R. 46; followed in *German* v. *City of Ottawa,* 56 Can. S.C.R. 80 and *Holland* v. *City of Toronto,* [1927] S.C.R. 242; 59

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

O.L.R. 628. This Court has also declined to define "gross negligence or wilful and wanton misconduct" in a case arising under legislation in Nova Scotia similar to s. 141(2) of the Saskatchewan Vehicles Act. In connection with the latter statute it is sufficient to say that gross negligence may be stated to be very great negligence and it must be left to the trial judge in each case to put the matter to the jury in that way with such reference to the evidence as may be necessary. The remarks of Duff C.J. in *McCulloch* v. *Murray* [1942] S.C.R. 141, approving the statement of Chisholm C.J. in the same case (16 M.P.R. 45), followed.

Short v. *Rush* [1937] 2 W.W.R. 191 at 200, followed in *Lloyd* v. *Derkson* [1937] 3 W.W.R. 504 and *Heck* v. *Braun* [1939] 2 W.W.R. 1, questioned by Kerwin J. and distinguished by Estey and Cartwright JJ.

Per: Estey and Cartwright JJ.—Whether conduct should be classified as "negligence", "gross negligence", or "wilful and wanton misconduct", is a question of fact to be determined in the circumstances of each case. It cannot however be said that a jury must find in every case that the driver's conduct amounts to a reckless disregard of consequences before they can find that conduct constitutes gross negligence.

Judgment of the Court of Appeal for Saskatchewan, [1950] 1 W.W.R. 780, affirmed.

APPEAL by the defendants from the judgment of the Court of Appeal for Saskatchewan (1), dismissing their appeal from a judgment by Thomson J. on a jury trial.

G. H. Yule K.C. for the appellants.

E. M. Hall K.C. for the respondents.

KERWIN J.:—This is an appeal by the defendants, Gerald L. Studer and Raymond N. Studer, the owner and operator, respectively, of an automobile, from a judgment of the Court of Appeal for Saskatchewan dismissing their appeal from the judgment rendered after a trial with a jury. The plaintiff respondent is Bernice Avis Cowper, an infant sixteen years of age, suing by her father as next friend, for damages for injuries received while she was in the motor vehicle driven by Raymond Studer. As a gratuitous passenger, Bernice is subject to the provisions of subs. 2 of s. 141 of *The Vehicles Act*, c. 98, of the 1945 Statutes of Saskatchewan:

141. (2). The owner or driver of a motor vehicle, other than a vehicle ordinarily used for carrying passengers for hire or gain, shall not be liable for loss or damage resulting from bodily injury to or the

(1) [1950] 1 W.W.R. 780.

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death of any person being carried in or upon, or entering, or getting on to, or alighting from such motor vehicle, unless there has been gross negligence or wilful and wanton misconduct on the part of the driver of the vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury.

After alleging gross negligence or wilful and wanton misconduct on the part of the driver, the statement of claim continues (para. 6):

6. The gross negligence or wilful and wanton misconduct on the part of the defendant Raymond N. Studer consisted of:

(*a*) He knew, or should have known, that he was approaching the railway crossing referred to in Paragraph 4, hereof.

(*b*) He was driving the said Dodge Sedan at a speed of sixty (60) miles an hour or more northward on said Lorne Avenue road as he approached said railway crossing at a time when the said road was, to his knowledge, covered with snow and/or ice and unsafe for driving at such speed or at any speed in excess of twenty (20) miles an hour.

(*c*) He knew, or should have known, that, at the speed at which he was travelling, he would not be able to bring the said Dodge Sedan to a stop in time to avoid a collision in the event that a train should come or be upon the said railway crossing.

(*d*) He was "showing off" and seeking to impress the infant plaintiff with his reckless handling of the Dodge Sedan.

(*e*) He failed to observe that a box freight car was on said railway crossing as he approached the said crossing.

(*f*) He was keeping no proper or any look-out as he approached the said railway crossing.

(*g*) He was not giving due attention to the driving of the said Dodge Sedan at the said time.

(*h*) He was driving the said Dodge Sedan with a reckless disregard of consequences.

With the consent of all parties, this paragraph was handed to the jury. The questions to be submitted to them had been agreed to by counsel for all parties, and the relevant questions, together with the answers thereto, given after a charge that is not objected to, read as follows:

1. Was there on the part of the Defendant Raymond Studer gross negligence, or wilful and wanton misconduct which caused the accident?

Answer: Yes.

2. If so, of what did such gross negligence, or wilful and wanton misconduct consist?

Answer: Statement of Claim sections *a, c, f, g.*

(*a*) He knew or should have known, that he was approaching the railway crossing referred to in paragraph 4 hereof (The Statement of Claim).

(*c*) He knew, or should have known, that at the speed at which he was travelling, he would not be able to bring the said Dodge Sedan to a stop in time to avoid a collision in the event that a train should come or be upon the said railway crossing.

(*f*) He was keeping no proper or any look-out as he approached the said railway crossing.

(*g*) He was not giving due attention to the driving of the said Dodge Sedan at the said time.

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For the appellant, Mr. Yule argued that the jury must be taken to have negatived the allegation in clause (*h*) of paragraph 6 of the statement of claim since no affirmative finding was made with reference to it. If one considered that clause by itself, that might be taken for granted but, in view of the charge and the answer to the first question, wherein the jury found that there was gross negligence or wilful and wanton misconduct on the part of the driver, and in view of the finding that particulars thereof were to be found in clauses (*a*), (*c*), (*f*) and (*g*), it may be confidently asserted that clause (*h*) is not exclusive of any idea fairly included in the other clauses specified by the jury. In my view such an idea is so included. Nor can it be said that none of these other clauses, or at any rate all of them together, are not capable in law of being gross negligence. In view of the fact that counsel for the respondent suggested that the two alternatives be put to the jury separately but bowed to the trial judge's ruling that the question be put as framed, and that all the questions were agreed to by counsel for the appellants, no objection may now be taken to the finding that Raymond N. Studer was guilty of gross negligence or wilful and wanton misconduct.

Mr. Yule then argued that the Court of Appeal for Saskatchewan had decided in *Shortt* v. *Rush and British American Oil Co. Ltd.* (1); *Lloyd* v. *Milton and Derkson* (2), reversed (1938) S.C.R. 315; *Heck* v. *Braun and Marchuk* (3); that the idea of criminality, in order to find a person guilty on a charge of criminal negligence, must exist before a driver of a gratuitous passenger could be found responsible under the relevant legislation. He then proceeded to argue that because these decisions were upon similar legislation which was re-enacted thereafter, it should be taken that the legislature adopted that construction—relying upon what was said by Anglin J. in

(1) [1937] 2 W.W.R. 191.
(2) [1937] 3 W.W.R. 504.
(3) [1938] 2 W.W.R. 1.

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Canadian Pacific Railway v. *Albin* (1), speaking on behalf of himself, Sir Louis Davies C.J., and Mignault J.:—

> Although s.s. 4 of s. 12 of the "Interpretation Act" (R.S.C. ch. 1, in force since 1890 (53 Vict., ch. 7, s. 1) declares that
>
> "Parliament shall not be re-enacting any Act or enactment or by revising, consolidating or amending the same be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language."

We

> cannot assume that the Dominion Legislature when they re-enacted the clause verbatim (in 1903 and again in 1906) were in ignorance of the judicial interpretation which it had received. It must on the contrary be assumed that they understood that (s. 92 of the Act of 1888) must have been acted upon in the light of that interpretation.
>
> *Casgrain* v. *Atlantic and North West Ry. Co.* (2), at page 300.

He might have added to that citation what was said by Duff, J., speaking on behalf of himself, Mignault, Newcombe, and Rinfret JJ., in *Orpen* v. *Roberts* (3), as at 374:

> Although by sec. 20 of the Interpretation Act, R.S.O. (1914), the legislature is not to be presumed by reason merely of having re-enacted a statutory provision without changing its language to have adopted a previous judicial construction of that language, nevertheless, the history of the legislation, when read in light of the course of judicial decision and opinion touching the effect of it, may, independently of the intrinsic weight of such decisions and opinions, afford convincing evidence of the intention of the legislature. There appears to be little room for doubt that in this instance the Appellate Division has accurately interpreted that intention.

In view of these decisions, it must now be taken that subsection 4 of s. 24 of the Saskatchewan Interpretation Act, 1943, c. 2, which is the same as the ones referred to in the two cases mentioned, merely removes the presumption that existed at common law and, in a proper case, it will be held that a legislature did have in mind the construction that had been placed upon a certain enactment when re-enacting it. In the present case it is apparent that the Court of Appeal for Saskatchewan did not consider that it had laid it down that the same elements that are required in a charge of criminal negligence must be present under the Saskatchewan legislation here in question but, in order to dispel all doubts, it should be now stated unequivocally that the elements are not the same. That

(1) (1919) 59 Can. S.C.R 151 at 166.

(2) [1895] A.C. 282.

(3) [1925] S.C.R. 364.

is implicit in the judgment of this Court in *McCulloch* v. *Murray* (1), so that it cannot be said that there was a course of judicial decision in the opposite sense.

In cases where claims are made for damages arising from ice or snow on a sidewalk where by virtue of statutory enactments a municipality is not to be liable except in the case of gross negligence, this Court has declined to lay down any rule defining that expression in any way except as great or very great negligence: *Kingston* v. *Drennan* (2); *Holland* v. *Toronto* (3), which contains merely a note of the decision, and 59 O.L.R. 628, where the reasons for judgment of this Court are printed. This Court has also declined to give a definition of gross negligence or wilful and wanton misconduct in a case arising under legislation in Nova Scotia similar to subsection 2 of s. 141 of the Saskatchewan Vehicles Act: *McCulloch* v. *Murray supra.* The same rule was followed by the British Columbia Court of Appeal under a statute referring only to gross negligence in *Murdock* v. *O'Sullivan* (4), the decision in which was affirmed in this Court (5). In connection with the Saskatchewan statute, it is sufficient to say that gross negligence may be stated to be very great negligence, and it must be left to the trial judge in each case to put the matter to a jury in that way, with such references to the evidence as may be necessary.

Mr. Yule then contended that the two legs of the phrase mean the same thing but this Court has already held that that is not the proper construction by its approval in *McCulloch* v. *Murray* of the reasons for judgment of Sir Joseph Chisholm, speaking on behalf of the majority of the Court *en banc* in that case in (1941) 3 D.L.R. 42. The term "wilful and wanton misconduct" denotes something subjective on the part of the driver, whereas gross negligence may be found entirely apart from what the driver thought or intended. In such a case as this, the two alternatives should be put to the jury separately but for the reasons already given, it is now too late for the appellants to object that this was not done.

(1) [1942] S.C.R. 141.
(2) (1897) 27 Can. S.C.R. 46.
(3) [1927] S.C.R. 242.
(4) (1943) 49 B.C.R. 249; 3 W.W.R. 162.
(5) [1944] S.C.R. 143.

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I have not referred to the evidence because, on a review of it, it is impossible to say, as was contended on behalf of the appellants, that there was no evidence upon which the jury could find as it did, and it is also impossible to say that it was not a permissible view for the jury to take of the evidence that what it found to be gross negligence or wilful and wanton misconduct was not the former.

The appeal should be dismissed with costs.

RAND J.:—I agree that the phrase "gross negligence or wilful and wanton misconduct" does not imply equivalence and is not to be identified in either sense with criminal negligence; and that the determination in any case of the condemned conduct is an ascertainment of fact for the jury in the light of the meaning of plain words of description. It is a matter of the degree to which, in the circumstances, conduct lies below the reasonable in attention to consequences; and the legislature has taken as the determinant the common judgment of men in the sense of the terms employed. In this I respectfully adopt the views of Duff C.J. in *McCulloch* v. *Murray* (1), expressed in his observations on the corresponding section of *The Motor Vehicle Act* of Nova Scotia.

On the other points, I agree that the appellant cannot succeed, and that the appeal must be dismissed with costs.

The judgment of Estey and Cartwright JJ. was delivered by

ESTEY J.:—The respondent Frederick Cowper, on behalf of himself and his infant daughter Bernice Avis Cowper, as plaintiff brought this action against the appellants as driver and owner respectively of a Dodge Sedan in which Bernice Avis Cowper was riding when she suffered the injuries for which damages are here claimed.

The driver, Raymond N. Studer, had invited Bernice Avis Cowper to accompany him upon this occasion and there is no dispute that in order that damages may be recovered the plaintiff-respondent must prove that the injuries were caused by the "gross negligence or wilful and wanton misconduct" on the part of Raymond N.

(1) [1942] S.C.R. 140.

Studer in driving the Dodge Sedan automobile. S.S. 1945, c. 98, s. 141(2). This section reads as follows:

141(2) The owner or driver of a motor vehicle, other than a vehicle ordinarily used for carrying passengers for hire or gain, shall not be liable for loss or damage resulting from bodily injury to or the death of any person being carried in or upon, or entering, or getting on to, or alighting from such motor vehicle, unless there has been gross negligence or wilful and wanton misconduct on the part of the driver of the vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury.

On March 13, 1949, the appellant Raymond N. Studer, 21 or 22 years of age, with the plaintiff respondent Bernice Avis Cowper, about 16 years of age, drove south from the city of Saskatoon in a Dodge Sedan owned by the appellant Gerald L. Studer. The highway upon which they were driving passes over the main line of the Canadian National Railways where there are double tracks. They passed over this crossing at 2 a.m. and returned to the same crossing at 4 a.m. The country is rolling and about 100 yards south of the crossing, Raymond Studer, driving north, came over a rise in the ground from which there is a gradual slope toward the crossing in question. As he came over the rise he saw the switch lights east of the crossing and box cars at the crossing. The road was slippery, the snow being hard packed. He immediately applied his brakes and skidded 210 feet where he hit the last box car upon the train proceeding westward at the crossing on the north track at about 2 miles per hour. The impact was such that the front of the automobile was badly damaged and the infant respondent thrown forward in a manner that caused her head to go through the windshield. Raymond Studer said the automobile, because of the impact, "bounced back." The evidence as to the speed of the automobile was most contradictory. Raymond Studer said he came over the rise at 35 miles per hour and was proceeding about 2 miles per hour when he struck the box car. The train was in the course of switching operations on the north track. The brakeman on the rear end had got off to adjust the switch when he heard the roar of an automobile and, looking up, could see it and estimated it to be 150 feet south. He thought it was coming at about 40 or 45 miles per hour. There was other

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evidence upon which the jury might have found that the automobile was proceeding at a much greater speed. The infant respondent was seriously and permanently injured.

The instructions of the learned trial judge with regard to negligence and gross negligence were so complete and thorough that no exceptions are taken thereto. In the course of his address the learned judge stated:

> Now we will give to you, when you go to the jury room, all the exhibits, and also copies of paragraph 6 of the statement of claim.

This was with the concurrence of counsel for all parties. Paragraph 6 reads as follows:

> 6. The gross negligence or wilful and wanton misconduct on the part of the defendant Raymond N. Studer consisted of:
>
> (*a*) He knew, or should have known, that he was approaching the railway crossing referred to in Paragraph 4 hereof.
>
> (*b*) He was driving the said Dodge Sedan at a speed of sixty (60) miles an hour or more northward on said Lorne Avenue Road as he approached said railway crossing at a time when the said road was, to his knowledge, covered with snow and/or ice and unsafe for driving at such speed or at any speed in excess of twenty (20) miles an hour.
>
> (*c*) He knew, or should have known, that, at the speed at which he was travelling, he would not be able to bring the said Dodge Sedan to a stop in time to avoid a collision in the event that a train should come or be upon the said railway crossing.
>
> (*d*) He was "showing off" and seeking to impress the infant plaintiff with his reckless handling of the Dodge Sedan.
>
> (*e*) He failed to observe that a box freight car was on said railway crossing as he approached the said crossing.
>
> (*f*) He was keeping no proper or any look-out as he approached the said railway crossing.
>
> (*g*) He was not giving due attention to the driving of the said Dodge Sedan at the said time.
>
> (*h*) He was driving the said Dodge Sedan with a reckless disregard of consequences.

The first question submitted to the jury read: "Was there on the part of the defendant Raymond Studer gross negligence or wilful and wanton misconduct which caused the accident?" The jury answered this question "Yes" and, therefore, as instructed, were required to state of what did such gross negligence or wilful and wanton misconduct consist, and as to this the learned trial judge instructed them as follows:

> But if you find there was gross negligence, or wilful and wanton misconduct, then it is necessary to explain why you come to that conclusion. That is rather to give the reason on which that conclusion is based, to say what it consists of and that is where these particulars I will give you come

into effect * * * If you can pick out any one, or a combination of them, or the whole of them, if you find they have been established—my suggestion to you is, that if you come to the conclusion that if there has been gross negligence or wilful and wanton misconduct and you answer the first question in the affirmative, then you can look at these particulars and decide which of them are the cause of the negligence—(*a*), (*b*), (*c*), (*d*) or whichever it is, of paragraph 6 of the statement of claim. You can put into there all of these items which you think have been proven, and leave out any you think have not been proven.

The jury selected sub-paragraphs (*a*), (*c*), (*f*) and (*g*) as the particulars of the gross negligence. I think, having regard to the foregoing instructions of the learned trial judge, particularly that sentence that the jury should "leave out any you think have not been proven," it must be taken as contended by counsel for the appellant, quite apart from authority (*Andreas* v. *The Canadian Pacific Railway Co.* (1)), that the jury negatived sub-paragraph (*h*) of the foregoing paragraph 6 to the effect that Studer was driving the automobile "with a reckless disregard of consequences."

The jury assessed in favour of Frederick Cowper, in his own right, special damages in the sum of $1,492, and as next friend of Bernice Avis Cowper the sum of $17,500. The learned trial judge directed judgment accordingly and that judgment was affirmed by the Court of Appeal.

The appellant submits that the jury, in not including sub-paragraph (*h*) in the particulars of gross negligence, negatived the allegation that Raymond Studer was driving "with a reckless disregard of consequences" and that being an essential of gross negligence, as that term has been construed in the foregoing s. 141(2), the judgment should be reversed. The appellant also contended that the foregoing construction has been adopted by the Legislature of Saskatchewan and, therefore, must be accepted in the courts.

The first case counsel for the appellant relies upon in support of his contention that the Court of Appeal in Saskatchewan has construed this section is *Shortt* v. *Rush and British American Oil Company Limited* (2). It was there held an instruction to the jury "that in order to hold the defendants liable they should find that the driver's conduct was intentional or on purpose" was erroneous in

(1) (1905) 37 Can. S.C.R. 1.
(2) [1937] 2 W.W.R. 191 at 200.

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law, but, though objectionable, it did not invalidate the verdict because, in an alternative charge, "which engaged the ultimate attention of the jury," the learned judge, in reply to their inquiry as to what kind of indifference could be held to constitute gross negligence, emphasized this alternative by stating "that in the circumstances the driver was careless of the consequences and 'took a chance.'" In these circumstances the Court of Appeal held that, while "the instructions of the learned trial judge to the jury were not altogether free from error, since no substantial wrong or miscarriage of justice had been occasioned in the trial on that account" the appeal should be dismissed. In the course of the judgment the words "gross negligence" and "wilful and wanton misconduct" were discussed at some length and views expressed which, though unnecessary to the decision, are entitled to the greatest possible respect. At p. 199 it was stated:

> that the term "gross negligence" in the enactment in question connotes criminal negligence which differs materially from civil negligence because objectively, it implies a want of care which may endanger human life while subjectively it implies a state of mind which is indifferent to consequences.
>
> It follows that in order to substantiate his allegation that Rush was grossly negligent in his operation of the truck on the occasion in question it was incumbent on the plaintiff to satisfy the jury, (1) that he failed to take that care without which he knew or ought to have known that he might endanger the plaintiff's life; (2) that with such failure he exhibited a reckless disregard or indifference as to the consequences.

In the second case, *Lloyd* v. *Milton and Derkson,* (1), the court held that the facts established gross negligence within the statements made in *Shortt* v. *Rush, supra.* Upon the owner appealing to this court that conclusion was reversed (2).

In the third, *Heck* v. *Braun and Marchuk,* (3), it was held that the driver Braun was negligent "but it was nothing more than inadvertence" and not gross negligence within the meaning of the Vehicles Act 1935.

The charge approved of, in the first of these cases, the finding of fact in the second and that "nothing more than inadvertence" was established in the last, did not, with great respect, require that the phrase "gross negligence" be construed to connote "criminal negligence", nor neces-

(1) [1937] 3 W.W.R. 504.
(2) [1938] S.C.R. 315.
(3) [1938] 2 W.W.R. 1.

sarily to include the essentials numbered (1) and (2) in the first case, nor, as stated in the last, "There must be conduct showing a reckless disregard, a complete indifference to the safety and rights of others."

The analyses made and the conclusions intimated by the learned judges are entitled to the greatest possible respect but, in the circumstances, do not constitute such a judicial construction of an enactment as to warrant the application of the common law rule that a re-enactment of words judicially construed discloses a legislative intention to adopt that construction. This is particularly true in the circumstances because of the modification of that rule enacted in Saskatchewan by s. 24(4) of the Saskatchewan Interpretation Act (S.S. 1943, c. 2, s. 24(4)).

When, therefore, the Legislature in 1945 considered this section which it then rephrased and enacted as sec. 11 (S.S. 1943, c. 59, s. 11), which is now s. 141(2) above quoted, it cannot be said to have done more than to have appreciated the effect of the three foregoing decisions and left the phrases as enacted to be further construed in the courts.

The words "gross negligence or wilful and wanton misconduct" as enacted in s. 141(2) must be construed as if these phrases stood alone. Such was the view of the learned judges in Nova Scotia, where there is a similar statutory provision. *Murray* v. *McCulloch* (1). Their judgment was affirmed in this court (2), where Sir Lyman Duff C.J. stated at p. 145:

> I am, myself, unable to agree with the view that you may not have a case in which the jury could properly find the defendant guilty of gross negligence while refusing to find him guilty of wilful or wanton misconduct.

The Legislature, by the enactment of s. 141(2) above quoted, effected a change in the common law and, therefore, some assistance may be found in ascertaining the intent and purpose of this enactment by considering the position of such a passenger prior thereto. Before the adoption of this provision (s. 141(2)) such a passenger could recover from the driver or owner for any injuries suffered by reason of the driver's failure to use that care which a reasonable man would have exercised in the same

(1) (1941) 16 M.P.R. 45. (2) (1942) S.C.R. 141.

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or similar circumstances. *Armand* v. *Carr* (1). One who fails to use such care is negligent and what, in given circumstances, will constitute such failure is a question of fact.

Lord Wright, in *Caswell* v. *Powell Duffryn Associated Collieries, Limited* (2), stated:

> The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the Court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man.

In *Read* v. *J. Lyons & Co. Ltd.* (3), Lord Macmillan stated:

> The more dangerous the act the greater is the care that must be taken in performing it.

There are, therefore, varying degrees of care and the failure to exercise that degree of care required in the circumstances constitutes negligence. In this view, which would appear to have ultimately prevailed at common law, there are no degrees of negligence. *Giblin* v. *McMullen* (4); *Moffatt* v. *Bateman* (5); Beven—Negligence, 4th Ed., at p. 25.

The term "gross negligence" appears often in statutory provisions and almost invariably it has been difficult to define its precise meaning. Indeed, Anglin C.J. in writing the judgment of this court in *Holland* v. *City of Toronto* (6), reported in full in 59 O.L.R. 628 at 631-37, in dealing with a statutory provision respecting the presence of snow and ice on sidewalks, stated:

> The term "gross negligence" in this statute is not susceptible of definition.

Chief Justice Duff, in *McCulloch* v. *Murray supra*, pointed out, at p. 144, that he did not think it was

> any part of the duty of this Court, in applying the enactment before us, to define gross negligence, or to define wilful and wanton misconduct.

He did, however, recognize that learned judges at trial must instruct juries and did go on to state:

> All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves.

(1) [1926] S.C.R. 575.
(2) [1940] A.C. 152 at 176.
(3) [1946] 2 All E.R. 471 at 477.
(4) [1868] L.R. 2 P.C. 317.
(5) (1869) L.R. 3 P.C. 115.
(6) [1927] S.C.R. 242.

The Legislature of Saskatchewan, while it relieved the driver and owner from the common law liability when the driver's conduct constitutes negligence, by the enactment of sec. 141(2) intended that these parties should remain liable for the driver's gross negligence or wilful and wanton misconduct. There is no reason to conclude that the Legislature intended there should be any hiatus between negligence and gross negligence and, therefore, whenever the conduct of the driver, in the opinion of the jury, was in excess of negligence it would be gross negligence within the meaning of sec. 141(2). Then, by the inclusion of the words "or wilful and wanton misconduct" after the words "gross negligence" the Legislature has evidenced an intention to include that conduct more reprehensible than gross negligence and for this also the above-named parties should remain liable to a passenger within the meaning of that section. Whether conduct should be classified as "negligence," "gross negligence," or "wilful and wanton misconduct," is a question of fact to be determined in the circumstances of each case. It may well be, as evidenced by the authorities above quoted, that what in one circumstance may be negligence may, in another, be gross negligence, or vice versa. It cannot, however, be said that a jury must find in every case that the driver's conduct amounts to a reckless disregard of consequences before they can find that conduct constitutes gross negligence.

A reading of the learned judge's charge, to which no exception was taken, makes it abundantly clear that there could be no doubt in the jury's mind but that it was their duty to consider whether the conduct of the accused constituted negligence and, if so, could it properly be described as gross negligence. The jury found that the conduct of the driver constituted gross negligence and there is abundant evidence to support that finding. In addition to the general verdict of gross negligence, the jury were asked to give particulars thereof, not in their own language, as already stated, but by the selection of "any one, or a combination of them, or the whole of them," from sub-paragraphs (*a*) to (*h*) inclusive above quoted. These were all pleaded as particulars of gross negligence and neither

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prior to nor throughout the trial was there any objection to them as such. The learned judge told the jury, and no exception was taken thereto, in express terms or language from which they would necessarily conclude that if these respective sub-paragraphs or any of them were proved such would constitute gross negligence.

It was in these circumstances that the jury selected sub-paragraphs (a), (c), (f) and (g) to indicate what they, upon the evidence, regarded as gross negligence. These particulars as found must be read and construed in relation to the pleadings, the evidence and the charge of the learned trial judge.

In *British Columbia Electric Railway Co.* v. *Dunphy* (1), the jury found negligence causing the accident on the part of the defendant and, as particulars thereof, stated "insufficient precaution on account of approaching crossing and conditions on morning in question." It was contended they did not, in effect, specify the negligence. Mr. Justice Anglin (later C.J.) stated at p. 271:

> Meticulous criticisms of a jury's findings are not admissible and they must always be read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge.

Mr. Justice Anglin went on to state that while the particulars might have been more specifically stated, it did appear that the meaning of the jury was "suffiiciently certain." Mr. Justice Duff, (later C.J.) stated that, when read with the charge, the particulars became "perfectly intelligible."

In *Pronek* v. *Winnipeg, Selkirk and Lake Winnipeg Railway Company* (2), Lord Wright stated:

> But the language of a jury in explaining the reasons for their verdict ought not to be construed too narrowly.

Jamieson v. *Harris* (3), emphasized by the appellant, is distinguishable from the case at bar. There death was caused during the construction of bins in an elevator by the falling of a plank. Though many of the 26 questions submitted to the jury were answered, they did not, upon any reasonable construction, include a finding that the falling of the plank was due to negligence on the part of the

(1) (1919) 59 Can. S.C.R. 263.
(2) [1933] A.C. 61 at 66.
(3) (1905) 35 Can. S.C.R. 625.

appellant (defendant). Moreover, the one question specifically asking such was not answered and, therefore, the essential fact that the negligence of the defendant caused the injury for which damage was asked was not proved.

Moreover, the remarks of Mr. Justice Anglin, in *Wabash Railway Co.* v. *Follick* (1), where the finding of the jury was described as vague, are pertinent to the position in this case. At p. 384 he stated:

> No objection to the findings seems to have been made when they were brought in. If counsel were not satisfied that they were sufficient and responsive to the questions submitted they might have called the attention of the trial judge to the matter and he might have directed the jury to bring in a more specific finding.

The language of these particulars, when read and construed in the light of the pleadings, evidence and charge, constitutes particulars of gross negligence.

The appeal should be dismissed with costs.

LOCKE J.:—It is unfortunate that, when it was decided by a number of the Provincial Legislatures in Canada that the liability of the driver of a motor vehicle to a passenger carried gratuitously should be restricted to cases where the negligence complained of was of a different character to that which had before been sufficient, some more definite term than gross negligence was not adopted. The meaning to be assigned to the expression has been a matter of discussion and disagreement in the courts since, in referring to the liability of one type of bailee, Holt C.J. in *Coggs* v. *Bernard* (2), said that he was only liable for some gross neglect.

By an amendment to the Consolidated Municipal Act 1892, enacted by the Ontario Legislature in 1894 (s. 13, c. 50), the liability of a municipal corporation for accidents to persons falling, owing to snow or ice upon sidewalks, was restricted to cases where there was gross negligence by the corporation, and the meaning to be assigned to the term was considered by this Court in *City of Kingston* v. *Drennan* (3). Sedgewicke J. in delivering the opinion of the majority of the Court, after saying that he was not bold

(1) (1920) 60 Can. S.C.R. 375.
(2) (1702) 2 Raym. 909 at 913.
(3) (1896) 27 Can. S.C.R. 46.

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enough to enter upon a detailed investigation as to the difference between gross and other kinds of negligence, said that (p. 60):

> We must, I suppose, give some meaning to this expression of the legislative will and the meaning I give to it is "very great negligence."

In *German* v. *City of Ottawa* (1), Anglin J. with whom Davies J. agreed, referred to and adopted the statement of Sedgewick J. in *Drennan's* case, and in *Holland* v. *City of Toronto* (2), (3), Anglin C.J.C. again referring to the matter said (p. 634):

> The term "gross negligence" in this statute is not susceptible of definition. No *à priori* standard can be set up for determining when negligence should be deemed "very great negligence," a paraphrase suggested in *Drennan* v. *City of Kingston* (4), which, for lack of anything better, has been generally accepted.

The amendment to the Saskatchewan Vehicles Act, 1935 (c. 68) was made to introduce the expression to be considered in this appeal. The words "gross negligence" appear in conjunction with the words "wilful and wanton misconduct", so that in a case such as this the driver of the vehicle is only liable if there has been gross negligence or wilful and wanton misconduct on his part. When the legislation was first considered by the Saskatchewan Court of Appeal in *Shortt* v. *Rush* (5), Mackenzie J.A. (p. 199) while referring to what had been said by Sedgewick J. as to the expression "gross negligence" came to the conclusion that, by reason of its association with the term "wilful and wanton misconduct", a different meaning was to be assigned to it and that it connoted criminal negligence and, accordingly, it was incumbent upon the plaintiff to satisfy the jury that the defendant had failed to take that care without which he knew or ought to have known that he might endanger the plaintiff's life, and that with such failure he exhibited a reckless disregard or indifference as to the consequences. This interpretation was adopted by that court in *Lloyd* v. *Milton* (6), and again in *Heck* v. *Braun* (7). These decisions cannot, in my opinion, be reconciled with the judgment of this Court in *McCulloch* v. *Murray* (8). The words "gross negligence" or "wilful and wanton

(1) (1917) 56 Can. S.C.R. 80.
(2) [1927] S.C.R. 242.
(3) (1925) 59 O.L.R. 628.
(4) (1896) 27 Can. S.C.R. 46.
(5) [1937] 2 W.W.R. 191.
(6) [1937] 3 W.W.R. 504.
(7) [1938] 2 W.W.R. 1.
(8) [1942] S.C.R. 141.

misconduct" are not to be interpreted as if they read "gross negligence *and* wilful and wanton misconduct." While the trial judge in charging the jury in that case had, in endeavouring to assist the jury to appreciate the meaning to be assigned to the expression "gross negligence", said that the adjective that most fittingly described such conduct was the word "reckless", there was no suggestion made to the jury that it was necessary to prove fault which could be properly characterized as criminal negligence. Nor do I think that the judgment of Sir Joseph Chisholm C.J. on the appeal is to be construed as adopting the expression "reckless conduct" as synonymous with "gross negligence", but as saying merely that reckless conduct may in some circumstances properly be described as gross negligence. I think the language there used by the learned Chief Justice, which was approved and adopted by Sir Lyman Duff, was not intended to express a view differing from that of Sedgewick J. in *Drennan's* case.

The reference in the judgment of Taschereau J. who delivered the judgment of the majority of the Court to the views of a properly instructed jury obviously proceeded upon the footing that the charge to the jury, when read as a whole, did not depart from that statement of the law. The learned Chief Justice of this Court in turn declined to attempt to define "gross negligence" and expressed the view that it was undesirable that the Court should attempt to replace by paraphrases the language which the Legislature had chosen to express its meaning. With great respect, I think it was error in *Shortt's* case to construe the expression "gross negligence" in any other manner than as indicated by the judgment of this Court in *Drennan's* case. It cannot be said that this leaves the matter in a satisfactory state but, unless and until the meaning of the expression is clarified by legislation, the courts administering justice must, in my opinion, treat the question to be decided, whether by a judge or a jury, as whether or not there has been very great negligence in the circumstances of the particular case. In the present matter there was, in my opinion, evidence to go to the jury upon that issue and I respectfully

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agree with Mr. Justice Gordon that the answers made are properly to be construed as finding gross negligence.

Mr. Yule, in his able argument for the appellant, contended further that since the Saskatchewan Legislature had re-enacted the amended section 85 of *The Vehicles Act,* 1935, after the decision of the Court of Appeal in *Shortt* v. *Rush,* in *The Vehicles Act,* 1939, and in the Revised Statutes of 1940, it should be held that it had adopted the interpretation of the expression "gross negligence or wilful and wanton misconduct" propounded in that case. The principle upon which the argument is based is stated by the Earl of Halsbury in *Webb* v. *Outrim* (1), as being that when a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound principle of construction to hold that the words were intended by the Legislature to bear the meaning which has been so put upon them. In *Barras* v. *Aberdeen Steam Trawling and Fishing Company* (2), in an appeal in a Scottish case, Viscount Buckmaster followed this statement of the law, and in *MacMillan* v. *Brownlee* (3), Sir Lyman Duff relied upon the principle as stated by Lord Buckmaster in construing a section in a statute of the Province of Alberta. Section 48 of the Interpretation Act (c. 1, R.S.S. 1940) provides that:

> The Legislature shall not, by re-enacting an Act or part of an Act or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decisions or otherwise been placed upon the language used in such Act or upon similar language.

A similar provision contained in subsection 4 of section 21 of *The Interpretation Act,* R.S.C. 1906, c. 1, is referred to in the judgment of Anglin J. in *Canadian Pacific Railway* v. *Albin* (4). In that case a section of the Consolidated Railway Act of 1903 was re-enacted after it had been interpreted in a number of decisions in Ontario and Anglin J. adopted the language of Lord Watson in *Casgrain* v. *Atlantic & North West Railway Co.* (5), reading:

> Their Lordships cannot assume that the Dominion Legislature, when they adopted the clause verbatim in the year 1888, were in ignorance of

(1) [1907] A.C. 81 at 89.
(2) [1933] A.C. 402 at 412.
(3) [1937] S.C.R. 319.
(4) (1919) 59 Can. S.C.R. 151.
(5) [1895] A.C. 282 at 300.

the judicial interpretation which it had received. It must, on the contrary, be assumed that they understood that sect. 12 of the Canadian Act must have been acted upon in the light of that interpretation. In these circumstances their Lordships, even if they had entertained doubts as to the meaning of sect. 12 of the Act of 1888, would have declined to disturb the construction of its language which had been judicially affirmed.

In the present matter, however, after the decision of this Court in *McCulloch* v. *Murray* in 1942, the Legislature has by s. 11 of c. 59 of the Statutes of 1943 repealed s. 140 of *The Vehicles Act,* R.S.C. 1940, c. 275, and re-enacted it in rather different terms but again used the terms in question "gross negligence or wilful and wanton misconduct", and by c. 98 of the Statutes of 1945 repealed The Vehicles Act of 1939 and re-enacted as s. 141 the section as amended in 1943. In my opinion, if in spite of the language of s. 48 of *The Interpretation Act* there is any presumption that the Legislature intended to adopt the interpretation which had been placed upon the expression in judgments of the courts, when the amendment of 1943 was made and when subsequently the section was re-enacted, the presumption is that the interpretation assigned to the similar language of the Nova Scotia statute by this Court was adopted.

The appeal should, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Makaroff, Carter & Carter.*

Solicitors for the respondents: *Hall, Maguire & Wedge.*

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*Oct. 30, 31
*Nov. 1
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*Feb. 26

THE T. EATON CO. LIMITED OF CANADA (DEFENDANT) ..... APPELLANT;

AND

DAME LENA MOORE (PLAINTIFF) .....RESPONDENT.

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

Damage—Negligence—Bottle of liquid dropped on floor of store by customer—Second customer slipped and fell—Fall of bottle witnessed by clerk who advised caretaker but did not warn customers—Whether store liable—Whether warning within functions of clerk—Art. 1053, 1054 C.C.

The respondent, a customer in appellant's large departmental store in Montreal, fell on the floor after slipping on a patch of liquid substance which had been in a bottle accidentally dropped by another customer. The fall of the bottle was witnessed by a sales clerk in charge of the clock counter and engaged at the time in serving a client. The clerk immediately telephoned the caretaking department and then resumed his sale. Within three minutes of the phone call a caretaker was on the spot, but in the interval the accident had happened. The dismissal of the action by the trial judge was reversed by a majority in the Court of Appeal.

Held (Estey and Cartwright JJ. dissenting), that it was not the clerk's duty in the performance of the work for which he was employed to do more than what he did, and therefore the store was not liable under 1054 of the *Civil Code*. (*Curley* v. *Latreille* and *Moreau* v. *Labelle* applied).

Held also, (Estey and Cartwright JJ. dissenting), that no positive fault could be attributed to the store since it had fully provided for an elaborate and efficacious system to meet such emergencies.

Per Estey and Cartwright JJ. (dissenting): It was the clerk's duty during the short interval that he knew must elapse before the arrival of the caretaker to warn customers of the danger actually known to him and his failure to do so rendered the store responsible; but if, whether by reason of express instructions or the lack of instructions, this duty did not rest on the clerk, then the store was directly liable for its negligence in failing to provide for the warning of its customers during such interval.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), maintaining,

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

(1) Q.R. [1949] K.B. 561.

McDougall J.A. dissenting, the action of the customer of a large departmental store who injured herself when she fell on the floor of the store.

W. B. Scott K.C. and P. M. Laing for the appellant.

F. P. Brais K.C. and A. J. Campbell K.C. for the respondent.

THE CHIEF JUSTICE:—The appellant owns and operates a large departmental store in Montreal. The building consists of ten floors with a total floor area open to the public of 646,380 square feet. In the operation of the store the appellant employs between 2,500 and 3,000 persons.

At about 11.00 a.m. on the morning of the 16th November, 1942, a store count disclosed that there were 1,283 members of the public in the premises. The number would be slightly larger around noon when the accident hereinafter mentioned happened.

Amongst the customers was the respondent, a nurse employed by the Department of Veterans Affairs, aged 56. She had come to the store to make some purchases and was walking on the ground floor, to leave by the St. Catherine and University Streets exit. She slipped and fell, thereby incurring injuries for which she claims compensation from the appellant. The cause of her fall was that she slipped on a patch of liquid substance of sticky appearance about six inches in diameter which was on the floor some twenty feet from the exit. The respondent described it as lotion and said it was very slippery. The presence of this substance was explained by the fact that half a minute, or a minute before the respondent fell, an unidentified woman, evidently a customer, had dropped a small bottle which broke on hitting the floor. The customer "merely turned around and looked at it and then scampered off on her way."

By pure chance the dropping of this bottle was noticed by Frank Bertrand, a sales clerk employed in the clock department of the appellant, and who was at the time actively engaged with a customer in selling clocks at his counter. He immediately picked up the house telephone and advised the caretaking department. The caretaking

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department signalled to O'Doherty, one of its staff, who was on the ground floor, by means of its system of signal lights and gongs installed throughout the store. He at once called the caretaking department by the house telephone and was instructed to go to the University and St. Catherine Streets exit. He took one minute to get there, arriving in about three minutes after Bertrand had put in his telephone call, but in the interval the accident had happened.

The respondent said both feet slipped from under her and she came down on the floor—no doubt heavily, because she was of unusual build, being five feet four inches in height and 220 pounds in weight.

Following the accident the appellant provided first aid and other treatment for the respondent. While she did not have to be hospitalized she was, however, unable to resume her duties and she was superannuated at the age of 57. This resulted in the reduction of her retirement pension to $747.50 per annum instead of the larger sum she would have received had she been able to continue her work to retirement age.

The learned trial Judge (Loranger J.) dismissed the action. The Court of King's Bench (Appeal Side) (1) reversed that judgment and assessed the total damages at $10,000. Counsel for the appellant stated that he raised no objection to this finding as to quantum and that the appeal was solely directed against the finding of the majority of the Court of King's Bench (Appeal Side) that the appellant was responsible for this unfortunate accident. Errol McDougall J. dissented in the Court of King's Bench (Appeal Side).

As stated by this Court in *Canadian National Railways Co.* v. *Lepage* (2):

> It is a familiar principle that neglect may, in law, be considered a fault only if it corresponds with a duty to act.

The learned trial judge found as a fact that

> Il n'y a aucune preuve de faute par omission, négligence ou incurie de la part de la défenderesse.

Moreover, even if the duty to act is shown, that duty exists only if the accident is foreseeable and, in turn, it must be foreseeable by a man of ordinary and reasonable

(1) Q.R. [1949] K.B. 561. (2) [1927] S.C.R. 575 at 578.

prudence. (*Ouellet* v. *Cloutier* (1); *L'Oeuvre des Terrains de Jeux de Québec* v. *Cannon* (2) per Rivard J.). It is absolutely certain that, upon the record, no positive fault resulting from negligence, or lack of foresight, could be imputed to the appellant. In the Court of King's Bench it was thought the latter could be held responsible on the ground of what they called *abstention fautive* by one judge, or *connaissance retardée* by another judge. But, if there had been omission, which would make the appellant liable, it can only be said that Bertrand did not desist from the selling of clocks, in which he was engaged at the time, and go out into the aisle and prevent the respondent from slipping on the substance on the floor. As for the *connaissance retardée* of the employer, it is proven, as found by the learned trial judge, that immediately the bottle of liquid fell upon the floor a signal was given to the caretaking department to come and take care of it, and the employees of that department answered the signal within a few moments, but the accident had already happened. As a matter of fact, upon the evidence, the respondent fell on the liquid any where between one-half a minute, or a minute, after the bottle had been dropped.

The learned trial judge treated the mishap as a pure accident resulting from the act of a third party, over whom the appellant had no control whatever. There were several obstacles in the way of the success of the respondent. First, the company itself cannot be saddled with any neglect in the matter. It had provided a complete and elaborate system of cleaning the floors under just some such circumstance.

Secondly, it had to be shown that Bertrand, upon whose alleged negligence the respondent relied for the maintenance of her claim, if he had himself attended to the cleaning of the patch of oil, would have been acting "in the performance of the work for which he was employed" (C.C., Article 1054). He did not belong to the caretaking department, whose duty it was to clean the floor. He was the clerk in charge of the clock counter. It was no part of his

(1) [1947] S.C.R. 521 at 527. (2) Q.R. [1940] 69 K.B. 112 at 114.

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work to attend to the cleaning up of this small patch of liquid on the floor, and it was so found by the learned trial judge, who stated:

Il n'avait rien à faire avec l'entretien des planchers.

In this case the learned trial judge rightly held that if any negligence can be attributed to Bertrand, at all events it was not in the performance of his work for the appellant.

Thirdly, as pointed out by McDougall J.:—

The time elapsed between the breaking of the bottle of lotion on the floor and the accident was so short as to militate strongly against the theory of negligence with which appellant was charged.

* * *

The two acts, fall and break of bottle and the fall of the respondent, were so closely related in time as to extrude or negative the factor of negligence . . .

* * *

No such immediate apprehension of danger could dictate any greater precautions at that time.

The patch of liquid on the floor was described as being about the diameter of one of the witnesses hands. It was not inherently dangerous; it did not constitute a concealed danger, but was visible and did not necessarily indicate the imminence or probability of an accident. Even if it had been Bertrand's duty to provide against the eventuality, such eventuality was unforeseeable.

Again quoting McDougall J.:—

It is, in my view, unreasonable to contend that the precaution must be instantaneous with the event causative of the accident. Time must elapse to transform what is normally a pure accident into actionable fault.

Reduced to its simplest form and in its present connotation, the test of negligence is not whether greater precautions might have been taken and the loss avoided, but whether ordinary precautions, those usual in the circumstances, were taken.

Here, the finding of fact in the Superior Court on that point was that the accident happened suddenly and almost at the same time as it was discovered that the liquid had spilled on the floor, and the orders to clean it up were given without delay.

In order to come to the conclusion that the appellant could be held responsible in the premises the learned judges of the Court of King's Bench (Appeal Side) referred to extracts from the works of commentators of the Civil Code. One of them puts it on what he calls *devoir moral,* thus

apparently assimilating the moral duty to the legal duty; but, of course, that is not the law of the Province of Quebec. Another writer states that the responsibility must be placed on those who can more easily sustain the loss, and again that is not the law of the Province of Quebec.

The proposition that the knowledge of imminence of danger might constitute a fault entailing responsibility if one neglects, or abstains, from acting, could hold only if there was the time and the means of preventing it, but, in this case, that is precisely what cannot be sustained on the facts as they were held, upon ample evidence, by the learned trial judge.

In addition to what is said above on that point, there are two considerations which must be taken into account. I cannot agree with the proposition that Bertrand, consistently with his duties towards his employer, should have immediately proceeded to the spot where the liquid had been spilt on the floor and leave on the counter, within the reach of a customer whom he did not know, valuable articles which he was then showing, with the risk that, during his absence, these articles might disappear. It was, in my mind, his paramount duty to remain, or at least, before doing anything else, to replace the articles on the shelves. In such a case, the very time required for doing so would have prevented him from arriving soon enough to bring any remedy in the circumstances.

Moreover, even the man in charge of the cleaning department, when he reached the so-called dangerous spot, found that he was not in a position to immediately make the cleaning. He had to provide for it temporarily by placing a piece of cardboard on the oily substance. It is not shown that Bertrand knew of the existence of this cardboard in the vicinity of the store where the cleaner took it.

The crux of the matter is that, in a given case, nobody can be found negligent for having failed to foresee absolutely every possible kind of happening. The law does not require more of any man than that he should have acted in a reasonable way.

As to the attempt to hold the company itself responsible, it was said that, if it cannot be attributed to anything

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that formed part of Bertrand's duty and the employer cannot be found liable on that account, there was failure on the part of the appellant to have instructed Bertrand, and presumably all other employees in the store, that when they saw something of this nature drop, which might be dangerous, they were to take immediate steps to protect customers from injury, which, in effect, is a contention that there was a negligent system. We have not in the Province of Quebec the distinction between the duty of the occupier towards an invitee and towards a licensee as illustrated by Willes, J. in *Indermaur* v. *Dames* (1), and where the latter judge says that the occupier is expected to "use reasonable care to prevent damage from unusual danger, which he knows or ought to know."

It is also expressed in slightly different language by Lord Hailsham, L.C., in *Addie* v. *Dumbreck* (2), that to those "who are present by the invitation of the occupier . . .", the latter "has the duty of taking reasonable care that the premises are safe," which is resumed in Salmond on Torts, 10th Ed., at p. 280, that the duty is usually stated as "to take care to make the premises reasonably safe."

That statement, however, to my mind, expresses the utmost duty which an occupier owes to a customer under the law of the Province of Quebec. Nothing requires him to do anything beyond that; and he could not be held negligent for having failed to provide against any eventuality however impossible to imagine.

One can but speculate how far the suggested duty of the occupier is to be carried. Can it be held that the operator of a department or chain store should be required to instruct all of his employees that, if they see someone drop something over which customers may stumble or upon which they may slip, they are at once to take steps to warn people of the danger—and, in the present case, not a certain danger? And, if so, does it apply to clerks working at nearby counters, truckers employed in bringing goods into the store and to all employees who may see the occurrence or its results?

(1) (1866) L.R. 1 C.P. 274. (2) [1929] A.C. 358 at 364.

The evidence is clear that the liquid was colourless, so that it would have been impossible for Bertrand to know that the contents were oily; though he undoubtedly learned that when he took up the injured woman. If the liquid was not oily, it might be no more dangerous than if water was present on the floor. Are the employees to take prompt steps to protect customers, even though what has been dropped does not appear to them to be dangerous, or are they to be required to immediately take steps to prevent anybody stumbling or falling upon anything that has been dropped?

The trial judge did not consider that there was any negligence on the part of the Eaton Company, so that obviously he considered the precautions they had taken, by maintaining the caretaking department and the system of signalling when there was a mishap, reasonable precautions by the employer. I cannot bring myself to think that this finding of fact should be disturbed and that the contrary view should prevail. The extent of the duty of the employer should not be carried further.

In the premises, I wish to express my complete agreement with what was stated by McDougall J. in the extracts which I have quoted above. Whichever view is taken of the special circumstances in which the accident happened, I would say that the element of time is here decisive against the admission of the Respondent's claim against the Appellant.

In the case of *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (1), both Duff J. (as he then was) and Mignault J. drew attention to the fact that the doctrine of the moral duty or that the negligence should fall upon the proprietor because he enjoys the profits arising from his enterprise are considerations which may have found favour among the legal writers in France, but they stated they did not think that considerations derived from this mode of reasoning can legitimately be applied in controlling the interpretation or the application of the text under discussion (to wit C.C. Article 1054).

For the several reasons enumerated; because no positive fault can be attributed to the company itself; because it

(1) [1923] S.C.R. 414 at 417, 427.

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had fully provided for an elaborate and sufficient system to meet such emergencies; because it was not Bertrand's duty in the performance of the work for which he was employed to look after the cleaning of the floor (*Moreau* v. *Labelle* (1); *Curley* v. *Latreille* (2); because even assuming that Bertrand had a moral duty, which is not admitted, such duty cannot be assimilated to legal duty towards the respondent; because the time elapsed between the breaking of the bottle and the accident was so short that, even granting the existence of a legal duty, there cannot be negligence on Bertrand's part; because the theory of the modern French writers does not form part of the law of the Province of Quebec (*The Governor, etc.* v. *Vaillancourt supra*), the appeal should be allowed with costs both here and in the Court of King's Bench (Appeal Side), and the judgment of the Superior Court restored.

The judgment of Taschereau and Locke JJ. was delivered by Taschereau, J.:—Pour réussir dans la présente action, la demanderesse-intimée devait nécessairement établir qu'il appartenait à l'employé Bertrand de la protéger contre l'accident dont elle a été la victime, ou alternativement, que l'appelante n'a pas pris les précautions nécessaires pour empêcher les dommages qu'elle a subis.

Bertrand, un commis vendeur au rayon des horloges, près de l'endroit où l'accident est survenu, a bien vu une bouteille, qu'une tierce personne venait d'acheter, tomber sur le plancher du magasin à rayons dont l'appelante est propriétaire, et réalisant qu'un accident pouvait arriver, avertit aussitôt les autorités, et demanda qu'on envoie quelqu'un pour enlever ce liquide huileux. Environ une minute plus tard, l'intimée qui se dirigeait vers la sortie de la rue Université, glissa sur cette flaque d'huile et fut sérieusement blessée. Deux minutes après, un nettoyeur préposé à cette fin couvrit cette flaque d'huile d'un carton placé derrière le comptoir voisin, et s'en retourna chercher les instruments nécessaires pour nettoyer le plancher.

C'est la prétention de l'intimée que Bertrand a commis une faute d'omission, qui engage la responsabilité de son employeur, en négligeant d'alerter les clients du danger que présentait cette flaque d'huile glissante.

(1) [1933] S.C.R. 201. (2) (1920) 60 Can. S.C.R. 131.

Il est certain que la faute d'omission peut engendrer la responsabilité, mais il faut que la négligence d'agir corresponde à un devoir d'agir (*C.N.R.* v. *Lepage* (1)). Ce devoir cependant doit être basé sur une obligation légale, et ne doit pas reposer uniquement sur l'altruisme ou le dévouement, que souvent la charité commande envers le prochain. (Colin et Capitant, Droit Civil, Français, 10ème Ed., p. 221). Négliger de prendre les précautions requises que prendrait un homme prudent, qui a l'obligation d'agir dans des conditions identiques, constituerait cette faute d'omission. Mais pour que le maître soit responsable de l'omission de son serviteur, il y a deux conditions impératives qui sont requises. Il faut que le préposé ait commis une faute, et il faut qu'il l'ait commise dans l'exercice de ses fonctions. (Code Civil, 1054) (Colin et Capitant, *supra,* page 257).

La première de ces propositions est élémentaire. Le délit ou le quasi-délit du préposé est évidemment une condition préalable à la responsabilité que la loi impose au maître, et comme conséquence de ce principe, il résulte que le maître ou le commettant, a un recours contre son employé coupable qui est l'auteur du fait dommageable, et qu'évidemment, la victime elle-même, peut réclamer de l'employé les dommages qu'elle a subis. (Colin et Capitant, *supra,* à la page 257). Comme le disent Planiol et Ripert, (Droit Civil, "Les Obligations" Vol. 1, page 883, No. 652).

> Pour que le commettant soit responsable, il faut non seulement que l'acte soit illicite mais encore que le *préposé* soit responsable *personnellement* du dommage qu'il cause.

La responsabilité de l'employé est délictuelle, celle du maître repose sur la loi, deux sources différentes d'obligations (C.C. 983).

En second lieu, il faut que l'employé ait commis le fait dommageable *dans l'exercice des fonctions* auxquelles il est employé. Comme le dit Mazaud, Vol. 1, "Responsabilité Civile," 4ème Ed., à la page 835:

> Si l'on consulte les travaux préparatoires du Code Civil, l'hésitation n'est pas permise; Dès que le dommage a été causé non plus "dans l'exercice des fonctions" mais seulement "à l'occasion des fonctions," le commettant ne doit pas être déclaré responsable.

(1) [1927] S.C.R. 578.

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On ne peut en effet faire reposer la responsabilité du maître sur le fait que l'omission ou l'acte fautif se serait produit dans le temps et le lieu du service. Il faut nécessairement un rapport entre la faute et la fonction du service, un lien qui rattache la faute à l'exécution du mandat confié au préposé. (Mazaud, Vol. 1, 4ème Ed., page 839).

Le commettant répond donc des actes fautifs que le préposé a commis pour atteindre le but de ses fonctions, même si les actes sont le fruit d'un abus des fonctions pour lesquelles il est employé. (Savatier, "Traité de la Responsabilité Civile," Vol. 1, page 427) (Colin et Capitant, Vol. 2, 10ème Ed., page 258). Dans le cas contraire, le commettant n'encourra aucune responsabilité. C'est la doctrine acceptée non seulement par les auteurs, mais également par cette Cour dans *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (1), où Sir Lyman Duff dit ce qui suit:

> *Le fait dommageable* must be something done in the execution of the servant's functions as servant or in the performance of his work as servant. If the thing done belongs to the kind of work which the servant is employed to perform or the class of things falling within *l'exécution des fonctions*, then by the plain words of the text responsibility rests upon the employer. *Whether that is so or not in a particular case must, I think, always be in substance a question of fact,* and although in cases lying near the borderline decisions on analogous states of fact may be valuable as illustrations, it is not, I think, the rule itself being clear, a proper use of authority to refer to such decisions for the purpose of narrowing or enlarging the limits of the rule.

De plus, dans *Curley* v. *Latreille* (2), M. le Juge Mignault à la page 175, s'exprime dans les termes suivants:

> Etant donné que l'interprétation stricte s'impose en cette matière, je ne puis me convaincre que le texte de notre article nous autorise à accueillir toutes les solutions que je viens d'indiquer. Ainsi, dans la province de Québec, le maître et le commettant sont responsables du dommage causé par leurs domestiques et ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés,* ou, pour citer la version anglaise de l'article 1054 C.C., *in the performance of the work for which they are employed.* Ceci me paraît clairement exclure la responsabilité du maître pour un fait accompli par le domestique ou ouvrier à l'occasion seulement de ses fonctions, si on ne peut dire que ce fait s'est produit dans l'exécution de ses fonctions. Il peut souvent être difficile de déterminer si le fait dommageable est accompli dans l'exécution des fonctions ou seulement à leur occasion, mais s'il appert réellement que ce fait n'a pas été accompli dans l'exécution des fonctions du domestique ou ouvrier, nous nous trouvons en dehors de notre texte.

(1) [1923] S.C.R. 416. (2) (1920) 60 Can. S.C.R. 131.

Enfin, dans *Moreau* v. *Labelle* (1), M. le Juge Rinfret dit ce qui suit:

> Ils font sentir d'une manière très nette l'erreur qui assimilerait au délit commis dans *l'exécution des fonctions du préposé* le délit commis *pendant le temps* de ces fonctions.

Bertrand, par faute, négligence ou inhabileté, a-t-il commis un quasi-délit qui le rendrait personnellement responsable sous l'empire de l'article 1053 C.C., et qui en conséquence, obligerait l'appelante en vertu de 1054 C.C.? S'il a commis une faute d'omission en négligeant de prévenir l'intimée d'un danger imminent, était-ce au cours de l'exercice des fonctions auxquelles il était employé?

Avec déférence, je dois répondre dans la négative à ces deux questions. Bertrand, préposé au comptoir de la vente des horloges, n'avait pas l'obligation légale d'avertir l'intimée qu'une tierce personne, en quittant le magasin, avait échappé cette bouteille d'huile graisseuse. L'exécution du mandat qui lui avait été confié n'avait aucune relation avec la sécurité des clients, et je ne vois pas comment on pourrait lui imputer une faute par suite d'une omission, alors que ni la loi ni les termes de son emploi ne l'obligeaient à agir. Je ne doute pas du sort qui aurait été reservé à une action intentée contre Bertrand, ou aux autres vendeurs, témoins de l'accident, pour leur réclamer personnellement des dommages à cause de cette prétendue omission. C'est avec raison, évidemment, qu'ils auraient répondu que cette action ne repose sur aucun fondement juridique, vu qu'ils n'avaient aucun devoir vis-à-vis l'intimée. Et pourtant, cette responsabilité quasi-délictuelle de Bertrand est essentielle à la responsabilité légale de l'appelante. Ce serait exprimer des vues contraires à celles des auteurs et de la jurisprudence que j'ai cités, que d'étendre la portée de l'article 1054, et de lui faire dire que "l'exécution des fonctions" de Bertrand, comprend dans le cas qui nous occupe, non seulement la vente des horloges, mais également la surveillance de la sécurité des clients.

L'intimée a soumis comme alternative que si Bertrand n'a pas commis de faute, la responsabilité de l'appelante est tout de même engagée comme résultat de sa négligence à prendre les soins raisonnables et les mesures nécessaires pour prévenir les accidents de ce genre.

(1) [1933] S.C.R. 201 at 210.

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La preuve a révélé que l'appelante a organisé dans son immeuble un système élaboré de nettoyage pour prévoir les éventualités telles que celle qui a été la cause de l'accident dans le présent litige. Ce système a été reconnu comme efficace par le juge au procès, et sur ce point, je m'accorde avec lui. Mais, évidemment, il est impossible de prévoir tous les accidents et de les prévenir. Il y aura toujours des accidents dommageables, qui cependant n'engendreront la responsabilité de personne. La loi demande que le propriétaire d'un immeuble agisse avec une prudence raisonnable. Ainsi, dans *L'œuvre des Terrains de Jeux de Québec* v. *Cannon* (1), M. le Juge Rivard s'exprime de la façon suivante à la page 114:

> Le plus sûr critère de la faute, dans des conditions données, c'est le défaut de cette prudence et de cette attention moyennes qui marquent la conduite d'un bon père de famille; en d'autres termes, c'est l'absence des soins ordinaires qu'un homme diligent devrait fournir dans les mêmes conditions. Or, cette somme de soins varie suivant les circonstances, toujours diverses, de temps, de lieux et de personnes.

Dans *Massé* v. *Gilbert* (2), M. le Juge Létourneau dit ce qui suit:

> De sorte que tout ce que la Cour doit se demander, c'est si l'intimé Gilbert, en cette occasion et eu égard à la situation des lieux, a bien pris le soin et les précautions qu'eut pris un propriétaire prudent et diligent; si oui, l'on peut dire qu'un propriétaire prudent et diligent n'eut rien fait de plus, rien fait de mieux pour éviter ce qui est arrivé, l'intimé doit être exonéré en appel comme il l'a été en première instance; . . .

Mais, ajoute l'intimée, même si le service de nettoyage était efficace et prompt, l'appelante aurait dû donner à tous ses employés les instructions qui s'imposaient pour prévenir tout accident de ce genre. Comme dans le cas de service de nettoyage défectueux, la responsabilité de l'appelante serait fondée alors, non sur l'article 1054 C.C., mais bien sur l'article 1053 C.C. Il s'agirait alors clairement d'un cas où la faute de l'appelante doit nécessairement être prouvée. La théorie du risque est inconnue dans la province de Québec, et la faute sous l'article 1053, est toujours la base de la responsabilité.

Comme je viens de le signaler, il y avait un service d'alarme perfectionné, permettant d'avertir les préposés aux divers services, pour qu'ils répondent à l'appel le plus rapidement possible. Au moment de l'accident, c'est

(1) Q.R. [1940] 69 K.B. 112. (2) Q.R. [1942] K.B. 181.

au moyen de ce système que le signal a été donné, et qu'un employé s'est rendu sur les lieux en quelques minutes pour faire disparaître la cause de tout danger. L'intimée cependant exige davantage et prétend qu'en outre, les 2,500 employés de l'appelante préposés au service des comptoirs, auraient dû également être chargés de veiller à la sécurité des clients, et qu'à leurs fonctions normales auraient dû s'ajouter celles, déjà confiées par la direction de la maison, à un groupe d'employés pourtant jugés compétents et efficaces par le juge de première instance.

Le service existant n'était peut-être pas le meilleur, et il ne fait pas de doute qu'il n'était pas suffisant pour prévenir tous les accidents. Le système idéal proposé par l'intimée aurait peut-être été plus efficace, mais l'appelante aurait été tenue de répondre à des exigences que la loi ne requiert pas. On ne peut demander en effet à l'appelante d'assigner tous ses employés à la sécurité des clients, quand dans une entreprise comme la sienne, les tâches doivent être nécessairement réparties. Les principes qui régissent cette cause doivent, il me semble, être ceux auxquels est assujettie la responsabilité des municipalités, dans la province de Québec, qui ont l'obligation d'entretenir leurs trottoirs durant la saison d'hiver. Dans ce dernier cas, comme dans celui qui nous occupe, demander plus que la prudence et la diligence raisonnables, plus que le soin vigilant d'un bon père de famille, serait exiger un degré d'excellence, un niveau ou un standard élevé de perfection bien au-dessus de la norme reconnue de la responsabilité juridique, et qui, comme cette Cour l'a dit dans *Ouellet* v. *Cloutier* (1), rendraient impossible toute activité pratique.

Je ne puis me convaincre que la Compagnie appelante n'a pas fait preuve de la prudence et de la diligence requises, et il n'a été nullement démontré que son service de nettoyage était défectueux, ou qu'il y ait eu des lenteurs à répondre à l'appel téléphonique de Bertrand.

Pour toutes ces raisons, je suis d'avis que l'appel doit être maintenu et l'action de la demanderesse-intimée rejetée avec dépens de toutes les cours.

ESTEY J. (dissenting):—The respondent's claim for damages suffered when she fell while a customer in the

(1) [1947] S.C.R. 521 at 526.

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appellant's store was dismissed at trial. Upon appeal, the Court of King's Bench (1) reversed this dismissal (Mr. Justice McDougall dissenting) and directed judgment in her favour for $10,000.

The respondent, a nurse 56 years of age, on the morning of November 16, 1942, was a customer at the appellant's department store in the City of Montreal. At about 11:45 she approached the exit to University Street and, because of the presence on the main floor of a gooey, sticky liquid, she slipped and fell, sustaining the injuries for which damages are here claimed. The area covered by the liquid was about six inches in diameter upon a floor of Italian marble called travertine. Many customers were coming and going along that point on the main floor. The presence of this liquid was due to a handbag, carried by a woman also leaving the department store, coming open and a bottle of lotion dropping therefrom and breaking upon the floor. Bertrand, a clerk in charge of the clock counter about 2½ yards from where the bottle fell, was serving a customer when he observed the bottle break and the lotion spread upon the floor. The lotion appeared to him to be a gooey, sticky substance. The respondent herself described it as "very slippery," "white, transparent" and "the same colour . . . as the floor." The woman carrying the handbag did not stop and Bertrand, apprehensive lest some person might fall because of the presence of the liquid, telephoned the caretaking department to come and "pick it up." The latter department, through its signal system, communicated with O'Doherty, an employee of that department, who was then near the rear of the main floor, and he arrived at the spot, as Bertrand estimated, in about three minutes from the time he telephoned. O'Doherty, as he had not been given any particulars, came "to investigate the trouble" and "immediately put a few cartons on the spot," which he obtained at Bertrand's clock section, just as a "precaution . . . because of the possibility of slipping." Bertrand himself continued waiting upon his customer and within about a half to a minute from the time he telephoned the respondent slipped and fell.

The appellant's is a large department store in which a count made at 11:00 o'clock upon the morning in question

(1) Q.R. [1949] K.B. 561.

disclosed 1,283 customers upon the premises. Forty-five minutes later the respondent, one of many customers passing to and from the busy University Street entrance of that store, as already stated, slipped and fell. In these circumstances the respondent did not see the liquid upon the floor and it is not suggested in this appeal that she should have. No fault is, therefore, attributed to the respondent.

Art. 1053 of the Quebec Civil Code reads:

Toute personne capable de discerner le bien du mal, est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabileté.

Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

The duty under art. 1053 upon those who invite others to come upon their premises for business purposes has been discussed in *The Quebec Liquor Commission* v. *Moore* (1); *C.N.R.* v. *Lepage* (2); and, among others in the Quebec courts, *L'Œuvre des Terrains de Jeux de Québec* v. *Cannon ès qual* (3); *Caza* v. *Paroissiaux et al* (4); *Desjardins* v. *The Gatineau Power Company* (5); *Brownstein* v. *Barnett* (6).

Sir Lyman Duff (later C.J.), in *The Quebec Liquor Commission* v. *Moore supra,* at p. 548 stated:

> I should be sorry indeed to think that the scope of Art. 1053 C.C. could be so restricted as to exclude the responsibility of occupiers of business premises for failure to give warning of traps known by them to exist, exposing persons invited by them to enter the premises for the purposes of their business to injury in consequence thereof.

and further at p. 549:

> I have the greatest difficulty in assuming that Art. 1053 C.C. does not contemplate as an act of negligence involving fault an invitation to customers by a shopkeeper who is aware that on entering his shop they will, if not warned, be exposed to serious risk of grave injury, without a suspicion of the existence of it, and who presents this invitation without any warning as to the existence of the risk. I cannot but think that to state the proposition is sufficient.

That the appellant corporation under art. 1053, as interpreted by the foregoing authorities, owed a duty to take reasonable care that the respondent should not be exposed to danger or peril known to the appellant, the

(1) [1924] S.C.R. 540.
(2) [1927] S.C.R. 575.
(3) Q.R. [1940] 69 K.B. 112.
(4) (1935) 41 R. de J. 70.
(5) Q.R. (1936) 74 S.C. 205.
(6) Q.R. (1939) 77 S.C. 23.

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existence of which, in the exercise of reasonable care, would not be known to her, has been accepted by all of the learned judges in the courts below and the appellant, upon the hearing of this appeal, has not contended otherwise. There has been a difference of opinion in the application of this principle to the circumstances here present.

That the lotion upon the floor, where so many people were walking, constituted such a peril as would, under the authorities, be classified as a trap, is not seriously disputed. Bertrand himself realized immediately the possibility of someone slipping thereon and telephoned the caretaking department, as he explained, to prevent such an accident as suffered by the respondent. Carmichael, the manager of the caretaking department, said he would have put sawdust upon it, of which there was a quantity "in containers at convenient locations." He had himself under like "circumstances placed a piece of furniture over things like that." O'Doherty, who arrived to clean it up, said it was "grease or oil or something on the floor" and he "immediately put a few cartons on the spot" which he obtained from Bertrand's clock section.

The presence of this lotion upon the floor in that crowded portion of the store made the premises at that point unsafe and immediately the appellant became aware thereof its duty under art. 1053 required that it take reasonable steps to protect its customers from possible injury. The appellant contends that it knew thereof only when Carmichael's department received the telephone call from Bertrand and as a consequence it acted promptly and effectively, thereby performing the duty imposed upon it by law. The respondent, on the other hand, contends that it was, in the circumstances, a part of Bertrand's duty to take reasonable steps to protect customers and, therefore, his knowledge was that of the appellant. It is not suggested that Bertrand was under a duty to remove the lotion, but that it was his duty to take steps to warn the customers by some reasonable measure such as covering the spot to prevent their stepping thereon.

Art. 1054, in part, provides:

Les maîtres et les commettants sont responsables du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés.

Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

The knowledge which Bertrand acquired in the performance of the work for which he was employed would be imputed to and become the knowledge of the employer. It is, therefore, important to ascertain if Bertrand was required, in the performance of the work for which he was employed, to take reasonable steps to protect the customers from injury.

The appellant contends that Bertrand was a clock salesman and he had no duty, in the circumstances, to protect customers or, if he did have a duty, he discharged that when he telephoned the caretaking department. The evidence does establish that as a salesman he was in charge of the clock counter, but it does not specify his duties as such. Whatever instructions he may have been given at the time of or throughout his employment are not disclosed in the record except that it is conceded he was given no instructions with respect to any duty he owed toward customers. In fact, he stated that upon this occasion his conduct was

> Just based on common sense. I took the initiative. I didn't want an accident to happen. I just 'phoned the caretaker to clean it.

The absence of instruction to the employee is not conclusive. In *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (1), the master was held liable, though no relevant instructions had been given by the employer. In that case Sir Lyman Duff (later C.J.), referring to art. 1054, stated at p. 416:

> If the thing done belongs to the kind of work which the servant is employed to perform or the class of things falling within l'exécution des fonctions, then by the plain words of the text responsibility rests upon the employer.

It is impossible, in any practical sense, for an employer in the position of the appellant to provide instructions to its sales staff that would cover every conceivable circum-

(1) [1923] S.C.R. 414

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stance. It has, therefore, been recognized that there are well known attributes of certain positions, such as that of salesman, which both the employers and the public have a right to expect the incumbent will perform. It is, in this regard, the duty of the salesman to be courteous and concerned for the comfort, convenience and safety of the customers upon the premises. An owner selling clocks as Bertrand was would be at fault within the meaning of art. 1053 if he did not take reasonable steps to prevent a customer from sitting upon a chair, stepping upon a trap door or a portion of the floor he knew to be unsafe. Bertrand, as a salesman employed by the appellant-owner, was under the same duty. It was one of the attributes of that position. In fact the evidence of the senior employees called on behalf of the appellant would support that view.

It is suggested that the employees of the caretaking department (two of whom patrolled the ground floor in question while the foreman and assistant foreman had to "keep their eye on the conditions throughout the store") were charged with the protection of the customers against injury from a situation such as created by this lotion. It is the duty of the employees of that department to remove the cause of the danger, but it cannot be suggested, upon the evidence, that these employees, few in number, of all the employees in this large department store, alone have a duty to warn customers of the danger.

Counsel for the appellant stressed the presence in the store of a system under which the cleaning department would be immediately communicated with by any employee who became aware of a situation such as that created by this lotion. This communication is made through the telephones placed here and there throughout the store. Bertrand used the telephone at his counter and the employees in the cleaning department acted promptly and effectively. An employee who did not telephone would be remiss in his duty and his failure to do so would not be excused upon his statement that he had not been instructed. Bertrand's statement that in telephoning to the cleaning department he took the initiative and acted upon his own common sense does not detract from the fact that in doing so he was performing the duty

that, in the circumstances, must be regarded as an essential attribute of his position. It is just the type of conduct that an employer has a right to expect of his responsible employees without specific instructions.

We are, in this case, concerned primarily with the vital and inevitable time that must elapse between the employee becoming aware of the danger and the removal thereof by the cleaning department. Throughout the whole of that period, which may be of short or substantial duration, the danger exists and the customers are exposed thereto. The appellant's position is that, though a salesman in charge of a counter is not only aware of the danger but fully conscious of the possibility of a customer suffering an injury, that salesman has no duty to warn the customers. The duties of a salesman such as Bertrand arise out of his position as a representative of the employer in selling and dealing with customers. The employer puts him forward to conduct business on his behalf and as if he were conducting the business himself.

An employer in the position of Bertrand and with his knowledge of this danger would not have performed his duty to his customers in merely telephoning the cleaning department. His plain duty would have been to immediately take reasonable steps to warn his customers of that danger.

The duty upon the employer's salesman is, in such circumstances, no less. It is part of his duty to be concerned for the care and safety of the customers. Specific instructions to that effect are not necessary. That duty would, by the very nature of his employment, as already stated, be an essential attribute. The law imposes that duty upon the employer to be discharged by either himself or his agent and where injury results from negligent omission of the performance of that duty the liability rests upon the employer. Where, as here, the employer is a limited company, the duty can only be discharged through its agents. A salesman in charge of a counter is such an agent. That it did not give specific instructions to do so, but took it for granted, as it had a right to do, that such

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a salesman would perform that duty, does not alter its liability in the event of non-performance on the part of the employee.

It is negligence on the part of a salesman in the position of Bertrand to observe a dangerous condition, telephone the cleaning department and still allow the danger to persist, when reasonable conduct on his part would either minimize or entirely eliminate that danger. The time between Bertrand's telephoning and the respondent's fall was estimated to be a minute to a minute and a half. In some circumstances that might well be too short a time, but in this particular case it is not contended that Bertrand did not have time in which to take the necessary precautions to warn the customers of this danger before the respondent fell. In not doing so he failed to perform that duty which his position required of him and his failure in that regard was a direct cause of the injury.

It is pointed out that any act on Bertrand's part to provide a reasonable guard or notice would require that he "desist from the selling of clocks in which he was engaged at the time." That the selling of clocks should supersede the protection of customers from imminent danger by a clerk who had the means at his hand to protect these customers is a suggestion that cannot be accepted. Bertrand left the customer to telephone and also to assist the respondent after she had fallen. A very short space of time would have been sufficient for him to place cartons from his counter, a chair or some other appropriate warning over the lotion and it would have avoided the accident and his conduct would have been well understood and probably appreciated by the customer he was serving.

There are cases where the danger is created unbeknown to the occupier of the premises. In that event the occupier has a reasonable time to become aware thereof. Once, however, he knows of the existence of the danger he must proceed at once with reasonable steps to protect his business guests. In this case the appellant knew immediately of the danger through Bertrand, who had at his counter the means which his position required should be used to protect the respondent and other customers.

There are other employees, possibly salesmen, whose knowledge of a danger such as this could not be attributed

to the appellant. Bertrand, however, was the salesman in charge of the nearby clock counter when he saw the danger and appreciated the possibility of injury. His duty, as above indicated, cannot be restricted to customers upon whom he was waiting, but would include those within a reasonable distance of his counter. The danger here created was within a few feet of his counter. Such knowledge, acquired by so responsible a salesman, must be attributed to the appellant. Bertrand had at his hand the means the use of which would have guarded and thereby warned the customers of the danger until such time as the employees of the caretaking department might remove it. His falure to take these reasonable steps constituted a fault in the sense indicated by My Lord the Chief Justice (then Rinfret J.) in *C.N.R.* v. *Lepage* (1).

> It is a familiar principle that neglect may, in law, be considered a fault only if it corresponds with a duty to act.

Counsel for the appellant contended that the majority of the learned judges in the Court of King's Bench based their decision upon the modern French construction of art. 1384 of the Code Napoléon, under which liability is predicated upon what has been described as a social responsibility or, as stated by Anglin J. (later C.J.):

> There is no doubt that the tendency in recent years of the French courts and the text writers has been to hold the master answerable for any wrong committed by his servant while in his employment, unless the act complained of be wholly foreign to his functions as servant. They hold the master liable if the servant's act be in any way connected with his employment.

Curley v. *Latreille* (2).

Art. 1384 of the Code Napoléon corresponds to art. 1054 of the Civil Code, but the language of the latter is different in important respects from that of the former and has been construed not to support liability upon such a basis. This was emphasized in *Curley* v. *Latreille supra*; *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (3); and *Moreau* v. *Labelle* (4). Mignault J. in the Vaillancourt case at p. 427 stated:

> Je suis encore du même avis, et il ne me semble pas inutile de le dire encore à raison de certaines solutions de la jurisprudence française

(1) [1927] S.C.R. 575 at 578.
(2) (1920) 60 Can. S.C.R. 131. at 143.
(3) [1923] S.C.R. 414.
(4) [1933] S.C.R. 201.

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qu'on a invoquées pour donner à l'article 1054 C.C., quant à la responsabilité des maîtres et commettants, une interprétation extensive qu'il ne comporte pas dans mon opinion. Il faut bien reconnaître que la jurisprudence française a pris depuis quelques années une orientation qui l'écarte de plus en plus de la doctrine traditionnelle. Elle admet de nouvelles théories en matière de responsabilité civile, comme l'abus du droit, l'enrichissement sans cause et la responsabilité des irresponsables, enfants en bas âge et insensés (Planiol t. 2, no. 878). On peut même dire qu'elle tend à faire abstraction de la faute et à la remplacer par la conception du risque. Mais n'oublions pas que nous avons un code dont le texte doit nous servir de règle, et que si les opinions des auteurs et les décisions de la jurisprudence française ne peuvent se concilier avec ce texte, c'est le texte et non pas ces opinions et ces décisions que nous devons suivre. Je ne serais certainement pas partisan d'une interprétation de notre code qui en ferait prévaloir la lettre sur l'esprit, mais quand le texte est clair et sans équivoque on n'a pas besoin de chercher ailleurs.

The formal judgment in the Court of King's Bench quoted from the reasons of the learned trial judge:

C'est un pur accident dont la Demanderesse doit subir les conséquences, vu qu'il lui est impossible d'en rechercher l'auteur et encore moins d'en attribuer la responsabilité à la Défenderesse. Il n'y a aucune preuve de faute par omission, négligence ou incurie de la part de la Défenderesse.

and then set out that the lotion constituted a danger or trap from which the appellant was under a duty to protect respondent, that Bertrand had failed in his duty to do so and his failure must be attributed to the absence of instructions on the part of the appellant. The failure to give these instructions constituted a breach of duty to the respondent and, therefore, the appellant was liable. The formal judgment, therefore, does not support the contention of counsel for the appellant and, moreover, Mr. Justice Bissonnette, who quotes more extensively from the French authors, states near the end of his judgment:

La seule proposition légale que j'ai voulu soutenir, c'est que la connaissance et l'imminence d'un danger, lorsqu'il y a temps utile et moyen efficace pour y parer, constituant une faute pouvant engendrer responsabilité si l'on néglige ou s'abstient d'agir. Et ce principe, en outre de la doctrine que j'ai citée, me paraît conforme à la jurisprudence de nos Cours, même de celles qui sont autorisées à juger selon la Common law.

If Bertrand had not a duty to warn the respondent as I have above indicated, then I am in agreement with the view expressed by my brother Cartwright, under which the appellant is liable, apart from any question of vicarious liability, for its own negligence in failing to properly instruct its employees, as he has indicated.

The appeal should be dismissed with costs.

CARTWRIGHT J. (dissenting):—For the reasons given by my brother Estey I agree with the conclusion at which he has arrived.

As he has pointed out, it is established by authority, and indeed was not questioned before us, that the appellant owed a duty to the respondent, as a customer in the store, to take reasonable care that she should not be exposed to unusual danger of which it knew or ought to have known.

The colourless and slippery lotion upon the travertine floor constituted an unusual danger and was the cause of the injury of which the respondent complains. The appellant, being a corporation, could have knowledge of this danger and could take such steps as might be reasonably necessary to protect its customers only through its servants or employees.

The appellant had provided a department whose duty it was to keep the store in a condition of cleanliness and safety and to remove dangers which might from time to time arise. The evidence indicates that this department operated efficiently and in the case at bar actually removed the source of danger within a few minutes after its creation. It is clear from the evidence, however, that in case of a danger arising suddenly and fortuitously, as happened in this case, the members of the cleaning department were dependent on the employees in the vicinity of such danger to notify them of its existence. In a store so large and serving so many customers as that of the appellant it is reasonable to suppose that such dangers would from time to time arise and this probability was recognized by the appellant, as is evidenced, amongst other things, by its installation of a system permitting prompt communication with the members of the cleaning staff. It is also clear that in the case of such a danger arising there would inevitably be an interval of time between the summoning of the members of the cleaning department and their arrival. In my opinion the appellant's duty to protect its customers from unusual danger was not discharged by setting in motion a system, however efficient, designed for the removal of the danger. It was, I think, part of its duty to warn the customers during the interval of time mentioned above which must necessarily elapse before the danger could be removed.

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It appears to me that the appellant is upon the horns of a dilemma. If, as my brother Estey holds, it was part of the duty of employees such as Bertrand to notify the members of the cleaning department and, pending their arrival, to warn customers of the danger, it is clear that Bertrand failed to perform the latter of such duties and the appellant would be responsible for his failure. If on the other hand the arrangements between the appellant and Bertrand (whether resulting from express instructions or from lack of instructions) were such that these duties did not rest upon him then I think that the appellant was negligent in failing to make reasonable provision for the warning of its customers of an unusual danger during the interval between the time of its obtaining knowledge of such danger and the time of its removal, and the appellant would be liable to the respondent not vicariously for the negligence of its employee but directly for its own negligence in failing to properly instruct its employees.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Scott, Hugessen, Macklaier, Chisholm, Smith & Davis.*

Solicitors for the respondent: *Brais, Campbell & Mercier.*

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*Mar. 19, 20, 21

*May 18

CHARLES G. ROCHE (*Plaintiff*).....APPELLANT;

AND

A. H. MARSTON, (*Defendant*).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Trial before judge alone—Pure question of fact—Principles governing appellate court—Practice—Effect to be given on appeal to defence not raised in pleadings nor established in evidence—Rules of Practice (Ont.) r. 143.

The appellant, a business consultant, conducted lengthy negotiations with a view to securing a controlling interest in three companies on behalf of the respondent, a financier, as to all of which the latter finally

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

decided not to purchase. The appellant brought an action upon an alleged verbal agreement by which he claimed he was to be paid a reasonable sum for services rendered. The respondent pleaded the agreement was that payment was to be made on a commission basis and only in the event of purchase, and further that the appellant was precluded from advancing his claim because of failure to register as a business broker pursuant to *The Real Estate and Business Brokers Act, 1946* (Ont.) c. 85. Before the Court of Appeal he further argued that the services for which payment was claimed were such as, if rendered, brought the appellant within the term "investment counsel" as defined by *The Securities Act, 1945* (Ont.) c. 22, and that he was prohibited from so acting unless registered as such under the Act.

The trial judge accepted the evidence of the appellant in preference to that of the respondent and awarded him judgment, but this judgment was reversed on appeal.

Held: That the Court of Appeal erred in over-ruling the findings of fact made by the trial judge and the appeal from its judgment should be allowed and the judgment pronounced at trial restored.

Per: Kerwin J.—The principles upon which an Appellate Court should proceed in dealing with the findings of a trial judge on a question of fact are those laid down in *Hontestroom (Owners)* v. *Sagaporack (Owners)* [1927] A.C. 37 at 50; *Powell* v. *Streatham Manor Nursing Home* [1935] A.C. 243 at 264; *Caldeira* v. *Gray* [1936] 1 All. E.R. 540.

Held: also that the defence as to The Securities Act should not be entertained, as it was not pleaded at the trial as required by the Ontario Rules of Practice, r. 143, and since a factual foundation was not clearly established in the evidence, no effect should be given to the allegation of illegality at this stage of the proceedings.

Held: further that as to The Real Estate and Business Brokers Act, the services rendered by the appellant did not fall within the section since it was not the legislative intention to include in the term "business", the shares of an incorporated company. *Macaura* v. *Northern Assurance Co. Ltd.*, [1925] A.C. 619 at 626, and the services rendered were in reference to the contemplated purchase of stock in the companies and not to the purchase of the business owned by such companies.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the appellant.

G. W. Mason K.C. for the appellant.

R. F. Wilson K.C. for the respondent.

KERWIN J.:—I agree with the reasons for judgment of my brother Cartwright. The principles upon which an Appellate Court should proceed in dealing with findings of a trial judge are found in the speech of Lord Sumner,

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approved by the other members of the House of Lords, in *Hontestroom (Owners)* v. *Sagaporack (Owners)* (1), and are as follows:

> (1) Does it appear from the President's judgment that he made full judicial use of the opportunity given him by hearing the viva voce evidence? (2) Was the evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation? (3) Is there any glaring improbability about the story accepted, sufficient in itself to constitute "a governing fact, which in relation to others has created a wrong impression," or any specific misunderstanding or disregard of a material fact, or any "extreme and overwhelming pressure" that has had the same effect?

While this was an Admiralty case, the same principles apply in ordinary common law cases: *Powell* v. *Streatham Manor Nursing Home* (2); which latter is referred to in a decision of the Privy Council, *Caldeira* v. *Gray* (3). These principles have been followed and applied in this Court.

In the present case, the trial judge accepted the evidence of the appellant in preference to that of the respondent, and his findings of fact should not be disturbed. In connection with the point as to the Securities Act of Ontario, the true rule is set forth by Anglin J., as he then was, in *Antoniou* v. *Union Bank of Canada* (4). There, referring to a point taken for the first time in this Court, he says:

> it should not be entertained, as, if it had been raised on the pleadings or at the trial, evidence might have been adduced to shew that these words import a definite and precise liability.

This was agreed to in terms by Sir Louis Davies and to the same effect are Mr. Justice Mignault's remarks at page 262. While in the present case the objection was taken before the Court of Appeal, it was not dealt with by that Court, and, in any event, under the circumstances the same rule should be applied.

The judgment of Kellock, Estey, Cartwright and Fauteux JJ. was delivered by:

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario, setting aside the judgment of Wells J. in favour of the plaintiff for $5,300 and costs and directing that the action be dismissed with costs.

(1) [1927] A.C. 37 at 50.
(2) [1935] A.C. 243 at 264.
(3) [1936] 1 All. E.R. 540.
(4) (1921) 61 Can. S.C.R. 253.

The plaintiff's claim was for services rendered to the defendant between May 23, 1947 and February 3, 1948. During this period the defendant was desirous of buying the control of a business and was prepared to pay a sum in the neighbourhood of $500,000 if he could find a business which he regarded as satisfactory. The plaintiff is described as a business consultant and was recommended to the defendant by a bank manager of whose branch both parties were customers.

It is common ground that the defendant asked the plaintiff to perform various services for him but there is direct contradiction as to the terms of the agreement between them. The position taken by the plaintiff was that during the period mentioned he performed numerous services for the defendant in connection with three different companies in each of which the defendant considered that he might purchase control, that from about June 27, 1947 to February 3, 1948, at the defendant's request, he devoted most of his time to the defendant's business and engaged in no other business activity without first obtaining the defendant's consent, that the rate of remuneration to be paid was not discussed and that it was an implied term of the arrangement that the plaintiff should be paid a reasonable sum for his services. It is established that during the period in question the plaintiff received no remuneration from any other source.

As to White's Hardware Limited, one of the three companies mentioned, the plaintiff testified that it was agreed between him and the defendant that if an option on the shares of such company was obtained by the defendant the plaintiff's fees for all services in connection with that company should be fixed at $4,000, regardless of whether the defendant exercised the option. This option was obtained. The plaintiff testified that when it was obtained the defendant was very pleased and agreed to pay him $6,000 instead of the $4,000 previously agreed upon. The defendant later decided not to exercise this option.

The defendant asserted that it was expressly agreed that if as a result of the plaintiff's services or efforts the defendant actually made a purchase he would pay a suitable commission to the plaintiff but that unless he made such a purchase the plaintiff was to be entitled to nothing.

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As to the option mentioned above the defendant said that he was pleased when it was obtained but that the agreement was that he should pay the plaintiff $6,000 only if it was exercised.

Faced with this conflict of evidence the learned trial judge has stated in terms that he accepts the evidence of the plaintiff in preference to that of the defendant and has found the facts to be as set out in the brief summary of the position taken by the plaintiff given above.

The learned trial judge while accepting the plaintiff's evidence as to what was said between the parties in regard to payment for services rendered in connection with White's Hardware Limited held that there was no consideration for the defendant's promise to pay $6,000 instead of $4,000. In this I respectfully agree. At the time of the agreement to pay the $4,000 the plaintiff had an enforceable claim against the defendant for payment of a reasonable sum in consideration of the services which he had rendered at the defendant's request. The defendant offered to pay and the plaintiff agreed to accept $4,000 in full satisfaction of such claim upon condition that the option was obtained. There is no evidence of any further consideration being given by the plaintiff for the defendant's promise to pay the additional $2,000.

The learned trial judge fixed the sums of $1,000 and $300, respectively, as being reasonable remuneration for the services rendered in respect of the other two companies. I am not satisfied that either of these amounts is not warranted by the evidence.

The learned Justices of Appeal were unanimous in deciding that the learned trial judge had erred in accepting the plaintiff's version of the facts. Their reasons for so holding were that the plaintiff's story was too unlikely to be credited and that the finding of the learned trial judge was falsified by the following testimony given by the plaintiff himself:—

Q. Now am I right in saying these three transactions cover a period roughly from May 27, 1947, to February 3, 1948?

A. That's right.

Q. During that period you were away on vacation for about one month?

A. That's right.

Q. And so that the period covered was approximately seven months?

A. That's right.

Q. And did the defendant get any benefit from any one of these three transactions?

A. Well, he got a lot of experience. He picked my brains for seven months, asked me all kinds of questions. He said that I certainly knew my business and he was glad to be connected with a man like me. He was looking for a man like me for a couple of years. So I don't know that he got any monetary rewards but he probably learned a few things. I know I learned a few things from him.

With the greatest respect to the learned Justices of Appeal, after a careful perusal of the evidence, I am unable to find any inherent improbability in the plaintiff's story. Indeed it appears to me more likely that the arrangement between the parties should be that the plaintiff should receive reasonable payment for the time and skill he devoted to the defendant's business than that for several months he should have applied himself almost exclusively to serving the defendant on the understanding that if in the end the defendant decided against making any purchase, as he was perfectly free to do, the plaintiff should receive nothing.

The evidence indicates that the plaintiff was not a business broker or a commission agent in the ordinary sense of such terms. His primary duty appears to have been not so much to bring about a completed transaction as to obtain information and to give advice which would assist the defendant in deciding whether or not to enter into transactions which were from time to time under consideration and some of which were proposed by the defendant himself. Situations might well arise where it would be the plaintiff's duty to dissuade the defendant from entering into a proposed purchase.

I am unable to find in the extract from the plaintiff's evidence, quoted above, anything inconsistent with his story. From the very nature of the services which the plaintiff was engaged to render it was obvious that the defendant would obtain no ascertainable financial benefit therefrom if he ultimately decided not to make a purchase. The consideration given by the plaintiff was the devotion of his time and skill over a considerable period to the defendant's service at the defendant's request.

In my respectful opinion the Court of Appeal erred in over-ruling the findings of fact made by the learned trial judge.

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Two points remain to be considered. The respondent argues that even if the findings of fact made by the learned trial judge are accepted the action must nonetheless fail, first by reason of the provisions of *The Real Estate and Business Brokers Act,* 1946, Statutes of Ontario 10 George VI Cap. 85 and alternatively by reason of the provisions of *The Securities Act,* 1945, Statutes of Ontario 9 George VI Cap. 22.

Paragraph 21 of the Statement of Defence as amended at the opening of the trial reads as follows:

> The Defendant says, as the fact is, that the Plaintiff is precluded from advancing the claim set up in his Statement of Claim because of his failure to register himself as a Business Broker pursuant to the provisions of Sections 36 & 37 of the Real Estate and Business Brokers Act, Ch. 85, Statutes of Ontario, 1946.

It is conceded that the plaintiff was not registered under *The Real Estate and Business Brokers Act* at the time of rendering the services for which remuneration is claimed in this action. Section 36 of the Act is as follows:

> No action shall be brought for commission or for remuneration for services in connection with a trade in real estate unless at the time of rendering such services the person bringing the action was registered or exempt from registration and the court may stay any such action at any time upon summary application.

If the words of this section are read in their ordinary and natural meaning it is obvious that the services rendered by the plaintiff do not fall within the section. It is necessary, however, to consider the artificial and greatly extended meanings given to the words "trade", "real estate" and "business" in the interpretation section of the Act. These are as follows:

> Section 1. (*k*) "trade" shall include a disposition or acquisition of or transaction in real estate by sale, purchase, agreement for sale, exchange, option, lease, rental or otherwise and any offer or attempt to list real estate for the purpose of such a disposition or transaction, and any act, advertisement, conduct or negotiation, directly or indirectly, in furtherance of any disposition, acquisition, transaction, offer or attempt, and the verb "trade" shall have a corresponding meaning.
>
> Section 1. (*e*) "real estate" shall include real property, leasehold and business whether with or without premises, fixtures, stock-in-trade, goods or chattels in connection with the operation of the business;
>
> Section 1. (*b*) "business" shall mean an undertaking carried on for the purpose of gain or profit and shall include an interest in any such undertaking, and without limiting the generality of the foregoing, shall include boarding house, hotel, stores, tourist camp and tourist home;

Wide though these definitions are, I am in respectful agreement with the learned trial judge that it was not the intention of the legislature to include in the term "business" the shares of an incorporated company. The acquisition of shares in a company is not, I think, the acquisition of an interest in the undertaking carried on by such company. In *Macaura* v. *Northern Assurance Company, Limited* (1) at page 626, Lord Buckmaster said:

> * * * Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

It is clear that the services of the plaintiff were in reference to the contemplated purchase of shares of stock in the companies mentioned in the pleadings and not to the purchase of the businesses owned by such companies.

The defence based on *The Securities Act,* 1945 is that the services for which the plaintiff claims payment are such that if the plaintiff rendered them he fell within the definition of "investment counsel" contained in the Act and that he was prohibited from so acting unless registered. Reliance is placed upon section 1(*g*), reading as follows:

> (g) "investment counsel" shall mean any person or company who engages in or holds himself or itself out as engaging in the business of advising others, for compensation, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities, but shall not include,—
>
> * * *
>
> (v) such other persons or companies not within the intent of this clause, as the Commission may designate;

and upon section 7(1) (*d*):

> 7. (1) No person shall,—
>
> * * *
>
> (*d*) act as an investment counsel unless he is registered as an investment counsel and such registration has been made in accordance with the provisions of this Act and the regulations.

This defence was not pleaded, and no attempt appears to have been made at the trial to base any argument upon

(1) [1925] A.C. 619.

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it. The following question and answer appear in the cross-examination of the plaintiff:

> Q. You are not, I understand, registered under the Securities Act?
> A. No, that is right.

But the purpose of this question appears to have been to negative, as regards the plaintiff, the exemption from the requirement of registration under *The Real Estate and Business Brokers Act* provided by section 16(*b*) of that act in certain circumstances for persons registered under *The Securities Act*.

We are informed by counsel that the Securities Act was mentioned in argument in the Court of Appeal and that counsel for the defendant asked in that Court for leave to amend the Statement of Defence by pleading the Securities Act "if necessary". No order for an amendment was made. Henderson J.A., with whom Roach J.A. agrees says in his reasons for judgment:

> The alleged necessity of his requiring to be licensed under The Real Estate and Business Brokers' Act was argued before us but there was no argument before us with respect to The Securities Act. In the view I take of the case it is not necessary for me to deal with either of these issues.

Hogg J.A. who delivered separate reasons does not refer to the Act.

There is no reference to the Securities Act in the appellant's factum. The only references to it found in the respondent's factum are a sentence in Part I—"The plaintiff was not registered under the Securities Act"—and in Part II where the fourth point in issue in the appeal is said to be:

> IV. Whether the Plaintiff has a right of action by reason of his failure to register under the Real Estate and Business Brokers' Act, or The Securities Act, 1945. The Respondent contends that no right of action exists in the absence of registration.

Before us counsel for the respondent submitted that it was not necessary for the defendant to plead the Securities Act as it is a public statute, but asked leave to amend if the Court should be of the view that an amendment was necessary to enable the defendant to rely on this defence.

In my view under the Ontario practice it was necessary for the defendant, if he wished to avail himself of this defence, to so plead as to make it plain that he was relying on the fact that the plaintiff was not registered under the

Act as rendering the contract illegal. This is, I think, the effect of Rule 143 of the Ontario Rules of Practice which provides:

> 143. A defendant to an action or counterclaim shall raise all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, the Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or the Statute of Frauds.

As was said by Brett J.A. in *Clarke* v. *Callow* (1):

> * * * If he (a defendant) means to deny the legality of a contract he has entered into, he must say so in plain terms.

I do not find it necessary to decide whether in the case at bar the amendment should be permitted. In my view the evidence is insufficient to support the defence. No doubt if the contract relied upon by the plaintiff was to render services which he was prohibited by the Statute from undertaking it would be illegal and the assistance of the Court would not be given to enforce it. This rule is clearly stated in the judgment of this Court in *Commercial Life Assurance Co.* v. *Drever* (2), a case in which the defence was sufficiently raised in the pleadings. But the statute renders the contract illegal only if the plaintiff was required by the terms of the Statute to be registered. Registration is required if he was acting as an investment counsel. It is, I think, doubtful whether the evidence as to the services which he rendered indicates *prima facie* that the plaintiff was engaged in the business described in the opening words of clause (*g*) of section 1, quoted above, but that clause excludes from the definition such persons not within the intent of the clause as the Commission may designate and section 78(*e*) provides:

> 78. The Lieutenant-Governor in Council may make regulations,—
> (*e*) designating any person or company or any class of persons or companies which shall be deemed not to be investment counsel;

For all that appears in the record even if otherwise he would have been required to register under the Act, as to which I express no opinion, the plaintiff may have been relieved from such requirement by designation of the Commission or by regulation made by the Lieutenant-Governor in Council. It may be that had the defence of illegality

(1) (1876) 46 L.J.Q.B. 53 at 54. (2) [1948] S.C.R. 306.

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by reason of the Statute been pleaded some onus would have fallen upon the plaintiff to establish his exemption from the obligation to be registered but, as has already been pointed out, not only was there no reference to this defence in the pleading but nothing occurred during the course of the trial to suggest that it was proposed to rely upon it.

We should not, I think, at this stage of the proceedings, give effect to an allegation of illegality which was not raised in the pleadings, was not mentioned at the trial and the factual foundation of which is not clearly established in evidence.

For the above reasons I would allow the appeal and restore the judgment pronounced at the trial, with costs throughout.

Appeal allowed

Solicitors for the appellant: *Mason, Foulds, Arnup, Walter and Weir.*

Solicitors for the respondent: *Day, Wilson, Kelly, Martin and Morden.*

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*Oct. 25, 26, 27
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*Feb. 26

WOODS MANUFACTURING COMPANY LIMITED (DEFENDANT) — APPELLANT;

AND

HIS MAJESTY THE KING, on the information of the Attorney General of Canada (PLAINTIFF) ..... — RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation by Crown—Principles Applicable in assessing compensation —Canadian Law same as English Law—Authorities Reviewed—Expropriation Act, R.S.C. 1927, c. 64.

The principles to be applied in assessing compensation to the owners of property expropriated by the Crown under the provisions of the *Expropriation Act*, R.S.C. 1927, c. 64, and other Canadian statutes conferring powers of expropriation, are those long since settled by the

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

decisions of the Judicial Committee of the Privy Council and of this Court. The laws of Canada as regards such principles are the same as the laws of England and the statements of law as enunciated by the Judicial Committee have been followed consistently in the judgments of this Court. *Vide*: *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 K.B. 16, approved and applied in *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* [1914] A.C. 569, followed in *Lake Erie & Northern Ry. Co.* v. *Brantford Golf and Country Club* 53 Can. S.C.R. 416; *Montreal Island Power Co.* v. *Town of Laval des Rapides* [1935] S.C.R. 304 at 307; *Jalbert* v. *The King* [1937] S.C.R. 51 at 71; *The King* v. *Northumberland Ferries* [1945] S.C.R. 458, and *Diggon-Hibben* v. *The King* [1949] S.C.R. 712.

The principles enunciated in the above-cited cases should have been, but were not, applied by the lower court.

Decision of the Exchequer Court [1949] Ex. C.R. 9, reversed.

Definition of "value to the owner", *The King* v. *Thos. Lawson & Sons Ltd.* [1948] Ex. C.R. 44 at p. 80, disapproved.

APPEAL from a judgment of the Exchequer Court of Canada, Thorson J., President, (1) on an Information by the Crown to have the amount of compensation money payable to the owner of a property expropriated for the purpose of a public work of Canada, determined by that Court.

Gustave Monette K.C., Duncan K. MacTavish K.C. and *J. C. Osborne* for the appellant.

J. A. Prud'homme K.C. and *J. B. Major K.C.* for the respondent.

The judgment of the Court was delivered by:

THE CHIEF JUSTICE:—The appellant was the owner of a large property situated in the City of Hull, on the east side of Laurier Street, and extending to the Ottawa river. The frontage on Laurier street is 456 feet, and the total area is 6·53 acres, of which an unopened street constitutes 0·75 acres leaving a net area of 5·68 acres. The appellant is a Canadian corporation with head office in Montreal, and operates mills at St. Lambert, Toronto, Winnipeg, Calgary, Ogdensburg, Welland and Hull. At the site expropriated is located the clothing and canvas division, where for many years prosperous operations have been carried on, the operating profits before income tax, having been in 1947, $183,435.

(1) [1949] Ex. C.R. 9.

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WOODS MANUFACTURING CO. LTD. v. THE KING

Rinfret C.J.

Pursuant to section 9 of the *Expropriation Act*, the respondent initiated expropriation proceedings on the 19th of May, 1944, and on the 7th of May, 1946. The first covered the vacant land having an area of 4 acres situated to the south, and the second affected a piece of land contiguous to the north, having an area of 1·6 acres, and on which several buildings are erected.

The action was heard before the Exchequer Court, and on the 23rd of December, 1948, the President fixed the compensation at $45,800 for the first expropriated property, with interest at the rate of 5 per cent from the 19th of May, 1944, and at $350,000 for the second expropriated property without interest. The appellant claims that these amounts are inadequate. It is contended that a total amount of $726,262.58 should have been awarded. By the information, a sum of $329,791.73 was offered for total compensation, including all loss and damage, if any, arising out of the expropriations.

While the principles to be applied in assessing compensation to the owner for property expropriated by the Crown under the provisions of the *Expropriation Act*, c. 64, R.S.C. 1927, and under various other Canadian statutes in which powers of expropriation are given, have been long since settled by decisions of the Judicial Committee and this Court in a manner which appears to us to be clear, it is perhaps well to restate them. The decision of the Judicial Committee in *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (1), where expropriation proceedings were taken under the provisions of *The Railway Act*, 1903, determined that the law of Canada as regards the principles upon which compensation for land taken was to be awarded was the same as the law of England at that time and the judgment delivered by Lord Dunedin expressly approved the statement of these principles contained in the judgments of Vaughan-Williams and Fletcher-Moulton, LL. JJ. in *Re Lucas and Chesterfield Gas and Water Board* (2). The subject-matter of the expropriation in the Cedars Rapids case consisted of two islands and certain reserved rights over a point of land in the St. Lawrence River, the principal value of which lay not in the land itself but in the fact that

(1) [1914] A.C. 569. (2) [1909] 1 K.B. 16.

these islands were so situate as to be necessary for the construction of a water power development on the river. It is in this case that the expression appears that where the element of value over and above the bare value of the ground itself consists in adaptability for a certain undertaking, the value to the owner is to be taken as the price which possible intended undertakers would give and that that price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects which make the undertaking as a whole a realized possibility. That decision was followed in the same year by a second judgment of the Judicial Committee in the case of *Pastoral Finance Association* v. *The Minister* (1), where Lord Moulton, in considering a claim for compensation for properties taken by the Government of New South Wales under the Public Works Act 1900 of that State, said that the owners were entitled to receive as compensation the value of the land to them and that probably the most practical form in which the matter could be put was that they were entitled to that which a prudent man, in their position, would have been willing to give for the land sooner than fail to obtain it.

These statements of the law have been followed consistently in the judgments of this Court. In *Lake Erie and Northern Railway* v. *Brantford Golf and Country Club* (2), in proceedings under the Railway Act, R.S.C. 1906, c. 37, Duff J. as he then was, in discussing the phrase "the value of the land to them", after saying that the phrase does not imply that compensation is to be given for value resting on motives and considerations that cannot be measured by any economic standard, said in part:

> It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for the purpose of some profitable business which he is carrying on or desires to carry on upon it and, in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there. In such a case Lord Moulton in *Pastoral Finance Association* v. *The Minister* (3), has given what he describes as a practical

(1) [1914] A.C. 1083.
(2) (1917) 32 D.L.R. 219 at 229.
(3) [1914] A.C. 1083 at 1088.

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formula, which is that the owner is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it.

In the same year, in *Lake Erie and Northern Railway* v. *Schooley* (1), Davies J. quoted the passage from the judgment of Lord Moulton above referred to and adopted it as stating the true principle, a statement with which Anglin J. concurred. In *Montreal Island Power Co.* v. *The Town of Laval* (2), Duff C.J. again referred to the formula enunciated by Lord Moulton as accurately stating the principle to be applied where land was compulsorily taken under the authority of an expropriation act, and in *Jalbert* v. *The King* (3); *The King* v. *Northumberland Ferries* (4) and in *Diggon-Hibben Ltd.* v. *The King* (5), the principle so stated was adopted and applied. The proper manner of the application of the principle so clearly stated cannot, in our opinion, be more accurately stated than in the judgment of Rand J. in the last-mentioned case at p. 715.

* * * the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.

We are unable to avoid the conclusion that the learned President did not apply these principles in the case at bar. In his reasons for judgment he says:

Where an owner makes a claim for property taken from him section 47 (i.e. of *The Exchequer Court Act*) permits compensation to him only to the extent of the value of such property.

Later, he expresses the following views:

It is only the form of the property that is changed; instead of the land, the owner has its money equivalent. It is also clear that the money equivalent referred to is the *market value of the land,* that is to say, the amount of money the owner could turn it into *if he offered it for sale.*

He also states:

In the case of *In re Lucas and Chesterfield Gas and Water Board* (6), in which Fletcher-Moulton L.J. stated that the money equivalent of the land was estimated on the value to the owner, and not on the value to the purchaser, it was clear that even although the land had special adaptability for a particular purpose its value to the owner was confined to its market value. That means that it cannot be more than it would fetch in the market.

(1) (1916) 53 Can. S.C.R. 416 at 421.
(2) [1935] S.C.R. 304 at 307.
(3) [1937] S.C.R. 51 at 71.
(4) [1945] S.C.R. 458.
(5) [1949] S.C.R. 712.
(6) [1909] 1 K.B. 16.

And finally, referring to his own judgment in *Thomas Lawson & Sons, Limited* (1), he says:

> I then expressed the opinion that this definition of "value to the owner" is essentially the same as that of "fair market value."

With deference, we are unable to agree with these statements which, in our view, are not the true expression of the law.

With regard to the property first expropriated we think that, applying the principles laid down by the majority of this Court in *Diggon-Hibben Ltd.* v. *The King* (*supra*) an allowance of ten per cent for compulsory taking should be added to the value of the land and buildings expropriated, but that apart from this the appellant has not made out its claim that the compensation allowed in respect of such property was inadequate. In the result the amount allowed should be increased from $45,800 to $48,880.

As to the second expropriation, the learned President valued the land at $9,000 per acre, because in his view, during the period that extended between the two expropriations, the land increased in value and, as the area covers 1.68 acres, he awarded $15,120. He found that the reconstruction cost of all the buildings was $478,032 less depreciation amounting to $188,296, leaving a depreciated value of $289,736. To these items he added $435 for fixtures, making a grand total of $305,291. The appellant produced a statement showing a loss of $76,920.96 plus an item of $2,550 as the depreciation in value of certain chattels, making a total claim for loss by disturbance, amounting to $79,470.96. The learned President was of opinion that even if it were conceded that the owner of the expropriated property had a right to compensation for loss by disturbance of his business, the amount of the appellant's claim under this head was difficult to determine as the appellant was left in possession and continued its operations for the time being. He also took the view that, even if the defendant were entitled to compensation for loss by disturbance, it had no right at the time of the judgment to receive the full amount of its claim for a loss that will happen only in the future, if it happens at all. The learned President, while expressing the opinion that the appellant was not entitled to more

(1) [1948] Ex. C.R. 44.

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than the present value of such prospective loss, reached the conclusion that the evidence supported the claim that the appellant's loss by reason of disturbance, would amount to $79,470.96.

The learned President concluded that the maximum amounts at which he would estimate the various items of the appellant's claim on the second expropriation, if he were required to do so, item by item, would be $15,120 for the land, $289,736 for the buildings and mechanical equipment, $435 for the fixtures, and $79,470.96 for the loss by disturbance of business, making a total of $384,761.96. He held, however, that the valuation should not be made piecemeal, but as a whole, and for the second expropriation he awarded a lump sum of $350,000. It was his view that this amount would adequately cover every factor or element of value, including that of loss by disturbance of business, that could properly be taken into account, and at the same time meet the tests of value to which he referred in his judgment.

It cannot be determined how the $350,000 awarded is distributed amongst the items above set out. Assuming that the whole of the reduction from the total of $384,761.96 was applied to the claim for disturbance the amount would be made up as follows:

Land	$ 15,120
Depreciated value of the buildings and mechanical equipment	289,736
Fixtures	435
Loss by disturbance	44,709
	$350,000

In determining whether or not the total awarded is adequate it is necessary to consider the evidence in some detail. The buildings on the lands secondly expropriated were four in number, a main factory building of stone and brick construction, a tarpaulin and waterproofing building, a garage and an auto shelter or shed. The main factory building was construced in 1907. It was established in evidence that the building was well suited for the type of manufacturing carried on there and which the company operating also at Montreal and elsewhere in Canada was

desirous of continuing. In these premises the company had carried on operations which realized substantial profits, with the exception of the year 1938, during the period 1937 to 1945 inclusive. While the expropriation vesting title in the Crown took place in the spring of the year 1946, the company was permitted to remain in possession and its operations in that year and the year following resulted also in substantial profits. The site on Laurier Avenue, in the residential portion of Hull, possessed for the owner the great advantage of being close to a large and available supply of labour suitable for employment in the company's operations and being not far distant from one of the principal bridges across the river leading to the City of Ottawa. While the company, in anticipation of being required to yield possession of the premises, had endeavoured to find a suitable property in Hull for the carrying on of their operations, they had not been able to find any and, according to Mr. E. S. Sherwood, a real esate broker having a wide experience in this district, no comparable buildings for an operation of the magnitude of the Woods Manufacturing Company were available either in Ottawa or Hull and he considered that it was doubtful that any such property would become available. The company had purchased land for a site in Overbrook in the Township of Gloucester, lying to the east of the city of Ottawa and a distance of six miles from its then location, but upon consideration had concluded that it was too far from a suitable supply of labour and had abandoned the idea of building there. Apparently inquiries in the immediate neighbourhood of Hull had not resulted in the company finding a suitable site there and, while some were available further down the Ottawa River, operations there would be faced with difficulty in getting the necessary help. The company's desire to continue its operations in Hull or its immediate vicinity was made plain.

There was a divergence of opinion among the experts as to the value of the property. For the company, Mr. W. H. Bosley, a real estate agent with wide experience in valuations and real estate operations generally, in answer to a question by the learned trial judge, expressed the opinion that if the owners were desirous of disposing of the property on the market they could have obtained $280,000

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for it. Having said this, however, he said that if he were representing a purchaser he would not feel that the property could have been bought at that figure, assuming the owner wished to continue in business, and expressed his inability to give an opinion as to what amount a purchaser might have paid to obtain it, but said that if such a purchaser needed the property urgently he would advise him to pay ten per cent more than that figure. As to the position of the owner, however, he said that he would advise the Woods Manufacturing Company Limited not to accept such a figure since it could not hope to reinstate itself for that amount. Mr. Sherwood considered that at the relevant time he could have sold the property on the market for $315,000, but said that he would have advised the owner, assuming that it was intended to continue the business, to refuse such an amount "or anything like it". As to a prospective purchaser, assuming the property suited his requirements, he would have advised him to pay ten per cent in excess of this amount but would have advised the appellant to refuse such an offer. Mr. R. B. Moffit, the Vice-President and Comptroller of the appellant, said that in his opinion, having regard to the suitability of the plant for the operations and the profit realized, he would have advised against selling for less than $700,000.

Mr. A. B. Doran, a contractor with some twenty years' experience in building construction, estimated the cost of replacing the buildings on the property at $474,873 on the basis of the prices for material as of the date of the expropriation. The main building had been constructed in the year 1907 but had been very well maintained and he computed the depreciation at the sum of $94,631, expressed otherwise, he said that if his firm had been given the contract to rebuild the plant the new building would be worth about $95,000 more than the building as it stood in May of 1946.

The evidence for the Crown as to the reconstruction cost of the main and subsidiary buildings varied but little from that tendered by the owner. Mr. James Adam, an architect and civil engineer of long experience, estimated the cost of replacement at $478,032 and this figure was accepted by the learned President. While declining to estimate the probable future useful life of the building,

he considered that since its erection it had deteriorated in the neighbourhood of thirty-five per cent. Mr. J. A. Coote, an assistant professor of mechanical engineering at McGill University, and a consultant for a firm of engineers in Montreal, had examined the buildings at the request of the Crown. Accepting the reconstruction cost at the amount of the estimate of Mr. Adam and others employed for the purpose by the Crown, he considered that the depreciated value of all the buildings was $287,736. Mr. Coote had never constructed or tendered on the construction of a building and, admittedly, did not have experience with industrial plants of the kind operated by the company and his evidence as to the extent of the accumulated depreciation and of the future useful life of the building appears to have been based upon theories expressed by others on the subject. When counsel for the Crown directed questions to him to establish his qualifications as an expert on the question of depreciation, he said that he had been studying the theory for twenty-five years, that he had lectured to students in accounting and engineering and had read widely on the subject and considered that a useful life of sixty years was the utmost that could be assigned to the main building. He, however, also said that although the building was practically forty years old in 1946 it was as a structure in excellent condition, that it was an "extra good building", well constructed and in general very well maintained, and then said in part:

> The question is: how many more years is it good for? Now nobody can tell, sir; I want to agree with the sentiment expressed here yesterday that nobody can tell how long a building is good for.

a statement which he repeated later, saying that "nobody knows what the useful life of that building is going to be". On cross-examination, when asked his opinion as to what condition the building would be in when it had reached sixty years of age, he said that:

> As a structure, I should say it would probably be pretty fair.

but that the maintenance cost then would be much higher and that obsolescence would become an increasingly important factor. He did not say, however, that it would cease to be an effective building for the company's purposes at that time. In answer to a question by the learned trial judge he made it clear that his opinion on this point was

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not based upon his own experience, saying that he wished to emphasize that nobody could tell what conditon the building was going to be in at age sixty but that:

> relying upon recorded experience, the experience of other people with buildings of that age, I say that I could not honestly give this building as a piece of productive equipment a life beyond sixty years.

It will be observed that expressed in percentages the depreciation in the main building in the opinion of Mr. Coote was 43·8 per cent, in that of Mr. Adam 35 per cent, and in that of Mr. Doran 22·3 per cent. There appears to be considerable support for the appellant's submission that the learned President was in error in placing the depreciation at the highest of these figures, in view of Mr. Coote's admission that his whole calculation was based on the assumption that the useful life of the building was limited to sixty years.

For the Crown the evidence, in so far as it related to the buildings as distinct from the land, was limited to the cost of replacing them. Replacement cost is, of course, a material factor for consideration in determining the value to the owner. In some circumstances it may well represent that value while in others it may greatly exceed it or be materially less. In the present case we are satisfied upon the evidence that the value of the property to the owner was in excess of the value of the land, plus the depreciated value of the buildings. In endeavouring to come to a conclusion as to what amount the owner, presumably directed by prudent business men, would have been prepared to pay for the property in May 1946 rather than to be forced to give up title and possession, the situation in the business world at that time is to be considered. The second World War had terminated and in consumers' goods of all kinds there existed what is commonly described as a seller's market, due to various factors including accumulated shortages during the war. The Woods Manufacturing Company during the years 1940 to 1945 both inclusive had made an average annual operating profit before income taxes in their Hull plant slightly in excess of $213,000. As there were available then no suitable factory buildings in Ottawa or Hull or the vicinity, and the company, if it was to continue in business, was faced with the necessity of constructing new suitable buildings on an appropriate site,

there can be no doubt in our opinion, that had the buildings now under consideration then been situated on a site one or two miles down the Ottawa River and available for purchase at the depreciated value of the buildings, plus the value of the site, the company would have purchased without hesitation. To fail to do so under such circumstances would indicate a lack of ordinary business judgment. A substantial further value to the owner is to be attributed to being permitted to remain in undisturbed possession of its property in Hull, with its added advantage of immediate proximity to an adequate labour supply.

The learned President has allowed only the bare value of the land, the lowest depreciated value placed upon the building by any witness and a portion of the proven claim for disturbance. He has declined to consider the value to the owner as distinguished from the market value or to allow 10 per cent, or any amount, for compulsory taking. We are all of opinion that on the evidence the amount awarded is clearly inadequate. The amount to which the appellant is entitled cannot be determined with mathematical accuracy. Keeping in mind the principles stated above and after a careful consideration of all the evidence we are of opinion that the amount of compensation for the property secondly expropriated inclusive of any allowance for compulsory taking should be fixed at the sum of $450,000.

There is this to be added. It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts. If the rules in question are to be accorded any further examination or review, it must come either from this Court or from the Judicial Committee.

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The appeal will be allowed with costs. The amount of compensation for the property first expropriated will be fixed at $48,880 with interest at the rate of 5 per cent per annum from the 19th of May, 1944. The amount of compensation for the property secondly expropriated will be fixed at $450,000 without interest.

Appeal allowed with costs.

Solicitors for the appellant: *Gowling, MacTavish, Watt, Osborne and Henderson.*

Solicitor for the respondent: *F. P. Varcoe.*

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* May 3, 4
* May 4

LA VILLE DE LOUISEVILLE (*Defendant*) APPELLANT;

AND

TRIANGLE LUMBER CO. (*Plaintiff*).....RESPONDENT.

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

Municipal law—Notice of action under s. 622 of the Cities and Towns Act, *R.S.Q. 1941, c. 233.—When required.*

The notice of action required by section 622 of the *Cities and Towns Act* is to be given only in the cases where the damage is the result of an accident, and not, as in the present case, where the damage results from the non-execution of an alleged contract.

City of Quebec v. *Boucher* Q.R. (1936) 60 K.B. 152 and *McConmey* v. *City of Coaticook* [1950] S.C.R. 486 referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), confirming, Marchand and Bissonnette JJ.A. dissenting, the judgment of the trial judge which had dismissed appellant's exception to the form.

André Taschereau K.C. and *J. M. Lesage K.C.* for the appellant.

Gustave Monette K.C. for the respondent.

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* PRESENT: — Rinfret, C. J. and Estey, Locke, Cartwright and Fauteux JJ.

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The judgment of the Court was delivered by

FAUTEUX J.—Poursuivie en dommages, avec le maire de la municipalité, par Triangle Lumber Company, l'appelante, la Ville de Louiseville a, pour sa part, rencontré cette action par une exception à la forme. Entre autres motifs, elle invoque que l'avis d'action reçu est, en regard des prescriptions de l'article 622 de la *Loi des Cités et Villes* la régissant, insuffisant et nul. Cette exception a été renvoyée par le juge de première instance dont le jugement a été confirmé par une décision majoritaire de la Cour du Banc du Roi siégeant en appel (1). Le présent appel est de ce dernier jugement.

Au cours de sa plaidoirie, limitée devant nous à l'insuffisance de l'avis, le savant procureur de l'appelante a été, vu la nature des faits invoqués dans la déclaration, invité par cette Cour à argumenter sur la nécessité de l'avis d'action en l'espèce. Les parties ayant été entendues sur ce point, la Cour a conclu à la non nécessité de l'avis et indiquant que les raisons écrites de ce jugement seraient données ultérieurement, a rejeté l'appel avec dépens.

Par son action, l'intimée, Triangle Lumber, allègue en substance les faits suivants: Le 28 juin 1946, un incendie éclatait en son établissement sis en la paroisse de Maskinongé, district de Trois-Rivières. Sur communication immédiate avec le département des incendies de la Ville de Louiseville, située à environ un mille du moulin de l'intimée, le gérant de la compagnie obtint la venue des membres de cette brigade. Les appareils pour combattre l'incendie étant arrivés et sur le point d'être mis en opération, le maire de la ville de Louiseville intervint et ordonna *instanter* le retour de la brigade à Louiseville. Le gérant de l'intimée dut alors se mettre en communication avec les autorités de la ville de Trois-Rivières, lesquelles envoyèrent le secours demandé. Dans l'intervalle, cependant, l'incendie et les dommages en résultant firent du progrès. Bref, et invoquant l'inexécution de l'entente arrêtée au téléphone entre son gérant et les préposés au département d'incendie de la Ville de Louiseville, la Triangle Lumber Company demande une compensation pour dommages faits à sa propriété mobilière et immobilière, aussi bien que

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pour perte de profits conséquente à la cessation des opérations pendant la période de reconstruction. Nous n'avons pas à nous prononcer sur le mérite de cette action. Il s'agit tout simplement de savoir si les dispositions de l'article 622, faisant de l'avis d'action une condition au droit d'action, sont applicables à l'espèce.

Il faut, dès maintenant, observer que les dommages réclamés ne résultent pas d'un accident et qu'en tant que l'appelante est concernée, l'action repose sur l'inexécution de l'entente intervenue entre le gérant de la compagnie et certains représentants de la ville de Louiseville. Il est à propos, même si non nécessaire ici, pour fins d'interprétation, de rappeler que les dispositions de l'article 622 sont exorbitantes du droit commun. Sur ce point, référence peut être faite à la cause de *The City of Quebec* v. *The United Typewriter Company* (1), et à la cause de *The City of Quebec* v. *Boucher* (2). Dans la première, M. le juge Brodeur à la page 246, s'exprime ainsi:

> La jurisprudence est à l'effet que ces avis constituent une exception aux règles ordinaires qui régissent les personnes dans leurs relations entre elles et, alors, ils ne doivent être donnés que dans les cas qui tombent clairement sous les dispositions du statut. *Robin* v. *Cité de Montréal* (3); *Newman* v. *Cité de Montréal* (4); *Del Sole* v. *Cité de Montréal* (5); *Québec* v. *Bastien* (6).

Dans la seconde, le présent Juge en chef de la Cour d'Appel de la province de Québec, avec la concurrence de Sir Mathias Tellier, des juges Dorion, Bond et Barclay, dit, à la page 157:

> Il faut donc interpréter strictement ces dispositions de la charte de l'appelante.

On ne saurait, tout en tenant compte des dispositions de l'article 41 de la loi concernant les statuts, S.R.Q., 1941, c. 1, étendre l'application des dispositions de l'article 622 à d'autres cas qu'à ceux qui y sont nettement pourvus.

Le paragraphe premier de cet article se lit comme suit:

> Si une personne prétend s'être infligé, *par suite d'un accident,* des *blessures corporelles,* pour lesquelles elle se propose de réclamer de la municipalité des dommages-intérêts, elle doit,.....donner un avis écrit ....., faute de quoi la municipalité n'est pas tenue à des dommages-intérêts à raison de tel accident, nonobstant toute disposition de la loi à ce contraire.

(1) (1921) 62 Can. S.C.R. 241.
(2) Q.R. (1936) 60 K.B. 152.
(3) Q.R. (1914) 54 S.C. 2.
(4) Q.R. (1912) 53 S.C. 481.
(5) Q.R. (1915) 24 K.B. 550.
(6) Q.R. (1916) 25 K.B. 539.

Il est clair que ce premier paragraphe ne vise qu'une réclamation pour blessures corporelles résultant d'un accident.

Le deuxième paragraphe:

Dans le cas de réclamation pour *dommages à la propriété mobilière ou immobilière,* un avis semblable doit aussi être donné.....faute de quoi la municipalité n'est pas tenue de payer des dommages-intérêts, nonobstant toute disposition de la loi.

Le premier paragraphe vise une réclamation pour dommages à la personne et le second une réclamation pour dommages à la propriété mobilière ou immobilière. Dans le premier paragraphe, il appert clairement que la réclamation se fonde sur un accident. Dans le second paragraphe, aucune indication n'est donnée sur la cause du dommage. En l'absence de précision et lisant le paragraphe 2 avec le paragraphe 1, il faut inférer qu'il s'agit d'un dommage causé "par suite d'un accident".

Les autres dispositions de l'article 622 confirment, je crois, la justesse de cette inférence.

Le paragraphe 4 édicte:

Le défaut de donner l'avis ci-dessus—soit l'avis requis au paragraphe 2 aussi bien qu'au paragraphe 1, le législateur ne distingue pas—ne prive pas cependant la personne victime *d'un accident* de son droit d'action, si elle prouve qu'elle a été empêchée de donner cet avis pour des raisons jugées suffisantes par le juge ou par le tribunal.

On a suggéré que l'excuse du défaut d'avis,—défaut résultant d'un cas de force majeure, par exemple,—n'est reconnue que dans le cas d'une réclamation pour dommages à la personne et non dans celui d'une réclamation pour dommages à la propriété mobilière ou immobilière. L'acceptation de cette suggestion conduirait aux résultats suivants. Ainsi, à la suite d'une collision d'automobiles, une personne subit des dommages à la personne, et subit la perte de sa voiture. On excuserait, les faits le justifiant, son défaut d'avis en ce qui concerne sa réclamation pour dommages résultant de blessures corporelles et on ne l'excuserait pas en ce qui concerne sa réclamation pour perte de sa voiture. Ou encore, un véhicule du service des incendies entre en collision avec la voiture d'un tiers et va se heurter sur l'immeuble d'un autre. Le propriétaire de l'immeuble n'apprend ce fait qu'à un retour de voyage et

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pour cette raison, ou autres jugées suffisantes par le juge, est empêché de donner l'avis en temps opportun. Comment se justifier, sans un texte clair à cet effet, de lui enlever le bénéfice de l'excuse prescrit par le législateur pour tempérer la rigueur de ces dispositions exorbitantes du droit commun.

Les dispositions du paragraphe 5 réfère encore au fait d'un accident:

> Aucune action en réclamation de dommages n'est recevable à moins qu'elle ne soit intentée dans les six mois qui suivent le jour où l'accident est arrivé, ou le jour où le droit d'action a pris naissance.

Enfin, le paragraphe 6 prescrit:

> La municipalité a un recours en garantie contre toute personne dont la faute ou la négligence a été la cause de l'accident et des dommages qui en résultent.

Le recours en garantie existe aussi bien pour tous les dommages que la municipalité peut être appelée à payer, qu'ils soient de la nature de ceux mentionnés au paragraphe 1 ou de la nature de ceux mentionnés au paragraphe 2. Les dispositions du paragraphe 6 confirment que les premiers comme les seconds résultent d'un accident.

Prises, dans leur ensemble, ces dispositions de l'article 622 ne s'appliquent donc que s'il y a eu accident, suivant l'acceptation ordinaire du mot.

La comparaison entre ces dispositions de l'article 622 et celles de l'article 623—lesquelles établissent une prescription de six mois pour réclamation de dommages résultant de délits, quasi-délits, ou d'illégalités—suggère que le champ d'application des dispositions de l'article 622 est plus restreint que celui des dispositions de l'article 623. Le premier vise bien un cas, mais pas tous les cas, de quasi-délits, comme le fait le second. Dans le premier, il faut que ce quasi-délit soit un accident, alors que, dans le second, le Législateur embrasse toutes les formes de quasi-délits. Dans la cause de *The City of Quebec* v. *United Typewriter* (1), M. le juge Mignault, à la page 251, ana-

(1) (1921) 62 Can. S.C.R. 241.

lysant la législation pertinente à cette cause, note la distinction entre le mot "accident", et l'expression "fait dommageable".

> Cette dernière expression, dit-il, est sans doute plus générale et comprendrait probablement—mais pour les fins de cete cause il n'est pas nécessaire de le décider formellement—une cause de dommages que l'on pourrait distinguer d'un pur accident.

Dans la cause de *Cité de Québec* v. *Boucher* (1), Boucher poursuivait la cité de Québec pour dommages-intérêts pour $500, pour ennuis et inconvénients provenant d'une étable appartenant à la demanderesse et des matières qu'on y laissait séjourner aux alentours. Au temps de l'action, l'article 535 de la charte de la cité de Québec était en substance, sur le point qui nous intéresse, comparable à l'article 622. La Cour d'Appel a décidé que l'avis n'était pas exigé. Et on ajoute à la page 157:

> C'est ainsi que la cité ne pourrait exiger semblable avis si elle était poursuivie en vertu d'un contrat, ou dans tous les autres cas non prévus. Aucun avis ne paraît être nécessaire lorsqu'il s'agit de délits, ou quasi-délits, ou d'illégalités mentionnés à l'article 538 de la charte.

Dans la même cause, on peut remarquer que la Cour décide aussi que, les dommages réclamés n'étant pas des dommages à la propriété immobilière, mais simplement pour ennuis causés au demandeur et à sa famille, l'avis pour réclamation pour pareils dommages n'était pas nécessaire.

Dans la cause de *McConmey* v. *City of Coaticook* (2), cette Cour n'avait pas à décider si le paragraphe 2 de l'article 622 ne visait—comme le paragraphe 1 du même article—que des dommages résultant d'un accident. Mais le jugement rendu supporte, je crois, la proposition que les deux dispositions ne s'étendent pas aux réclamations de dommages résultant de l'inexécution d'un contrat.

Les dommages réclamés de l'appelante n'ayant pas, suivant les allégations de la déclaration, été causés par suite d'un accident, mais étant plutôt le résultat de l'inexécution d'un contrat allégué, il n'y avait pas lieu pour l'intimée de donner un avis d'action à l'appelante.

(1) Q.R. (1936) 60 K.B. 152. (2) [1950] S.C.R. 486.

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Pour cette raison, tel que déjà indiqué, l'appel est renvoyé; avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *J. Miville Lesage.*

Solicitors for the respondent: *Monette, Filion, Meighen & Gourd.*

HIS MAJESTY THE KING.....APPELLANT;

AND

GORDON ROBINSON (or ROBERTSON) ..... RESPONDENT.

HIS MAJESTY THE KING.....APPELLANT;

AND

HUGH LOGAN McKENNA.....RESPONDENT.

HIS MAJESTY THE KING.....APPELLANT;

AND

GEORGE CUTHBERT.....RESPONDENT.

HIS MAJESTY THE KING.....APPELLANT;

AND

GERALD ADAM BEATTY.....RESPONDENT.

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*Feb. 13
*Apr. 24

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Criminal law—Habitual criminal—Statute—Interpretation—Words "liable to at least" in s. 575C (1) (a) of the Criminal Code—Whether indicative of maximum or minimum penalty.

The words "been convicted of an offence for which he was liable to at least five years' imprisonment" in section 575C (1) (*a*) of the *Criminal Code* describe an offence for which the maximum penalty permitted by the law is imprisonment for five years or more, and not an offence for which the law prescribes a mandatory minimum sentence of imprisonment for at least five years.

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

APPEALS from the judgment of the Court of Appeal for British Columbia (1) quashing the conviction of each of the respondents on the charge of being a habitual criminal.

H. A. Maclean K.C. for the appellant.

T. F. Hurley and R. A. Reid for the respondents.

The judgment of the Chief Justice and of Kerwin, Taschereau, Estey and Fauteux, JJ. was delivered by:

FAUTEUX J.:—The nature and the course of proceedings, eventually leading to these four separate appeals, are substantially alike in all of the cases. Each of the respondents was separately indicted on two counts: one being that, at some definite time in 1950, in the province of British Columbia, he was found in unlawful possession of drugs, under the *Opium and Narcotic Drug Act 1929* as amended, and the second one charging him to be a habitual criminal within the meaning of the provisions of Part X(A) of the *Criminal Code* of Canada. The first count—which is not relevant to the point raised in the present appeal—was either admitted by the accused or found by the jury. As to the second count, the accused pleaded not guilty but were found guilty by the jury. An appeal, subsequently lodged against the latter conviction, was unanimously maintained by the Court of Appeal of the province (2), which quashed the conviction and directed a verdict of acquittal to be entered thereon. Identical in all of the cases, the judgment rests on the interpretation of the provisions of section 575(*c*) (1) (*a*) of Part X(A). On this point, and under the authority of section 1025 of the *Criminal Code,* leave to appeal to this Court was granted to the appellant.

It was agreed by counsel of all interested parties that the argument made in the appeal of *His Majesty the King* v. *Gordon Robinson or Robertson*—the first being called for hearing—would apply in all the other cases.

The opposing contentions of the parties, which are now to be considered, may more clearly be stated once the relevant part of section 575(*c*) is quoted:

> A person shall not be found to be a habitual criminal unless the judge or jury as the case may be, finds on evidence,

(1) [1950] 2 W.W.R. 1265. (2) [1950] 2 W.W.R. 1265.

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(*a*) that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, whether any such previous conviction was before or after the commencement of this Part, and that he is leading persistently a criminal life; or

The submission of respondent, which prevailed in the Court of Appeal, rests on an argument, centered solely on the meaning of the words "at least"—twice appearing in the above provision—and purporting to implement the rule of literal interpretation. In both instances the words are said to mean "not less than". "Not less than"—it may be pointed out—is the qualifying phrase used by Parliament in relation to minimum mandatory sentences, which are few in number. Paraphrasing the relevant part of the provision, in a manner strictly consistent with the submission made, the provision would read: "A person shall not be found to be a habitual criminal unless it is found on the evidence that, since attaining the age of eighteen years, he has not less than three times, previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which the minimum mandatory punishment enacted is not less than five years' imprisonment." In this category, it may immediately be noted, there is only one offence in the *Criminal Code*. The offence is dealt with in section 449:—Stopping the mail with intent to rob.

In the appellant's view, the words "at least", in the context, mean "as much as" and the questioned part of the provision should read: ". . . . unless . . . he has . . . been convicted of an indictable offence for which he was liable or exposed to suffer as much as five years' imprisonment." Thus, it is said, that, in the context—and not detached therefrom—these words are indicative of a minimum manifestly related to the maximum number of years of imprisonment which the offender is liable or exposed to suffer as punishment. There are, in the *Criminal Code,* some one hundred and eighty indictable offences for which the offender is liable to receive as a maximum punishment a sentence of at least five years' imprisonment.

The will of Parliament is well manifested by the provisions of Part X(A) and the words "at least", when read

in the context, are, in my respectful view, quite inapt to defeat the primary as well as incidental purposes of this Part.

Part X(A) is new in our *Criminal Code*. Enacted in 1947, by section 18 of the *Criminal Code Amendment Act*, chapter 35, its provisions may be traced to Part II of the English Act assented to on December 21, 1908, being 8 Edward VII Ch. 59, the unabridged title of which is: "An Act to make better provision for the prevention of crime and for that purpose to provide for the reformation of young offenders and the prolonged detention of habitual criminals and for other purposes incidental thereto."

The primary purpose of Part X(A) is best indicated by the following underlined words of section 575(*b*):—

> Where a person is convicted of an indictable offence committed after the commencement of this Part and subsequently the offender admits that he is or is found by a jury or a judge to be a habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period and such detention is hereinafter referred to as preventive detention and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be a habitual criminal.

It is equally provided—by section 575(*g*)—that persons undergoing preventive detention may be confined in a prison or part of a prison set apart for that purpose, to be subjected to such disciplinary and reformative treatment as may be prescribed by the prison regulations. In brief, the provisions of Part X(A) are clearly directed to persons who, by reason of "criminal habits and mode of life", must, for the protection of the public, be subjected to preventive detention, for an indeterminate period. It is left to the Minister of Justice to "review the condition, history and circumstances of that person—once at least in every three years—with a view to determining whether the person should be placed out on license, and if so, on what conditions (s. 575(*h*)).

What the Legislature considers as being tantamount to "criminal habits and mode of life justifying preventive detention for the protection of the public", is indicated in the provisions of secton 575(*c*) where a minimum requirement, expressed in the form of several conditions, is estab-

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lished. Three of the conditions which must be found on the evidence, before a person can be branded and dealt with as a habitual criminal, are that:

(1) Since attaining the age of eighteen years

(2) he has, at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence

(3) that is, not any indictable offence but an indictable offence for the commission of which the offender is liable to at least five years' imprisonment.

The corresponding section in the English Act is section 10, which, in substance, prescribes that:

(1) Since attaining the age of sixteen

(2) he has, at least three times previously to the conviction of the crime charged in the indictment, been convicted of a crime.

(3) which, according to ss. 6 of section 10, comes within the definition of a crime as precised under the *Prevention of Crimes Act, 1871.*

Thus, and under both Acts, it is not the repeated commission of all kinds of offences which may cause an offender to be found a habitual criminal. It is only the repeated commission of such offences which are therein indicated. While such indication is, under section 20 of the *Prevention of Crimes Act, 1871,* achieved by various ways, only one method to that end is used in Part X(A). The offences are not identified by names or by reference to sections describing them, but by the measure of punishment or, more precisely, by the maximum punishment which the offender is exposed to suffer. And only those crimes for which the authorized maximum punishment is at least five years' imprisonment come within the purview of Part X(A). Again, in such category, there are, in the *Criminal Code,* some one hundred and eighty crimes while there is only the crime described in section 449 for which the minimum mandatory sentence prescribed is five years' imprisonment. If the appellant's submission is right, these one hundred and eighty indictable offences are within the purview of Part X(A) which may then, and for that reason, receive as general an application as the generality

of the above quoted provisions suggest it should. If, on the contrary, the submission of the respondents is accepted, Part X(A) is inapplicable in the case of these one hundred and eighty indictable offences and applicable only to the one indictable offence defined in section 449.

That Parliament would have, in 1947, enacted all the provisions of Part X(A), and would further, by incorporating it in the *Criminal Code,* have extended—by force of section 28 of the *Interpretation Act*—its application to other federal statutes where indictable offences are created, with the sole object of dealing exclusively with the now uncommon offence of stopping the mail with intent to rob or search, is clearly untenable.

Can the intent of Parliament, manifested by the above quoted provisions, be defeated on the alleged ground of ambiguity or intractability of the language adopted by Parliament in the following phrase of subsection (1) (*a*) of section 575(*c*) "for which he was liable to at least five years' imprisonment"?

"It is quite true", says one of the learned members of the Court of Appeal, "that when one reads the subsection for the first time, the effect of the intractability of the language may not be at once apparent; the dominant impression may be that it simply excludes from its operation offences which do not merit imprisonment for five years or more. But a check on this thinking reveals one cannot fix a maximum of this kind if there is no minimum; the point at which the maximum starts automatically fixes the minimum." With this line of reasoning one cannot disagree provided, in my respectful view, both the minimum and the maximum are related to the same type of sentence. However that may be, this reasoning does not solve the question for, in the appellant's submission, the phrase "for which he was liable to at least five years' imprisonment" is related to the first kind of sentence above indicated and means "for which the authorized discretionary sentence is at least five years" while, in the respondents' view, it refers to the second kind of sentence and means "for which the mandatory sentence is at least five years". It thus becomes apparent that the controlling word in the phrase is really the word "liable", and that the meaning of this word, in the ordinary language as well as under the Code, must

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then be ascertained to decide the issue. Of the various imports ascribed to the word "liable" in The Oxford English Dictionary, vol. VI, p. 234, the following are indicated: "Exposed, or subject to, or likely to suffer". Under the *Code*, the provisions of section 1054 make it clear that Parliament has given to the word "liable" a like practical significance. For this section reads:

> Every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for any shorter term: Provided that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted.

The opening words of this section: "Every one who is liable . . ." are clearly in reference to similar words used by Parliament in the pattern generally followed in the prescription of punishment, as illustrated in the following section:

> Every one is guilty of an indictable offence and liable to seven years' imprisonment who breaks and enters any place of public worship, with intent to commit any indictable offence therein.

(s. 456).

The words "liable to seven years' imprisonment" in section 456, read in the light of the provisions of section 1054, necessarily indicate an authorized but not a mandatory term of imprisonment. And the words "for which he was liable . . .", in the new enactment—section 575(*c*)—can only be related to similar words used in the general pattern and must, thus, be presumed to be understood in the same sense. The fact that the opposite view would entirely defeat what the above quoted provisions of Part X(A) indicate as its clear object, is no reason to nullify the presumption. That the word "liable" appears in few provisions—some ten sections under the Code—where, by exception, a mandatory term is prescribed, is of no avail as an argument against the above conclusion, for the word "liable", in its proper sense, is there equally related to the maximum authorized sentence to which the minimum mandatory term is attached. It is also of some significance that in section 263, dealing with the predetermined mandatory punishment for murder, the word "liable" is not used.

In my respectful view, the submission of the respondents cannot rest, as alleged, on the rule of literal construction.

As to the application of the narrow construction doctrine, in the construction of penal statutes, this may be said. The matter, in England, is deal with in Maxwell on Interpretation of Statutes, 9th Edition, 1946, p. 267, in the following terms:

> The rule which requires that penal and some other statutes shall be construed strictly was more rigorously applied in former times when the number of capital offences was very large (a), when it was still punishable with death to cut down a cherry-tree in an orchard, or to be seen for a month in the company of gipsies (b), or for a soldier or sailor to beg and wander without a pass. Invoked in the majority of cases *in favorem vitae,* it has lost much of its force and importance in recent times, and it is now recognized that the paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object.

In Canada, section 15 of the *Interpretation Act* disposes of all discussion in the premises. This section, by force of section 2, extends and applies to the Criminal Code and the following words in section 15 "or to prevent or punish the doing of anything which it deems contrary to the public good" make it clear that its provisions embrace penal as well as civil statutory provisions in any Canadian statute except if there is inconsistency or a declaration of inapplicability.

The appeal of His Majesty against each of the four respondents should be maintained, and the judgment of the Court of Appeal should be quashed. This conclusion, however, does not bring these cases to an end, for there were, before the Court of Appeal, other points besides the one discussed herein on which the respondents are entitled to have an adjudication. Adopting the course followed in *The King* v. *Deur* (1), and *The King* v. *Boak* (2), the cases should be remitted to the Court of Appeal for British Columbia in order that it may pass upon these other grounds of appeal.

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

LOCKE J.:—The contention of the Crown is that while the words "at least", where they first appear in subsection (a) of section 575C(1) of the *Criminal Code,* are to be construed as meaning "not less than", where they again appear following the words "liable to", they are to be

(1) [1944] S.C.R. 435. (2) [1925] S.C.R. 525.

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taken as meaning "as much as". Thus, if the respondents were shown to have been convicted three times or more of criminal offences for which the maximum permissible punishment was five years' imprisonment or more, this condition of the section would be complied with. The Court of Appeal (1), has unanimously rejected this contention, the learned judges all being of the opinion that in the context the expression should be construed, where used for the second time, in the same manner as when first used.

Since no mention is made of section 15 of the *Interpretation Act*, R.S.C. 1927, c. 1, in the reasons for the judgment appealed from or in the factum of either party, I judge that it was not argued in the Court of Appeal that the rules of statutory construction prescribed by that section were to be applied. Mr. Justice O'Halloran refers to the common law rules of construction but, while the result may not be affected, I am of the opinion that it is to the statute we must look. Section 15 reads:

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

This section appears to have had its origin in section 5 of c. 10, Statutes of Canada 1849 which was, with minor differences which do not affect the meaning, expressed in the same terms. It was reproduced in substantially the same form in section 6 of c. 5 Consolidated Statutes of Canada 1859 and appeared as the 39th paragraph of section 7 of the *Interpretation Act*, passed at the First Session of the Parliament of Canada in 1867, and has been continued in language identical in meaning up to the present time. Section 3 of the Act as passed in 1867 provided that section 7 and each provision thereof should extend and apply to every Act passed in the session held in that year and in any future session of the Parliament of Canada, except in so far as the provision was inconsistent with the intent and object of the Act or the interpretation which

(1) [1950] 2 W.W.R. 1265.

such provision would give to any word, expression or clause inconsistent with the context and except in so far as any provision thereof in any such Act is declared not applicable thereto. Section 2 of the *Interpretation Act*, R.S.C. 1886, c. 1, declared that the Act and every provision thereof should extend and apply to every Act of the Parliament of Canada then or thereafter passed, with the like exceptions, and the legislation was in this state when the *Criminal Code* was first enacted in 1892. Section 2 of the present Act is in like terms and its application does not, in my opinion, restrict in any way the application of section 15 to the language here to be construed.

Section 15 appears to me to be substantially a restatement of the rules for the construction of statutes contained in the Resolutions of the Barons in *Heydon's Case* (1). While in *Attorney General* v. *Sillem* (2), Pollock, C.B. said (p. 509) said that the rules of construction there stated were not to be applied to a criminal statute which creates a new offence, this argument is not available here to the respondents since the matter has been dealt with by statute. The offence of being a habitual criminal is new to our law. Clearly the language employed in defining it is capable of the construction contended for by the respondents. This, if adopted, would lead to the result that, unless the three offences or more proven against them were such that the minimum permissible punishment was five years' imprisonment, they were entitled to be acquitted. *In re National Savings Bank Association* (3), Turner, L.J. dealing with the construction of a clause in the *Companies Act 1862*, said that he did not consider it would be consistent with the law or with the course of the Court to put a different construction upon the same words in different parts of an Act of Parliament, without finding some very clear reason for doing so. There are dicta to the same effect by Cleasby, B. in *Courtauld* v. *Legh* (4), and by Chitty, J. in *Spencer* v. *Metropolitan Board of Works* (5). In the present matter the clear indication that the words "at least" are to be construed as meaning something else than "not less than", where used the second time, must be

(1) (1584) 3 Co. Rep. 7(*a*).
(2) (1863) 2 H. & C. 431.
(3) (1866) L.R. 1 Ch. 547 at 549.
(4) (1869) L.R. 4 Ex. 126 at 130.
(5) 22 Ch. Div. 142, 148.

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found if at all in their association with the word "liable" and it is really the sense in which the latter word is to be understood in the context that determines the matter.

In my opinion, the requirement that statutes and their provisions are to be deemed remedial and that they shall accordingly receive "such fair, large and liberal construction and interpretation" as will best ensure the attainment of the object of the Act does not mean that the object of the Act is not to be clearly manifest from the language employed. The object of these amendments to the *Criminal Code* is to be ascertained by determining the identity of the persons against whom they are directed. In accordance with the canons for the interpretation of statutes the Act as a whole may be examined as an aid to the construction of the language of the amending sections. As appears from section 575B the legislation is designed for the protection of the public against the danger inherent in permitting habitual criminals being at large. While in sections 122, 364, 377, 449, 510A, 542 and 1054A, minimum terms of imprisonment are provided for the offences defined, in but one of these, section 449, is the minimum permissible term five years, and in none other is it more than this. In sections 122, 364, 449 and 510A the language is that the guilty person is "liable to imprisonment for a term not less than." In 14 sections of the *Code* where the prescribed punishment is or includes a fine and a minimum is prescribed the words used are also "not less than." In none of the sections is the minimum permissible term of imprisonment or fine expressed by employing the expression "at least". Where, however, only the maximum punishment by way of imprisonment which may be imposed is to be expressed, this has been done in at least 260 other sections of the *Code* by saying that the guilty person is "liable to" a penalty, leaving it to the operation of section 1054, which provides that anyone liable to imprisonment for life or any other term may be sentenced to imprisonment for any shorter term except where a minimum term is prescribed, to enable the Court to impose imprisonment for any lesser term. While in some 35 other sections of the *Code* the maximum term of imprisonment is defined by saying that it shall be for a term

"not exceeding" or "not more than" a stated period, this appears unnecessary in view of the provisions of section 1054.

The persons to whom the habitual criminal sections of the *Criminal Code* are applicable are, if the respondents' contention be accepted, only those who have on three occasions or more been convicted of offences against section 449, dealing with the offence of stopping a mail with intent to rob or search the same, and presumably such other offences for which there may hereafter be prescribed a minimum term of five years' imprisonment. Construing the subsection in the manner contended for by the Crown means that conviction on three or more occasions of any of the many other offences described in the *Code* for which the maximum imprisonment might be five years or more would comply with the subsection. The language of section 575B is that where a person is convicted of an indictable offence committed after the commencement of the Part and subsequently admits that he is, or is found by a jury or a judge, to be a habitual criminal:

> the Court, if it is of the opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period.

It is habitual criminals as a class against whom the public are to be protected. The words "liable to", with the noted exceptions, being used throughout the *Code* to indicate the maximum sentences which may be imposed, the expression "liable to at least" in subsection 575C(1), in my opinion, conveys, and was intended to convey, the meaning contended for by the Crown. It is inconceivable to me that these new sections of the *Code* were directed against the very limited class of criminals who would be affected if the respondents' contention were correct. We are required by section 15 to interpret the subsection in such manner as will best ensure the attainment of its object according to its true intent, meaning and spirit, and to construe this language in this manner is, in my judgment, not to legislate but to comply with the directions of the statute.

I would allow these appeals and refer each case back to the Court of Appeal, in order that the other grounds of appeal raised before that Court may be there dealt with.

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Cartwright J.

CARTWRIGHT J.—The only question raised on this appeal is as to the proper interpretation of section 575C of the *Criminal Code*. This section is found in Part XA dealing with habitual criminals which was added to the *Code* in 1947 by 11 Geo. VI, c. 55, section 18.

The section, so far as it is relevant to this appeal, reads as follows:

> 575C. (1) A person shall not be found to be a habitual criminal unless the judge or jury as the case may be, finds on evidence,
>
> (*a*) that since attaining the age of eighteen years, he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, whether any such previous conviction was before or after the commencement of this Part, and that he is leading persistently a criminal life; or . . .

The controversy is as to the proper construction of the words "been convicted of an offence for which he was liable to at least five years' imprisonment."

The respondent submits that these words, construed in their ordinary and natural meaning, describe an indictable offence as punishment for which the law prescribes a mandatory minimum sentence of imprisonment for at least five years. The appellant submits that they describe an indictable offence as punishment for which the maximum penalty permitted by the law is imprisonment for five years or more.

The solution of the question depends upon the meaning to be given to the words "liable to". Their ordinary and natural meaning is, I think, "exposed to". The intention of Parliament as disclosed in the words of the section seems to me to be to describe a class of indictable offences, and to require as one of the conditions of a person being found to be a habitual criminal that he shall at least three times have been convicted of an offence comprised in such class. The offences of which the class is composed are described by reference to the penalty which the law permits to be inflicted on a person convicted thereof, that is to say, the penalty to which he is exposed, which he runs the risk of suffering, which he is subject to the possibility of undergoing, not the penalty which he must suffer. Every indictable offence on conviction of which a person may lawfully is the permissible maximum and not a mandatory minimum. be sentenced to five years imprisonment or more is, I think,

included in the class described and every indictable offence on conviction of which a person may not lawfully be sentenced to so long a term of imprisonment as five years is, I think, excluded.

Expressing my view in different words, I think that the question an affirmative answer to which will determine that a particular indictable offence falls within the class described is: Does the law permit (not does the law require) the imposition on a person guilty of such offence of a term of imprisonment of as much as or more than five years?

The meaning which I ascribe to the word "liable" is given in the Oxford English Dictionary (1933) Volume VI, page 235. In Black's Law Dictionary, 3rd Edition (1933), page 1103, the meaning given is: "Exposed or subject to a given contingency, risk or casualty which is more or less probable". In *In re Soltau's Trusts* (1), North J. agreeing with a decision of Stirling J. in an earlier case held that the expression "is liable to be laid out in the purchase of land" does not mean "has to be laid out in the purchase of land" but means "subject to some disposition under which it may be laid out in the purchase of land".

If the words of the section only were to be considered it would be my view that their natural meaning is that attributed to them by the appellant. We are not, however, limited to a consideration of the words of the section. In order to ascertain the intention of Parliament we must construe the statute as a whole and not one part only by itself. The great majority of the sections in the Criminal Code which define indictable offences and prescribe the penalties therefor are in the following form: "Every one is guilty of an indictable offence and liable to——years' imprisonment who . . .". Section 1054 of the *Code* provides as follows:

> 1054. Every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for any shorter term: Provided that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted.

In my opinion a consideration of such sections strengthens the view that the words "liable to" followed by a stated term of years' imprisonment mean that such term In so far as Parliament may be said to grade offences, in the Criminal Code, according to their seriousness it does

(1) (1893) 2 Ch. 629.

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so by fixing for each a permissible maximum sentence leaving it within the power and discretion of the Court, before which a person is convicted, to impose such lesser sentence as the particular circumstances may warrant, subject in the case of a few offences to a prescribed minimum. The words with which we are concerned appear to me to mean that no person shall be found to be a habitual criminal unless proved to have been convicted at least three times of an offence so serious that the permissible maximum sentence therefor is at least five years' imprisonment. They set a minimum in the field of permissible maxima.

It will next be observed that the *Code* contains only one offence, that described in section 449, for which a mandatory minimum sentence of as much as five years' imprisonment is prescribed. The words of a statute must be construed so as to give the statute a sensible meaning if possible. Here the construction for which the appellant contends gives the statute a sensible and effective meaning while that for which the respondent argues would render Part XA without effect.

In my opinion if the words of an enactment which is relied upon as creating a new offence are ambiguous, the ambiguity must be resolved in favour of the liberty of the subject, but whether or not such ambiguity exists is to be determined after calling in aid the rules of construction. I have reached the conclusion that the words of the section construed with the aid of the applicable rules, mentioned above, leave no room for doubt as to the intention of Parliament, and that such intention is that for which the appellant contends.

I would allow this appeal and those in the cases of *His Majesty the King* v. *McKenna*, *His Majesty the King* v. *Cuthbert* and *His Majesty the King* v. *Beatty* which it was agreed should abide its result and refer each case back to the Court of Appeal so that the other grounds of appeal, raised in that Court, may be dealt with.

Appeals allowed.

Solicitor for the appellant: *H. A. MacLean.*

Solicitor for the respondents: *T. F. Hurley.*

L. T. WELCH .....APPELLANT; 1951

AND *Feb. 12, 13 *Apr. 24

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Criminal law—Having instruments for making bill paper—Whether the manufacturing of paper is necessary—S. 471 (a) of the Criminal Code.

The having in one's possession without lawful excuse instruments enabling one to fashion or change a piece of white paper to resemble Bank of America's bill paper, is an offence within the meaning of section 471 (*a*) of the *Criminal Code.*

APPEAL from the judgment of the Court of Appeal for British Columbia dismissing appellant's appeal from his conviction at trial before a jury on a charge of having had in his possession instruments for making paper intended to resemble the bill paper of the Bank of America, contrary to s. 471 (*a*) of the *Criminal Code.*

J. Stevenson Hall for the appellant.

H. A. Maclean K.C. for the respondent.

The judgment of the Chief Justice and of Taschereau, Estey and Fauteux, JJ. was delivered by:

ESTEY J.:—The appellant was convicted of having in his "possession instruments for making paper intended to resemble the bill paper of a body corporate carrying on the business of banking, to wit, the Bank of America," contrary to the provisions of s. 471(*a*) of the *Criminal Code.* He was unsuccessful in his appeal to the Court of Appeal in British Columbia and obtained leave, under s. 1025 of the *Criminal Code,* to appeal to this Court.

The instruments in his possession enabled the accused to take a piece of white paper and make it into a Bank of America traveller's cheque. Counsel for the accused submits that such instruments are not included in s. 471(*a*). He would construe this subsection to include only those instruments which can be used for the manufacture of the bill paper from its original ingredients and not, therefore,

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

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to include the making of a piece of white paper into a bill paper intended to resemble the bill paper of the Bank of America. S. 471(*a*) reads:

> 471. Everyone is guilty of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse, the proof whereof shall lie on him,
>
> (*a*) makes, begins to make, uses or knowingly has in his possession, any machinery or instrument or material for making exchequer bill paper, revenue paper or paper intended to resemble the bill paper of any firm or body corporate, or person carrying on the business of banking;

The foregoing s. 471 follows in the statute immediately after those dealing with the offence of forgery and is included with those sections under the heading "Forgery and Preparation Therefor." It is specifically directed against the preparation for a forged bill and makes it an offence to be in possession of instruments, without lawful authority or excuse, that may be used "for making . . . paper intended to resemble the bill paper of any firm or body corporate, or person carrying on the business of banking."

While "exchequer bill paper" is defined in s. 335(*k*), bill paper generally, or that of a firm or body corporate or person carrying on the business of banking, is not defined, no doubt because each of these bodies selects its own particular bill paper. The Bank of America, in making its traveller's cheques, used specially designed paper. The acquisition or making of paper to resemble the bill paper of the Bank of America would be a step toward, or in preparation of, a completed forgery of its traveller's cheques. The accused was found to have in his possession instruments with which he fashioned or changed a piece of white paper, by impressions or other means, with intent that it would resemble the bill paper upon which these traveller's cheques were made. It is the possession of such instruments without lawful authority or excuse that the section makes an offence.

The submission that, because the instruments which were in the possession of the accused could not manufacture bill paper which would resemble that of the Bank of America from its original ingredients, but could only fashion or change white paper as already indicated, the accused, in having them in his possession without lawful excuse,

had not committed an offence contrary to s. 471(*a*) is not tenable. The words "making" and "manufacturing" are sometimes used synonymously. The word "making" is, however, a wider term and somewhat more inclusive. The mere physical fashioning or changing of a given commodity might, in some circumstances, be described as manufacturing, but, in any event, it is a making. The instruments in the possession of the accused enabled him to do just that. He fashioned or changed the white paper with these instruments and made it into that which he intended would resemble the bill paper of the Bank of America. The language of this section cannot be given the narrow construction suggested by counsel for the accused.

Counsel for the accused supported his suggested construction of s. 471(*a*) by reference to a number of cases which were decided under the language of particular statutes and which, therefore, do not materially assist in the construction of the section here in question. In one of the more recent, *Gamble* v. *Jordan* (1), the accused was charged with having flock in his possession "for the purpose of making" certain articles. He had received from his sister a mattress, the seams of which he had opened, and "removed the flock with the intention of putting it back in the same covering." It was held that the accused was neither making nor manufacturing a mattress. In the language of Avory J., at p. 153:

> In one sense a new mattress may be made out of a secondhand one; new covering may be put upon old stuffing, or an old cover may be stuffed with new flock. Those are not the operations in question.

The accused, in the case at bar, was fashioning or changing a piece of white paper into a paper to be used for an entirely new and different purpose and without the additions he made it could not be so used. The white paper had to be changed or fashioned; in a word, it had to be made to serve that new purpose.

Counsel for the accused referred to ss. 14, 15, 16 and 20 of the *Forgery Act*, R.S.C. 1886, c. 165. No doubt these were present to the mind of Parliament when it enacted s. 471(*a*) (or rather its predecessor s. 434(*a*) in the *Criminal Code* of 1892 R.S.C., c. 29), which is entirely different in its language and much wider in its scope. The foregoing

(1) [1913] 3 K.B. 149.

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sections were drafted in more detail and in that sense are limited in their application and no doubt more favourable to the contention of counsel for the accused. It is not, however, from a construction of the language of those sections but rather that of s. 471(*a*) that the submission of counsel on behalf of the accused must be determined. The language of that section sets forth a clear intention on the part of Parliament to make that which the accused here did an offence.

The appeal should be dismissed.

LOCKE J.:—I am of the opinion that this appeal should be dismissed for the reasons given by Mr. Justice O'Halloran in delivering the judgment of the Court of Appeal.

Appeal dismissed.

Solicitor for the appellant: *H. T. Fitzsimmons.*

Solicitor for the respondent: *Eric Pepler.*

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*Mar. 5
*Apr. 13

HONORÉ ALAIN (*Defendant*).....APPELLANT;

AND

ÉMILE HARDY (*Plaintiff*).....RESPONDENT.

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

Minor—Automobile—Truck borrowed from father with permission—Collision—Whether father liable—Application of 1054 of the Civil Code—Meaning of expression "unable to prevent the damage" in 1054—Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53.

Appellant's son, a minor of twenty and one-half years, borrowed his father's truck with his permission and collided with a stationary automobile injuring one of its occupants. Both father and son were sued. The action was maintained against the son, who did not appeal, but dismissed against the father. In the Court of Appeal, plaintiff succeeded in having the father condemned jointly and severally with the son.

Held: The action against the father should be dismissed since he rebutted the presumption of Art. 1054 of the *Civil Code* by proving that his son was an experienced driver, that he had given him a good education

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

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and had properly supervised him, thus establishing that in lending him the truck he acted prudently and committed no fault. The presumption of s. 53 of the *Motor Vehicles Act* was also destroyed by the evidence as to the competency of the son as a driver.

Held further, that following the principle enunciated in *City of Montreal* v. *Watt and Scott*, the father did not have to establish that it was physically impossible for him to prevent the damage (i.e., force majeure), but that he was unable to prevent it by reasonable means (i.e., that there was absence of fault on his part).

Per Kerwin, Taschereau, Rand and Fauteux JJ.: This action could not be based on the fact that the damage was caused by a thing under the father's care since the cause of the accident was the intervention of some human agency; nor could it be based on any master and servant relationship since the son was not acting in his father's interest.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the trial judge and holding that the father appellant was jointly and severally liable with his son for the damage caused by the son while driving his father's truck with his permission during a pleasure ride.

W. Desjardins K.C. for the appellant.

J. Turgeon K.C. for the respondent.

The CHIEF JUSTICE:—L'intimé, en sa qualité de curateur à sa fille, Blandine Hardy, interdite pour démence, a poursuivi l'appelant Honoré Alain et son fils, Dorillas Alain, leur réclamant des dommages, à raison du fait que le 14 juin 1947, dans la soirée, à Cap Santé, dans le comté de Portneuf, alors qu'une automobile, appartenant à son beau-frère, dans laquelle était assise Blandine Hardy, fut frappée avec violence par le camion de l'appelant Honoré Alain, conduit par son fils Dorillas. Le fils était tout près de sa majorité; il avait au-delà de vingt ans et demi. Il était devenu majeur au moment où la cause a été instruite. Il possédait un permis comme chauffeur, après avoir passé des examens.

L'enquête au procès démontra qu'il pleuvait abondamment ce soir-là, ce qui causait une certaine brume ou buée. Le camion se dirigeait dans le même sens que la

(1) Q.R. [1950] K.B. 582.

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voiture où se trouvait mademoiselle Hardy et les lumières rouges, à l'arrière de cette voiture, fonctionnaient au moment de la collision. Cette voiture était stationnaire.

Le juge de première instance fut d'avis qu'il n'y avait aucune explication du fait que le chauffeur du camion avait frappé cette auto comme il le fit, car, dit-il, elle "devait être bien visible dans le rayon de ses phares". Il trouva donc le fils Dorillas responsable de l'accident et des dommages qui en sont résultés.

Il n'y a pas eu d'appel de ce jugement de la part de Dorillas Alain, mais l'action contre le père, Honoré Alain, fut rejetée. Le jugement, en ce qui le concerne, déclare que le soir en question il avait "prêté son camion à son fils, qui en avait le contrôle absolu et qu'à ce moment, le fils n'était pas le préposé du père". Le jugement ajoute que "le défendeur Dorillas était près de sa majorité, d'assez longue expérience, était un chauffeur compétent, avait son permis de conduire après avoir passé les examens spéciaux requis par la loi" et que, dans ces circonstances, "Honoré Alain n'était aucunement responsable de l'accident".

La Cour du Banc du Roi (en appel) (1) infirma ce jugement. Interprétant la preuve comme ayant établi que l'habitude entre le père et le fils était de laisser ce dernier "prendre le soir le camion pour son usage et son plaisir personnels en toute liberté, sans demande spéciale, et sans avertir de l'usage qu'il en voulait faire", elle fut d'avis qu'il y avait erreur dans le jugement de la Cour Supérieure à l'effet que le camion avait été prêté par l'intimé à son fils et que la garde en avait été transférée à celui-ci. Elle appliqua donc au père, le présent appelant, l'article 1054 du *Code Civil* et le condamna à payer à l'intimé la somme de $7,287.87 "conjointement et solidairement avec son co-défendeur déjà condamné".

Quatre des juges de la Cour du Banc du Roi ont seuls écrit des notes à l'appui du jugement de cette Cour, et, en somme, le tribunal d'appel s'est rallié aux raisons exposées par l'honorable juge Marchand. C'est lui qui a rédigé le jugement formel et c'est dans les notes qu'il a fournies que l'on doit trouver les motifs de la Cour d'Appel pour infirmer le jugement de la Cour Supérieure.

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L'honorable juge Marchand déclare que la carence par le fils d'écarter la prescription de l'article 53 de la *Loi des véhicules moteurs* constitue sur ce point "chose jugée pour l'un et l'autre"; ce qui doit s'interpréter, évidemment, comme signifiant que ce qui a été jugé contre le fils doit être tenu pour chose jugée contre le père. Il y a lieu de s'en étonner puisque le père, en premier lieu, a bénéficié d'un jugement de première instance qui a débouté l'action à son égard, et, en second lieu, puisque l'intimé Hardy lui-même en a appelé de ce jugement à l'égard du père. Il ne saurait y avoir chose jugée dans une affaire qui est portée en appel.

Pour la responsabilité du père, l'honorable juge Marchand examine la portée de l'article 1054 du *Code Civil* et celle de l'article 53 de la *Loi des véhicules moteurs*. Au sujet du premier article, il fait remarquer que les parents "ne peuvent échapper à cette responsabilité qu'en prouvant leur impossibilité d'empêcher la commission" des fautes des enfants. Sur ce point, il mentionne que Dorillas, lors de l'accident, était mineur, bien qu'approchant sa vingt-et-unième année. "Il travaillait avec son père à livrer de porte en porte de la glace pour usage domestique. Depuis l'âge de quatorze ans, alors qu'il avait quitté l'école, il s'était habitué à la manœuvre du camion qui servait à ce travail. Il avait, l'année précédente, obtenu un permis de conducteur. Il ne semble pas avoir causé à ses parents d'inquiétudes particulières. Il n'était pas adonné à l'usage des liqueurs enivrantes. Dans son travail, en ville, il paraît avoir été assidu et prudent... il avait l'habitude de se servir du camion pour son usage et son plaisir personnels, une fois sa journée de travail faite... il le prenait, en se contentant de dire à son père qu'il partait dans la voiture. Il ne se souciait pas de lui en demander la permission; il avait sa propre clef d'allumage; il ne s'astreignait pas, il n'était pas astreint à dire où il allait, sur quelles routes, avec qui, le temps qu'il passerait. C'est dans une indépendance complète, sans contrôle aucun, qu'il se servait ainsi de la voiture pour son plaisir".

L'honorable juge Marchand en conclut qu'ayant donné à son fils la liberté de se servir du camion à sa guise, pour son plaisir, le père s'est trouvé dans l'impossibilité de

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rapporter une preuve satisfaisante qu'il n'avait pu empêcher l'accident et qu'il "doit être tenu solidairement responsable des dommages causés par le quasi-délit de son fils". C'est là la raison de base du jugement de la Cour d'Appel.

L'enquête a établi, sans contradiction, que le soir de l'accident le fils avait demandé à son père l'autorisation de se servir du camion (Case p. 107, ligne 32).

En pareil cas, le prêteur ne peut être tenu responsable de la faute de l'emprunteur que s'il a omis de prendre les précautions nécessaires pour se renseigner sur l'habileté de l'emprunteur et ses connaissances comme chauffeur d'automobile. (*O'Connor* v. *Wray* (1)). Or, ici, il ne peut y avoir le moindre doute sur les capacités du fils comme chauffeur. Il conduisait le même camion depuis trois ans, dans les rues de la Cité de Québec, pour y faire la livraison de la glace pour le compte de son père. Il est évident qu'il avait donc une grande expérience, plus que suffisante, pour que son père ne commit aucune imprudence en lui prêtant le camion. A cela, il suffit d'ajouter le témoignage rendu au fils dans le jugement même de la Cour d'Appel, tel qu'exprimé dans les notes de l'honorable juge Marchand. En plus, le dossier permet également de décider que, ainsi que d'ailleurs le père l'avait allégué dans sa plaidoirie écrite, il avait donné à son fils une "excellente éducation et une bonne instruction"—ce qui est implicitement confirmé dans ce que dit lui-même l'honorable juge Marchand: "Il n'était pas adonné à l'usage des liqueurs enivrantes. Dans son travail, en ville, il paraît avoir été assidu et prudent". Et, un peu avant: "Depuis l'âge de quatorze ans, alors qu'il avait quitté l'école, il (le fils) s'était habitué à la manœuvre du camion qui servait à ce travail".

En tenant compte de cette situation, il me paraît impossible de décider que le père avait été imprudent en permettant à son fils de se servir du camion.

D'autre part, pour disposer de l'application de l'article 53 de la *Loi des véhicules moteurs,* il me paraît suffisant de référer à la décision de cette Cour dans la cause de *O'Connor* v. *Wray,* ci-haut citée.

(1) [1930] S.C.R. 231.

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Et maintenant, pour en arriver à l'application de l'article 1054 du *Code Civil*, dont la Cour du Banc du Roi s'est inspirée pour maintenir contre le père l'appel du présent intimé, je crois devoir me contenter de référer à *Mazeaud*, Traité théorique et pratique de la Responsabilité civile, 4e éd., Tome I, p. 719 au n° 777:

777. Une question qui se pose souvent devant les tribunaux est celle de savoir si l'autorisation donnée par les parents à l'enfant d'accomplir un acte déterminé peut être retenue comme constituant un défaut de surveillance, et, par suite, empêcher les parents de se soustraire à l'article 1384.

Il va de soi que, si les parents ont autorisé un acte répréhensible, leur responsabilité est engagée: c'est le cas des parents qui laissent leur enfant conduire une automobile ou une motocyclette sans être muni du permis de conduire, chasser sans permis.

Il est encore certain que, si l'acte autorisé est un acte particulièrement dangereux, étant donnés les circonstances et notamment l'âge de l'enfant, l'autorisation est fautive: telle l'autorisation accordée à un enfant de 7 ans de jouer avec des allumettes-tisons.

Mais la question est plus délicate lorsque l'acte permis à l'enfant n'a pas un caractère dangereux aussi marqué: par exemple, autorisation de circuler en bicyclette, en motocyclette ou en automobile avec un permis de conduire, de chasser avec un permis de chasse, de se livrer à un sport violent. Si l'on oblige les parents, pour s'exonérer, à prouver la force majeure, il faut, dans tous les cas, engager leur responsabilité; ils avaient en effet un moyen d'éviter le dommage: refuser leur autorisation. Mais on doit se contenter de la preuve de l'absence de faute. Le problème consiste donc à se demander si les parents ont commis une imprudence, un défaut de surveillance, en donnant l'autorisation. On voit alors qu'il n'y a pas de réponse absolue. Tout dépendra des circonstances de fait dans chaque affaire; on tiendra compte notamment du caractère de l'enfant, de son âge. Il n'est pas douteux que l'évolution du milieu social joue ici un grand rôle: il y a quelques années, les tribunaux considéraient que permettre à un enfant de monter en bicyclette était toujours une imprudence; aujourd'hui, cette opinion paraît excessive et nous approuvons pleinement la décision rendue le 13 octobre 1926 par le Tribunal fédéral suisse qui, après avoir rappelé qu'on doit tenir compte "des circonstances particulières de la cause . . . se fonder, avant tout, sur les usages, sur les nécessités de la vie, de même que sur l'âge et sur le caractère de celui qui dépend de l'autorité du chef de famille", décide qu'on ne peut attendre d'un père, lorsque son fils a "atteint un âge qui, dans le milieu où il vit, équivaut virtuellement à l'âge de la majorité . . . qu'il exerce sur ce fils une surveillance telle qu'il doive l'empêcher d'essayer la motocyclette d'un ami". En un mot, il faut rechercher s'il y a eu ou non absence de faute et pour cela comparer la conduite des parents à celle d'une personne prudente.

Je me rallie entièrement à cet exposé de la doctrine, et, comme le juge de première instance, je n'ai pu trouver chez l'appelant aucune faute ou aucune négligence de nature à entraîner sa responsabilité. Il me paraît évident

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que le fils rencontrait toutes les conditions raisonnablement exigibles pour que le père fut justifié de lui permettre de se servir du camion, et que sa conduite était parfaitement celle "d'une personne prudente", pour employer l'expression de Mazeaud.

En théorie, ce fils était encore mineur, mais il était sur le point de devenir majeur. Quelques mois de plus et l'article 1054 C.C. n'eut pu être invoqué contre le père. C'est là un élément qui, sans être suffisant pour écarter la responsabilité légale du père, telle qu'elle est édictée dans cet article 1054 C.C., doit tout de même entrer en ligne de compte pour savoir si le père doit bénéficier de la clause d'exonération de cet article.

Ici, le père me paraît avoir établi toutes les circonstances qui, suivant une jurisprudence généralement admise, le libère de l'application de l'article 1054 C.C.

Je maintiendrais donc l'appel, avec dépens, tant dans cette Cour que dans la Cour du Banc du Roi (en appel), et je rétablirais le jugement de la Cour Supérieure.

KERWIN J.:—I agree with the Chief Justice and Mr. Justice Taschereau.

TASCHEREAU J.:—Le demandeur Émile Hardy a été nommé curateur à sa fille majeure Blandine, interdite pour démence. En cette qualité, il a institué des procédures légales contre Honoré Alain et contre son fils Dorillas, de qui il réclame conjointement et solidairement la somme de $21,287.57.

Il allègue que le camion du défendeur Honoré Alain, conduit par le fils Dorillas, alors mineur, est venu en collision avec une voiture-automobile dans laquelle se trouvait Blandine Hardy, et lui a causé des dommages dont les deux défendeurs doivent être tenus responsables. M. le Juge Roméo Langlais de la Cour Supérieure de Québec a condamné le fils à payer la somme de $7,287.87, mais il a rejeté l'action contre le père Honoré Alain. Il en est arrivé à la conclusion que l'accident était imputable à la conduite négligente du fils, mais que le père qui lui avait prêté son camion n'avait commis aucune faute, et qu'il ne pouvait en conséquence être recherché en dommages.

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Dorillas Alain n'a pas appelé du jugement qui l'a condamné, mais Émile Hardy es qualité a appelé du jugement qui a rejeté l'action contre le père Honoré Alain, et la Cour du Banc du Roi (1) a maintenu cet appel. Les deux défendeurs ont donc été tenus conjointement et solidairement responsables. Seul Honoré Alain se pourvoit maintenant devant cette Cour, et prétend que quant à lui, l'action aurait dû être rejetée en premier lieu, parce que son fils, conducteur de la voiture, n'a commis aucune faute, et subsidiairement, même en admettant la responsabilité quasi-délictuelle de ce dernier, il a droit au bénéfice du paragraphe 6 de l'article 1054 C.C., vu qu'il "n'a pu empêcher le fait qui a causé le dommage".

L'appelant est marchand de glace et exerce son commerce dans les limites de la Cité de Québec, et son fils co-défendeur est son employé rémunéré. Ce dernier est préposé à la distribution de la glace de porte en porte, et conduit le camion qui sert à la transporter. Il est cependant clairement établi qu'au moment de l'accident, aucune relation de maître et de commettant n'existait entre le père et le fils, car c'est en dehors des heures de travail, et à un moment où Dorillas n'était pas dans l'exercice de ses fonctions, que s'est produit l'accident qui a donné lieu au présent litige.

Le soir en question, soit le 14 juin 1947, Dorillas Alain, après avoir obtenu de son père, la permission qui d'ailleurs ne lui était jamais refusée, de se servir du camion, se rendit à Cap Santé dans le comté de Portneuf, en compagnie d'une demoiselle Paquet. La visibilité sur la route n'était pas bonne, car le temps était pluvieux et il y avait de la brume. Après quelques arrêts à Cap Santé, où le fils Alain et mademoiselle Paquet prirent un verre de bière et un léger repas, ils reprirent la route numéro 2 vers 10:45 heures p.m. pour revenir à Québec, et c'est en face de la propriété d'un nommé Piché, que le camion de l'appelant frappa violemment la voiture d'un M. Dagenais, stationnée sur le côté de la route, et dans laquelle se trouvait Blandine Hardy, qui a ainsi souffert de sérieuses blessures lui causant une démence permanente.

(1) Q.R. [1950] K.B. 582.

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Je ne crois pas qu'il soit nécessaire de déterminer si le jugement, condamnant le fils Alain et lui attribuant la responsabilité de cet accident, empêche l'appelant de dire que cet accident n'est pas dû à la faute de son fils. Il importe peu de savoir si sur ce point, comme le prétend M. le Juge Marchand, avec qui ont concouru MM. les Juges Galipeault et Casey, il y a chose jugée, car je suis d'opinion, comme l'a trouvé M. le Juge Langlais, que le fils Alain est responsable de cet accident. En effet, la preuve révèle qu'il conduisait le camion imprudemment, à une trop grande allure alors qu'il pleuvait et que le temps était brumeux. Sur ce point, l'appelant ne peut réussir.

Le second motif soumis à la considération de cette Cour présente plus d'intérêt, et aussi beaucoup plus de difficultés. C'est la prétention de l'appelant qu'il a réussi à repousser la présomption qui existe contre lui, vu qu'il est le père de cet enfant mineur, qui conduisait le camion. L'article 1054 C.C. dit ceci:

> Toute personne . . . est responsable non seulement du dommage qu'elle cause par sa propre faute, mais encore de celui causé par la faute de ceux dont elle a le contrôle, et par les choses qu'elle a sous sa garde.
>
> Le père, et après son décès, la mère, sont responsables du dommage causé par leurs enfants mineurs.
>
> * * *
>
> La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle *n'a pu empêcher le fait qui a causé le dommage.*

Cet article établit évidemment une présomption que le père est responsable du délit ou du quasi-délit de son fils mineur, mais, cette présomption peut être repoussée si le père établit *"qu'il n'a pu empêcher le fait qui a causé le dommage"*. C'est-à-dire, que si la clause d'exonération trouve son application, le père ne pourra être recherché en dommages pour le quasi-délit de son fils.

Le jugement de la Cour d'Appel, comme quelques autres rendus dans la province de Québec, semblent faire reposer la responsabilité du père sur le fait que tout en laissant la possession physique de sa voiture à son fils mineur, il en

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a tout de même conservé *la garde juridique.* (*Vide* dans ce sens *Beaulieu* v. *Roy* (1); *Arklay* v. *Andrews* (2); *Lambert* v. *Dumais* (3); *Monette* v. *Laplante* (4).

Ce principe découle nécessairement de l'application du premier paragraphe de l'article 1054, qui est à l'effet que toute personne est responsable du dommage causé par *les choses qu'elle a sous sa garde.* Or, dit-on, si le père a conservé la garde juridique du camion, il est responsable de l'accident causé par son fils mineur Dorillas. Avec respect, je ne puis souscrire à cette proposition légale. Ce premier paragraphe de l'article 1054 a été maintes fois interprété par nos tribunaux, et la jurisprudence reconnue est aujourd'hui à l'effet que pour que cette dernière partie du premier paragraphe de 1054 C.C. s'applique, il faut nécessairement que le dommage ait été causé *par le fait de la chose elle-même sans aucune intervention humaine.* (*Quebec Railway* v. *Vandry* (5)). Cette cause a été subséquemment commentée par le Conseil Privé dans la cause de *Watt* v. *Scott et la Cité de Montréal* (6). Dans *Curley* v. *Latreille* (7), M. le Juge Anglin disait déjà:

> Responsibility for damage caused by a thing which he has under his care (art. 1054 C.C. para. 1) arises only when the occurrence *is due to the thing itself,* not when it is ascribable to the conduct of the person by whom it is put in motion, controlled or directed.

Dans *Lacombe* v. *Power* (8), le Juge en chef Anglin rendant le jugement unanime de la Cour, s'exprimait dans les termes suivants:

> The automobile on which the deceased was working was safe and harmless while in the position in which he had placed it on the third floor of the defendants' garage. It became dangerous only because it either started of itself or was put in motion. If the proper inference from the evidence was that the automobile started of itself, i.e., without the intervention of human agency, and owing to something inherent in the machine, the ensuing damage might be ascribable to it as a "thing" and be within the purview of art. 1054 C.C. But if its movement was due to an act of the deceased; conscious or unconscious, the damage was caused, not by the thing itself, but by that act, whether it should be regarded as purely involuntary and accidental or as amounting to negligence or fault. On the latter hypotheses, the provision of art. 1054 C.C.,

(1) Q.R. [1935] 58 K.B. 220.
(2) Q.R. [1940] 78 S.C. 226.
(3) Q.R. [1942] K.B. 561.
(4) Q.R. [1946] K.B. 728.
(5) [1920] A.C. 662.
(6) [1922] 2 A.C. 555.
(7) (1920) 60 Can. S.C.R. 131 at 140.
(8) [1928] S.C.R. 409 at 412.

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invoked by the appellant, does not apply: either the case was one of pure accident, entailing no liability; or, if there be liability, it must rest on fault to be proven and not presumed.

Et, dans *Pérusse* v. *Stafford* (1), l'honorable Juge Anglin disait encore:

> In the second place, it is contended that fault is presumed against the defendant under article 1054 of the Civil Code, because the injury was caused *by a thing under her care*. Our view is that that provision has no application to a case where, as here, the real cause of the accident *is the intervention of some human agency*—the question whether such human agency—that of the driver in this case—is at fault being a question of fact. Damage is not caused by a thing which is in the control of the defendant within the meaning of art. 1054 C.C. where it is really due *to some fault in the operation or handling of the thing by the person in control of it.*

Commentant la cause de *Vandry* v. *Quebec Railway*, la Cour d'Appel de Québec dans *La Compagnie des Tramways de Montréal* v. *Lapointe* (2), a jugé:

> Pour qu'il y ait application de l'article 1054 Code Civil, et de la présomption de faute qui résulte de la garde d'une chose inanimée, il faut que l'accident soit dû à un vice de la chose ou que le dommage ait été causé *par elle-même seule* sans aucune intervention extérieure.

Voir également *News Pulp* v. *McMillan* (3).

Dans le cas qui nous occupe, il est certain que ce n'est pas la chose elle-même, le camion, qui a causé le dommage. C'est comme conséquence de la conduite négligente de la voiture par le fils que les dommages ont été causés. Il y a eu intervention humaine. En conséquence, il me semble impossible de tenir le père responsable sous prétexte *qu'il aurait eu la garde juridique du camion.* D'ailleurs, même s'il l'avait eue, il aurait encore pu se libérer, car celui qui a ainsi la garde juridique d'une chose peut invoquer le paragraphe 6 de 1054, en prouvant qu'il n'a pas pu par des *moyens raisonnables* empêcher le fait qui a causé le dommage. (*Vandry* v. *Quebec Railway*) supra. Dans *Watt* v. *Scott et la Cité de Montréal* (4), après avoir réaffirmé le principe que le paragraphe 6 de 1054 s'applique à tous les paragraphes de cet article, sauf au dernier relatif aux maîtres et serviteurs, Lord Dunedin s'exprimait ainsi:

(1) [1928] S.C.R. 416 at 418.
(2) Q.R. [1921] 31 K.B. 374.
(3) Q.R. [1921] K.B. 117.
(4) [1922] 2 A.C. 555 at 563.

The only addition to the views expressed in Vandry's case, which was not necessary there but is necessary here, is that in their Lordships' view, "unable to prevent the damage complained of" means unable by reasonable means.

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On a aussi prétendu, et cette théorie ingénieuse a rencontré déjà quelque faveur dans la province de Québec, que le fils en conduisant l'auto de son père devient son préposé, et qu'en conséquence, au cas d'accident, ce dernier est responsable des dommages subis. Il est évidemment facile d'imaginer des cas où la femme serait la préposée de son mari, ou le fils le préposé de son père, mais quand le père prête son automobile à son fils, pour des fins personnelles au fils, qui ne se rapportent nullement aux affaires du père, le rapport de maître et de préposé n'existe pas, et la responsabilité du père n'est pas engagée en vertu du dernier paragraphe de l'article 1054. La relation de maître et de serviteur suppose de toute nécessité que ce *dernier agisse dans l'intérêt du premier.* (Savatier, "Responsabilité Civile", Vol. I, pages 382 et 383). Or, rien de tel n'a été démontré dans la présente cause.

Le véritable principe qu'il faut donc appliquer en l'espèce, c'est que le père, appelant, est présumé responsable des actes de son fils mineur. Cette présomption cependant peut être détruite en prouvant que le père n'a pas pu empêcher le dommage tel que le veut la clause d'exonération de l'article 1054. Quelle est donc la preuve que doit faire le père pour démontrer qu'il n'a pu ainsi empêcher le fait qui a causé le dommage? Plusieurs jugements l'ont clairement établie. Ainsi, dans *Charron* v. *Leclerc* (1), le père d'un enfant mineur a été tenu responsable, parce qu'il n'avait pas réussi à démontrer qu'il n'avait pas commis de faute, mais les notes des honorables Juges de la Cour d'Appel sont à l'effet que si le père avait été *plus prudent* en laissant la conduite de son automobile à son fils, l'action contre lui aurait été rejetée. Dans *Laflamme* v. *Rémillard* (2), la Cour d'Appel de Québec a jugé que le père était responsable parce qu'il tolérait que son fils se serve de son automobile, sans qu'il eut démontré que celui-ci avait pour cela la *compétence voulue.*

(1) Q.R. [1948] K.B. 161.

(2) Q.R. [1947] K.B. 143.

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D'autres autorités également permettent de conclure que la négligence d'un père consisterait donc à permettre à son *fils incompétent* de conduire une automobile, de ne pas exercer la surveillance voulue, et d'avoir failli à lui donner une bonne éducation. (Colin et Capitant, "Droit Civil", Vol. 2, 10ème éd. p. 252; Savatier, "Responsabilité Civile", Vol. 1, p. 326).

Le procureur de l'intimé a soumis que le père *aurait pu empêcher le dommage* s'il avait refusé de prêter l'automobile à son fils. Il est certain que dans cette éventualité, il n'y aurait pas eu d'accident, mais là n'est pas le critère de la responsabilité. Le père n'est pas tenu de démontrer qu'il y avait *impossibilité complète* d'empêcher le fait qui a causé le dommage. En effet, si le texte devait être interprété de cette façon, et s'il fallait lui donner une telle rigidité, seule la preuve du cas fortuit, de la force majeure ou de l'acte d'un tiers, pourraient faire disparaître la responsabilité. Il doit y avoir plus de flexibilité, et ce qu'il faut rechercher, c'est toujours la faute, et s'il y a eu surveillance, bonne éducation, prêt d'une auto à un chauffeur compétent, on peut dire que le père a agi comme un *homme prudent,* et il est alors exempt de responsabilité. Je n'ignore pas qu'on a déjà décidé que le fait pour un père de prêter une bicyclette à son enfant mineur, ou de lui permettre de jouer à un sport violent, constituait faute de sa part, mais cette vue étroite de la responsabilité paternelle est maintenant surannée. Comme le dit Savatier ("Responsabilité Civile", Vol. 1, p. 327):

> Nous croyons tendencieuses ou périmées, les décisions qui affirment que le père a manqué de prudence par cela seul qu'il a laissé son fils *monter à bicyclette,* ou *même jouer au football,* et nous pensons le père déchargé de toute responsabilité, si le sport que pratiquait l'enfant était normal pour son âge, et si les conditions dans lesquelles il s'exerce excluait toute surveillance immédiate du père, et par conséquent, toute possibilité pour lui d'empêcher le dommage.

Mazeaud (Responsabilité Civile, Vol. 1, pages 719 et 720) dit ce qui suit, après avoir expliqué que la responsabilité du père disparaît, s'il peut démontrer qu'il a bien surveillé son enfant, qu'il lui a donné une bonne éducation:

> Mais la question est plus délicate lorsque l'acte permis à l'enfant n'a pas un caractère dangereux aussi marqué: par exemple, autorisation de *circuler en bicyclette,* en motocyclette *ou en automobile* avec un permis

de conduire, de chasser avec un permis de chasse, de se livrer à un sport violent. Si on oblige les parents, pour s'exonérer à prouver la force majeure, il faut, dans tous les cas, engager leur responsabilité; ils avaient en effet un moyen d'éviter le dommage: *refuser leur autorisation.* Mais on doit se contenter de la preuve de l'absence de faute. Le problème consiste donc à se demander si les parents ont commis une imprudence, un défaut de surveillance, en donnant l'autorisation . . . En un mot, il faut rechercher s'il y a eu ou non absence de faute et pour cela comparer la conduite des parents à celle d'une personne prudente.

Dans la présente cause, je suis d'opinion, comme l'a dit M. le Juge Langlais de la Cour Supérieure, que le présent appelant a clairement démontré la compétence de son fils pour conduire une automobile. Le fils était âgé de vingt ans, était porteur d'une licence provinciale qu'il a obtenue après avoir passé les examens requis. Il conduisait le camion depuis plusieurs années comme employé de son père, et en plus s'en servait en dehors de ses heures d'ouvrage, pour son usage personnel. Il était un chauffeur compétent d'assez longue expérience, n'était pas adonné aux liqueurs alcooliques, et comme le dit M. le Juge Marchand dans ses notes "Dans son travail en ville, il paraît avoir été assidu et prudent", je ne vois rien qui puisse être reproché à l'appelant, et qui puisse entraîner sa responsabilité civile. Il a repoussé la présomption établie par l'article 1054 C.C.

L'article 53 de la *Loi des Véhicules Moteurs* (S.R.Q. 1941, c. 142) n'aide pas davantage l'intimé. La présomption de responsabilité créée contre le propriétaire, a été détruite par la preuve de compétence du chauffeur, et par conséquent, il y a absence de faute de l'appelant.

Dans ces conditions, l'appel doit être maintenu, et l'action contre Honoré Alain, rejetée avec dépens de toutes les cours.

RAND J.:—I concur in the reasons and conclusions of the Chief Justice and of Mr. Justice Taschereau.

FAUTEUX J.:—Je concours dans les raisons et conclusions de M. le Juge en chef et de M. le juge Taschereau.

Appeal allowed with costs.

Solicitor for the Appellant: *W. Desjardins.*

Solicitors for the Respondent: *Lesage, Turgeon & Lesage.*

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*Nov. 1, 2, 3, 6
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*Apr. 13

BERNADETTE ROSCONI AND PAUL LUSSIER ..... APPELLANTS;

AND

YVONNE DUBOIS AND ALEXINA GOULET ..... RESPONDENTS;

AND

TÉLESPHORE BRASSARD AND OVILA PHOENIX ..... MISE-EN-CAUSE.

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

Interdict—Mental incapacity—Feeble-mindness—Mortgage loan secured by woman three years before her interdiction—Notoriety—Whether valid consent given—Whether contract null—Whether monies must be offered back—Arts. 335, 984, 986, 1011 C.C.

The curator to an interdicted woman sought the annulment of a mortgage loan, secured by the woman nearly three years before her interdiction for imbecility. The grounds of annulment alleged were (1) that she had been the victim of lesion and fraud; (2) that the condition for which she was later interdicted existed notoriously at the time of the contract; and that (3), in any event, she was too mentally feeble at the time to give a valid consent to the contract. The action was allowed by the trial judge but dismissed by the Court of Appeal chiefly on the ground that her mental condition was not notorious at the time.

Held: The appeal should be dismissed as there had been nothing done to put the parties back in the position they occupied before the loan, and the money advanced in good faith had not been repaid.

Per Rinfret C.J.: There was ample proof of her mental incapacity and even if notoriety were not proven, she was unable to contract as under Arts. 984 and 986 C.C. a person who, by reason of mental weakness, is unable to give a valid consent, is incapable of contracting. The contract should therefore be subject to annulment; however, since the monies loaned were not tendered back to the lenders and since feeble-minded persons are not mentioned in Art. 1011 C.C., the exception contained in that Article is of no avail to her, therefore the action should be dismissed.

Per Taschereau J.: Under Art. 335 C.C. mere mental incapacity or imbecility is not enough, it must also be shown that it was notorious, that is, generally known, not only to experts and a few friends but also to the people in the neighbourhood or locality. There was no proof of such notoriety in this case. But assuming that the act was

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

signed when the borrower was in a state of mental incapacity,—the nullity being only relative—the parties must be replaced in the position they occupied prior to the contract, i.e., the monies loaned must be returned; otherwise the act remains valid. The exception in Art. 1011 C.C. only applies to acts made by interdicts, minors or married women during their interdiction, minority or marriage, and since the borrower was not in either of these three categories at the time and since no such payment or tender was made, the action should be dismissed.

Per Rand J.: Taking the facts to be that the borrower at the time the act was passed was incapable of appreciating its import, but that her condition was not notorious, the rule is that the act was null. But the nullity is relative and the right to set aside the contract on the ground of mental incapacity is subject to the condition that what was received must be returned. As that was not offered here, the action fails.

Per Cartwright and Fauteux JJ.: There was no proof of lesion and, in any event, only minors can plead it. Nor was there any proof that if there were fraud, the lenders were parties to it or knew of it, and furthermore, to succeed on this point, the borrowers had to tender the monies back (*Latreille* v. *Gouin* [1926] S.C.R. 558). As to the notoriety, there was no proof of it, but assuming the notoriety, it is doubtful whether the trial judge exercised judicially his discretionary power to annul in view of the lenders' good faith. As to whether the borrower was insane or mentally incapable of giving a valid consent, it was not established that she was insane, but whether insane or merely feeble-minded, she cannot have the act annulled since she did not offer to return the monies. The exception contained in Art. 1011 C.C. is of no help to her as it applies only to minors, married women or interdicts.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), dismissing an action by the curator to an interdicted woman seeking the annulment of a mortgage loan secured by the incapable three years before her interdiction.

Gustave Monette, K.C., and *René Duranleau, K.C.*, for the appellants.

C. H. Desjardins, K.C., for the respondents.

The CHIEF JUSTICE: Paul Lussier, l'un des appelants, a été nommé curateur aux biens et à la personne de sa tante, Joséphine Rosconi, le treize avril 1945, dans un jugement prononçant l'interdiction de cette dernière pour cause d'imbécilité.

(1) Q.R. [1949] K.B. 473.

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Joséphine Rosconi était alors célibataire et âgée de soixante-seize ans. Elle est décédée à Montréal, le trois mai 1949, âgée de plus de soixante-dix-neuf ans.

En sa qualité de curateur de Joséphine Rosconi, Paul Lussier institua contre les défenderesses-intimées une action aux fins d'obtenir une déclaration de nullité et l'annulation d'un acte d'obligation passé le vingt-quatre juillet 1942, devant le notaire Émile Beauchemin.

Aux termes de cet acte d'obligation, Mlle Rosconi reconnaît et déclare devoir aux défenderesses-intimées la somme de quatre mille dollars pour prêt d'autant remboursable dans quatre ans, et, en garantie de ce remboursement, elle leur cède et transporte jusqu'à due concurrence partie d'une créance hypothécaire au montant de $29,000 qu'elle détient contre le mis-en-cause Phoenix.

Cette somme de quatre mille dollars avait été remise à Mlle Rosconi au moyen d'un chèque signé par les intimées et, apparemment, le 24 juillet 1942, date même de l'acte d'obligation, elle a déposé ce chèque à son compte de banque; mais, dès le même jour, elle retira de son compte, par chèque à son ordre, la somme de $3,160. La preuve révèle que l'emprunt avait été fait par elle pour que la somme en fut remise à un nommé Péladeau. En fait, dans la comptabilité de Mlle Rosconi pour ce M. Péladeau figure cette somme de $4,000.

L'appelant es-qualité a attaqué cet acte d'obligation comme illégal et inexistant à raison de l'état mental et de la faiblesse d'esprit de Mlle Rosconi qui, suivant lui, la rendaient incapable de contracter et de donner un consentement valable, et aussi à cause de son état d'imbécilité constant, continu et notoire.

Les intimées ont plaidé en substance que Mlle Rosconi, que, d'ailleurs, elles n'ont ni connue ni rencontrée, avait la capacité voulue pour contracter lorsque l'acte fut passé et que, antérieurement à son interdiction, elle ne souffrait ni de démence ni d'imbécilité.

La Cour Supérieure accueillit l'action de l'appelant es-qualité et a déclaré illégal, irrégulier, inexistant et nul à toutes fins que de droit, cet acte hypothéciare du 24 juillet 1942, et a enjoint la mis-en-cause Brassard d'en radier l'enregistrement.

La Cour du Banc du Roi (juridiction d'appel) (1) a infirmé ce jugement et a rejeté l'action avec dépens.

Un médecin légiste de grande réputation, le docteur Émile Legrand, neurologue éminemment qualifié, a témoigné que lorsqu'il l'a examinée, à deux reprises, Mlle Rosconi souffrait d'une débilité mentale prononcée qui l'empêchait de comprendre la portée de l'acte qui fait l'objet du litige. Il déclara que cette personne présentait une grande insuffisance cérébrale, que son niveau intellectuel était très bas et que ses facultés n'étaient pas développées. Il ajoute, qu'à son avis, cette faiblesse mentale datait de sa naissance et était chez elle congénitale, qu'elle souffrait d'une déficience qui la rendait absolument incapable de donner un consentement valable.

Le docteur Jean Saucier, expert reconnu dans les maladies nerveuses, corrobora entièrement le docteur Legrand et exprima l'avis que Mlle Rosconi était une débile mentale.

En plus, le docteur Georges Larin, qui a étudié les maladies nerveuses pendant trois ans chez Charcot, à Paris, et qui est un ami de la famille Rosconi depuis cinquante ans, après avoir dit qu'il rencontrait cette demoiselle tous les jours, durant trois mois, pendant la dernière maladie de sa mère, a témoigné qu'il était évident que Mlle Rosconi était une faible d'esprit atteinte de crédulité exagérée, qu'elle ne pouvait pas discuter d'affaires sérieuses et qu'elle ne jouissait pas d'une compréhension normale. Il dit que, du vivant de sa mère, Mlle Rosconi ne s'occupait nullement de l'administration de ses affaires. Elle a commencé à dilapider ses biens en donnant de l'argent à tous ceux qui lui parlaient de la religion. Lorsqu'elle n'avait pas de fonds disponibles, ses quémandeurs n'avaient qu'à s'adresser à leur notaire, qui lui faisait consentir à vil prix des cessions d'hypothèques et des ventes de propriétés, bien en dessous de la valeur réelle. Il en est résulté qu'un grand nombre de personnes de mauvaise foi l'ont, par la suite, bassement exploitée en faisant appel à sa dévotion excessive et incomprise. Certaines gens peu scrupuleux ont eu recours à toutes sortes d'escroqueries pour abuser de cette pauvre démente, et ses actes de prodigalité insensée et

(1) Q.R. [1949] K.B. 473.

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déraisonnée se sont répandus chez certains exploiteurs. Le jugement de première instance réfère à plusieurs incidents qui démontreraient que Mlle Rosconi s'engageait dans toutes sortes de marchés, que le juge relate comme n'étant pas d'une personne sensée. Elle avait apparemment des lubies religieuses avec le résultat que "quiconque savait l'aborder et lui parler de dévotion pouvait obtenir n'importe quel montant d'argent." Le demandeur lui-même, qui, comme nous l'avons vu, est le neveu de Mlle Rosconi, affirme qu'il a connu sa tante depuis son enfance, qu'elle souffrait d'une déficience intellectuelle qui a toujours existé, que l'on a réussi à lui extorquer des sommes tellement importantes que sur une fortune qui valait $150,000, il ne lui restait plus, lors de l'institution de l'action, que la somme de $58,000 environ. Sa sœur a témoigné que Mlle Rosconi n'a jamais rien compris des choses de la vie et que sa déficience mentale existait depuis sa naissance. Il faut ajouter à cela que l'une de ses sœurs fut internée à Saint-Jean-de-Dieu (hospice des aliénés, à Montréal) depuis cinquante-cinq ans et que trois autres parents sont décédés au même endroit.

De l'avis de l'honorable juge de première instance, aucun des notaires qui ont reçu d'elle des actes d'emprunt ou d'hypothèque n'a pu affirmé positivement que l'interdite était une personne normale et jouissant de toutes ses facultés mentales. Aucun d'eux, d'ailleurs, ne l'aurait vue assez longtemps pour se rendre compte d'une façon convenable de son degré d'intelligence. Le notaire Beauchemin, qui a préparé l'acte dont il est question, sur les instructions du nommé Péladeau, l'a fait sans communiquer avec Mlle Rosconi ni lui fournir d'explications.

De toute la preuve, le juge de première instance a été amené à conclure "que le demandeur a établi hors de tout doute que Joséphine Rosconi a été une débile mentale depuis sa naissance. Sa faiblesse d'esprit était apparente, continue et notoire. Elle n'a jamais eu l'intelligence nécessaire pour donner un consentement valable à l'acte dont la validité même est présentement contestée".

Le jugement de la Cour Supérieure a donc considéré que, de l'ensemble des témoignages donnés par des personnes dignes de foi et absolument responsables, il paraissait évident que la faiblesse d'esprit de Mlle Rosconi était

devenue un fait notoire, qu'elle souffrait d'aliénation mentale et qu'elle n'a pu donner un consentement valable à l'acte d'obligation attaqué. En fait, le juge a trouvé qu'il était acquis aux débats que Mlle Rosconi avait été habituellement considérée comme une démente et qu'elle n'a jamais eu d'intervalle lucide au cours de son existence.

Il s'agissait d'appliquer ici les articles 335 et 986 du *Code Civil*.

Il ne fait pas de doute, par application de l'article 334 C.C. que tout acte fait postérieurement par l'interdit pour cause d'imbécilité est nul, mais la question qui se posait dans la présente cause était de décider quel pouvait être l'effet des actes antérieurs à l'interdiction prononcée pour imbécilité.

L'article 335 déclare que ces actes "peuvent cependant être annulés, si la cause de l'interdiction existait notoirement à l'époque où ces actes ont été faits".

Mais, d'autre part, l'article 986 déclare "incapables de contracter, entre autres, les personnes aliénées ou souffrant d'une aberration temporaire causée par maladie, accident, ivresse ou autre cause, ou qui, à raison de la faiblesse de leur esprit, sont incapables de donner un consentement valable".

Or, en vertu de l'article 984 C.C., quatre choses sont nécessaires pour la validité d'un contrat:

Des parties ayant la capacité légale de contracter;

Leur consentement donné légalement;

Quelque chose qui soit l'objet du contrat;

Une cause ou considération licite.

Il s'ensuit que si, à raison de sa faiblesse d'esprit, une personne est incapable de donner un consentement valable, par application de l'article 986, elle est déclarée incapable de contracter, en vertu de la loi, et elle ne peut plus rencontrer deux des conditions essentielles et nécessaires à la validité d'un contrat exigées par l'article 984, à savoir: la capacité légale de contracter et celle de donner légalement son consentement. Ces deux dernières conditions sont déclarées nécessaires pour la validité d'un contrat, en vertu de l'article 984, et si elles font défaut le contrat est nul et inexistant.

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C'est ce dernier aspect de la cause qui, nous le disons en tout respect, paraît avoir échappé au jugement de la Cour d'Appel, qui s'appuie uniquement sur l'article 335 du *Code Civil* et qui ignore les articles 984 et 986 du *Code*.

En effet, si l'on parcourt le jugement formel, on s'aperçoit qu'il réfère au seul article 335 et que le raisonnement qui s'y trouve s'appuie uniquement sur les termes de cet article. Il décide que "pour réussir à faire rescinder le contrat *a quo*, pour le motif d'imbécilité notoire, l'intimé es-qualité (c'est-à-dire l'appelant devant la Cour Suprême), aux termes de l'article 335 C.C., devait répondre aux deux exigences qu'il contient, soit: la preuve de l'imbécilité et la notoriété de son existence; et que si l'intimé es-qualité (toujours le présent appelant) a failli sur l'une ou l'autre de ces conditions, son action doit être rejetée et le jugement infirmé". Il ajoute que "la notoriété d'imbécilité exigée par l'article 335 du *Code Civil* n'a pas été prouvée et que l'absence de cet élément vicie, dans son fondement, le jugement de la Cour Supérieure".

Si l'on parcourt les notes des savants juges de la Cour d'Appel, l'on s'aperçoit qu'ils se préoccupent uniquement de la question de notoriété qui est déclarée "la condition essentielle au maintien de l'action". Elles concluent "que pour ce public d'où devait venir la notoriété, il n'y avait rien qui dut la faire tenir pour incapable d'un emprunt... et à défaut d'une preuve suffisante à cet effet, le demandeur perd le bénéfice de cette dernière partie de l'article 335 C.C. sus-mentionné et qui était essentiel au succès de sa demande".

On y lit encore ce qui suit:

"...le seul motif sur lequel le jugement pourrait s'appuyer serait l'état mental de Mlle Rosconi au mois de juillet 1942, et les conséquences rétroactives de l'interdiction pour imbécillité prononcée en avril 1945, à savoir: si les *causes* qui ont entraîné cette interdiction *existaient* notoirement à la date du prêt".

Et encore:

"The burden of proof was upon the respondent (présent appelant) to prove that the mental condition of Mlle Rosconi notoriously existed prior to the interdiction and at the time that the loan was made."

Et aussi:

"I am not prepared to declare that such fact was notorious, in the sense of Article 335 C.C., on said last mentioned date, particularly when I find in the record indication of a sane appreciation of the purport of her acts by Miss Rosconi."

L'on voit donc que la seule recherche des honorables juges de la Cour d'Appel s'est bornée à trouver une preuve de notoriété.

Mais, comme l'avait d'ailleurs signalé le juge de première instance, un obstacle beaucoup plus sérieux à la validité du contrat attaqué était énoncé dans les articles 984 et 986 du *Code Civil,* dont il n'est nullement question dans les notes à l'appui du jugement *a quo.*

Or, non seulement les faits considérés comme établis par le juge du procès sont à l'effet que Mlle Rosconi, à raison de la faiblesse de son esprit depuis sa naissance, était incapable de donner un consentement valable et qu'il manquait donc à son contrat, comme nous l'avons dit, deux des quatre éléments nécessaires pour la validité de ce contrat: son incapacité légale de contracter et l'impossibilité où elle était de donner un consentement valable, mais la preuve, tout à la fois des personnes qui l'ont connue et des médecins qui ont été entendus lors de l'enquête, justifie suffisamment la conclusion à laquelle en est arrivé le jugement de première instance sur ce point.

Dans les circonstances, il nous paraît que, à cet égard, ce jugement était bien fondé et qu'il n'eut pas dû être mis de côté par la Cour du Banc du Roi (en Appel).

Sans doute, lorsque, en plus du fait d'imbécilité ou de faiblesse d'esprit prévue par les articles 984 et 986 du *Code Civil,* vient s'ajouter la notoriété indiquée à l'article 335 C.C., l'incapacité de la personne en cause offre une double raison d'annuler l'acte auquel elle aurait été partie, mais il est évident qu'en face des prescriptions des articles 984 et 986 l'on ne saurait dire que l'existence de la notoriété édictée à l'article 335 soit une condition essentielle au maintien d'une action pour annulation ou pour déclaration de nullité d'un contrat du genre de celle intentée par l'appelant es-qualité. L'absence de notoriété ne pouvait vicier, dans son fondement, le jugement de la Cour Supérieure, si,

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au surplus, ce jugement pouvait s'appuyer sur l'incapacité de Mlle Rosconi de donner un consentement valable, à raison de la faiblesse de son esprit, car, dans ce cas, elle était déclarée par la loi incapable de contracter et l'acte qu'elle a signé manquait de deux des éléments essentiels et nécessaires pour la validité d'un contrat.

Il reste, cependant, une question subsidiaire qui a été soulevée devant cette Cour et que, d'ailleurs, avait signalée l'honorable Juge en chef Létourneau au cours de ses notes. C'est à savoir que "l'acte d'emprunt ne pourrait être annulé et mis de côté qu'à cette condition que l'emprunteuse offre et rembourse ce que lui a valu l'acte que l'on veut ainsi faire mettre de côté; car il est en preuve que cette dernière a bien eu et reçu ce montant de $4,000 pour lequel l'acte d'emprunt a été fait et que c'est en toute bonne foi que ce montant lui a été fourni et avancé par les défenderesses (intimées)".

Sur ce point, il faut d'abord considérer la portée des articles 987 et 1011 du *Code Civil* qui édictent que "l'incapacité des mineurs et des interdits pour prodigalité est établie en leur faveur. Ceux qui sont capables de contracter ne peuvent opposer l'incapacité des mineurs ou des interdits avec qui ils ont contracté"; et l'article 1011, à l'effet que "lorsque les mineurs, les interdits ou les femmes mariées, sont admis, en ces qualités, à se faire restituer contre leurs contrats, le remboursement de ce qui a été, en conséquence de ces engagements, payé pendant la minorité, l'interdiction ou le mariage, n'en peut être exigé, à moins qu'il ne soit prouvé que ce qui a été ainsi payé a tourné à leur profit".

L'on ne saurait se défendre de trouver dans ces articles une certaine négligence de rédaction.

L'article 987 ne parle que des mineurs et des interdits. En plus, il spécifie les "interdits pour prodigalité".

En vertu de la proposition *inclusio unius fit exclusio alterius*, il s'ensuivrait que l'incapacité des autres personnes énumérées à l'article 986 n'est pas établie uniquement en leur faveur et que, comme conséquence, les deux parties contractantes pourraient s'en prévaloir. D'autre part, le deuxième paragraphe de l'article 987 ne limite plus l'application aux interdits pour prodigalité, mais il parle des

interdits en général. L'on ne saurait penser que le législateur a voulu corriger le premier paragraphe de l'article 987 par son second paragraphe. Il semblerait donc que l'emploi du mot "interdit" sans qualification, dans ce second paragraphe, ne réfère qu'aux interdits qui sont mentionnés dans le premier paragraphe, c'est-à-dire, aux interdits pour prodigalité seulement.

Mais, dès lors, sur quoi la doctrine s'appuie-t-elle pour déclarer que, nonobstant cette énumération limitée, l'article 987 contient un principe général qui s'applique à tous les interdits?

Les codificateurs ne s'en expliquent pas.

L'article 1125 du *Code Napoléon,* qui correspond à notre article 987 C.C. est au même effet, sauf qu'il mentionne le cas des femmes mariées.

J'éprouve une certaine difficulté, lorsque le Code spécifie les interdits pour prodigalité, d'arriver à la conclusion que cet article couvre tous les interdits.

D'autre part, l'on se trouve en présence d'une difficulté du même genre si l'on passe à l'article 1011. Il ne parle que des mineurs, des interdits ou des femmes mariées; et là, le mot "interdits" n'est pas qualifié comme il l'est dans l'article 987. Il omet les autres personnes qui apparaissent dans l'énumération de l'article 986 C.C. et, entre autres, le cas qui nous occupe où, à raison de sa faiblesse d'esprit, une personne incapable de donner un consentement valable est, par l'article 984, déclarée incapable de contracter.

Une explication plausible de cette omission pourrait se trouver sans doute dans le fait que l'article 1124 du *Code Napoléon,* qui correspond à l'article 986 du *Code Civil* de la province de Québec, ne contient pas les deux dernières énumérations de cet article 986. Le Code Civil français n'énumère pas comme incapables de contracter, entre autres, les personnes qui, à raison de la faiblesse de leur esprit, sont incapables de donner un consentement valable; et lorsque, dans l'article 1312 du Code français (qui correspond à l'article 1011 du Code de Québec), le législateur en est venu à traiter la question du remboursement de ce qui aurait été payé en conséquence d'engagements invalides, ce dernier n'a pas mentionné comme dispensées du rembour-

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sement les personnes incapables de donner un consentement valable, parce que cette catégorie de personnes n'était pas, par le Code français, déclarée incapable de contracter.

L'on peut également prétendre que l'article 1011 énonce un principe général qui doit s'étendre non seulement aux mineurs, aux interdits ou aux femmes mariées, mais également à toutes les classes de personnes qui sont énumérées dans l'article 986 du Code de Québec.

Il en réulterait que, pour que l'appelant eut pu être contraint à rembourser ce qui a été payé à Mlle Rosconi, il eut fallu que les intimées prouvent que ce qui a été ainsi payé a tourné à son profit.

On trouve d'ailleurs un principe de ce genre dans l'article 1146, en vertu duquel "le paiement fait au créancier n'est point valable s'il était incapable de le recevoir, à moins que le débiteur ne prouve que la chose payée a tourné au profit de ce créancier".

En l'espèce, aucune allégation ne s'y rapporte dans la plaidoirie écrite et le point n'a pas été soulevé.

En autant que l'on pourrait le déduire du dossier, il semblerait même que cette somme de $4,000 n'a pas tourné au profit de Mlle Rosconi, puisque toutes les circonstances paraissent établir qu'elle a fait cet emprunt, de la même façon que dans plusieurs autres cas prouvés lors de l'enquête, uniquement dans le but de remettre cet argent immédiatement à M. Péladeau.

Naturellement, Mlle Rosconi elle-même n'a pas été entendue comme témoin. Lors de l'enquête, elle était interdite pour imbécilité. Et, malheureusement, Roger Péladeau non plus n'a pu rendre témoignage parce qu'au moment du procès il a été incapable de se rendre au tribunal pour cause de maladie.

Les renseignements qu'offre le dossier sont donc nécessairement incomplets. Cependant, ils révèlent que le notaire Beauchemin, qui a reçu l'acte, ne connaissait pas Mlle Rosconi avant le mois de juillet 1942 (N.B.—Et c'est le 24 juillet que le contrat attaqué a été reçu par lui). Au cours de son témoignage, le notaire nous dit qu'il a été mis en relation avec Mlle Rosconi par M. Péladeau lui-même; que celui-ci lui aurait rendu visite à son bureau dans le but d'obtenir un prêt d'argent; que c'est lui qui est venu cher-

cher le notaire pour le conduire sur la rue Saint-Hubert, où demeurait Mlle Rosconi; qu'il lui a présenté cette dernière et que c'est bien M. Péladeau qui avait représenté au notaire que Mlle Rosconi avait besoin d'argent et qu'il lui avait demandé si lui (le notaire) pouvait lui prêter le montant. Il déclare: "Je lui ai dit que M. Péladeau avait demandé de l'argent pour le transporter à son neveu et elle a consenti".

Le notaire Beauchemin déclare que M. Péladeau lui "disait qu'il venait de la part de Mlle Rosconi". C'est Péladeau qui a payé les frais de l'acte et la commission sur le prêt, sans que le notaire ait envoyé un compte à ce sujet. C'est Péladeau qui payait les intérêts sur le prêt à tous les six mois.

Il semble probable que Mlle Rosconi n'a nullement profité de cet emprunt et que c'est ni plus ni moins Roger Péladeau qui s'est servi d'elle comme intermédiaire pour se procurer ce montant de $4,000 dont il a retiré le produit.

En autant qu'il est possible de déchiffrer les entrées faites par Mlle Rosconi sur les feuilles qui lui servaient de comptabilité pour Roger Péladeau, ce serait bien ce dernier qui a reçu le montant de $4,000 qui a fait l'objet de l'acte attaqué par l'appelant.

Que l'appelant es-qualité, représentant maintenant les droits de Mlle Rosconi, ne soit pas obligé de rembourser la somme de $4,000 que les intimées ont apparemment versée de bonne foi et dans l'ignorance où elles étaient de l'état mental de celle avec qui elles transigeaient, froisse évidemment les sentiments d'équité; mais s'il est exact que l'imbécilité de Mlle Rosconi la rendait incapable de faire un contrat comme celui dont il s'agit, il est certainement logique qu'elle ait également été dans le même état d'incapacité pour profiter de cette somme de $4,000, où elle n'a fait que servir d'instrument à Roger Péladeau; et on ne saurait dire que, dans les circonstances, les intimées étaient sans remède, car il y a tout lieu de croire qu'elles auraient un recours contre Péladeau lui-même, dont la conduite pourrait peut-être être considérée par les tribunaux comme constituant une fraude à leur égard. C'est de Péladeau dont elles auraient réellement été les victimes, si les révélations contenues au dossier doivent être tenues pour exactes. Mlle

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Rosconi ne pourrait pas plus être tenue responsable de ce qui s'est passé en rapport avec l'argent que les intimées ont fourni qu'elle ne peut l'être en rapport avec l'acte qu'on lui a fait consentir alors qu'elle était incapable de donner un consentement valable. Comme l'écrit Laurent (Principes de Droit Civil Français, tome 5ième, 3ième éd.): "... La loi veut avant tout qu'il y ait aliénation mentale, c'est-à-dire un état de maladie qui affecte l'intelligence et qui ne permet pas à celui qui en est affligé de gouverner sa personne et ses biens... s'ils ne sont pas dirigés dans la gestion de leurs affaires, ils sont victimes de leur incapacité" (N° 249, pp. 289, 290).

Dans les circonstances, il ne semblerait pas y avoir de raison pour que l'article 1011 du *Code Civil* ne vienne pas protéger les personnes incapables de donner un consentement valable de la même façon qu'il protège les mineurs, les interdits et les femmes mariées. (*Voir* Dalloz—Répertoire Pratique, Vol. VIII—Vo. Nullité—n^{os} 63, 64, 65):

Les jugements et la doctrine qu'on y trouve sont d'abord à l'effet que "pour savoir si la chose reçue a tourné au profit de l'incapable, il faut se reporter, non au moment du contrat, mais au moment où l'action en nullité ou en rescision est intentée; que c'est à la partie qui a contracté avec l'incapable qu'incombe la charge de prouver que ce qu'il a payé a tourné à son profit"; mais surtout que "les règles ci-dessus s'appliquent à tous les incapables. Ainsi l'art. 1312 est applicable: ...au mineur émancipé comme au mineur en tutelle. Jugé, en conséquence, que le mineur émancipé qui a vendu, sans l'assentiment de son curateur, un mobilier d'une valeur considérable ne peut être condamné ni à la restitution du prix, ni à des dommages-intérêts, alors qu'il n'a commis aucune faute et que le prix ne lui a pas personnellement profité" (D.P. 80.1.61).

La règle s'applique également "à l'individu pourvu d'un conseil judiciaire" (Huc, t. 8, n° 214; Baudry-Lacantinerie et Barde, t. 3, n° 1974).

Planiol (Traité Élémentaire de Droit Civil, 6e éd., tome 1, n° 2110) donne une définition du "faible d'esprit". D'après lui, on appelle ainsi "celui dont les facultés sont affaiblies sans qu'il y ait perte totale de la raison et qui, par suite,

ne peut pas être interdit... chez ces personnes, c'est la faculté de vouloir qui est altérée plus que celle de comprendre".

Et dans Juris-Classeur Civil, sous les articles 488 à 577 du *Code Napoléon*, en la troisième partie: de l'interdiction judiciaire, le numéro 293 s'exprime comme suit:

> Le consentement libre et conscient étant l'élément essentiel de l'obligation, l'acte passé antérieurement à l'interdiction pourra toujours, même quand la débilité mentale de son auteur n'est pas habituelle *ou n'est pas notoire*, et même en l'absence de toute demande en interdiction, être annulé si cet auteur se trouvait, au moment même de la passation de l'acte, privé de ses facultés intellectuelles;

et cette proposition est appuyée sur de nombreuses autorités auxquelles on réfère.

Et, au numéro 287, dans la même compilation (Juris-Classeur Civil), se lit ce qui suit: "...cette preuve (de débilité mentale) est faite par la démonstration d'un *état habituel* d'où cette incapacité résulterait".

Nous n'avons pas à envisager la présente affaire comme si nous siégions en première instance. Le juge de la Cour Supérieure, qui a eu l'avantage de suivre l'enquête et d'entendre les témoins, a été d'avis que le demandeur-appelant avait "établi hors de tout doute que Joséphine Rosconi a été une débile mentale depuis sa naissance. Sa faiblesse d'esprit était apparente, continue et notoire. Elle n'a jamais eu l'intelligence nécessaire pour donner un consentement valable à l'acte dont la validité même est présentement contestée". Il a considéré que Mlle Rosconi "n'a jamais eu d'intervalles lucides au cours de son existence". Pour apprécier l'état de démence au moment de la transaction, l'honorable juge s'est appuyé sur l'arrêt *Re Cloutier* v. *les héritiers de feu Albert Gagné* (1): "...que la doctrine et les auteurs enseignent que la mission du juge se réduit uniquement à rechercher si au moment où l'acte a été passé le disposant jouissait de sa raison..."; "...qu'il s'agit d'une question de fait pure et simple, fondée sur les témoignages rapportés à l'enquête et, après en avoir fait une analyse minutieuse", il ne peut en arriver "à une autre conclusion que Joséphine Rosconi était démente et incapable de distinguer entre les avantages ou les désavantages contenus dans l'acte attaqué" (*McDonough* v. *Barry* (2).

(1) Q.R. (1936) 42 R.I. (N.S.) 173. (2) Q.R. (1929) 67 S.C. 22.

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La Cour du Banc du Roi (en Appel) n'a pas mis de côté ces décisions sur les faits. Elle a bien dit qu'il n'y avait pas de preuve de notoriété, mais, comme nous l'avons vu, elle ne s'est nullement prononcée sur l'existence des conditions prévues par l'article 986 C.C.

Notre Cour, siégeant comme second tribunal d'appel, n'intervient que très rarement pour écarter l'avis prononcé sur les faits par le tribunal de première instance; mais, surtout, elle ne met pas cet avis de côté lorsqu'elle trouve dans la preuve une justification de cet avis, même si, appelée à se prononcer, lors de l'enquête en Cour Supérieure, elle déclare parfois que peut-être elle ne serait pas arrivée à la même conclusion.

Or, ici, il me paraît indiscutable que l'on peut trouver amplement dans les témoignages qui ont été rendus, experts et autres, pour justifier sur ce point l'opinion du premier juge.

Si l'on accepte les témoignages des médecins éminents qui ont été entendus dans cette cause, l'on doit en conclure que Mlle Rosconi était atteinte d'une débilité cérébrale congénitale et qu'elle était donc dans un état habituel d'incapacité mentale. Cela rencontre les citations tirées de Juris-Classeur Civil qui n'exigent pas, pour l'application de l'article 986, que la débilité mentale soit notoire, ni même qu'elle soit habituelle, pourvu qu'il soit prouvé que, lors de la passation de l'acte, son auteur était privé de ses facultés intellectuelles; et qui ajoutent que la preuve en est faite "par la démonstration d'un état habituel d'où cette incapacité résulterait".

Sans doute, en l'absence d'interdiction, celui qui veut opposer l'acte à la personne atteinte de faiblesse d'esprit, au sens de l'article 986 C.C., est admis à prouver que l'acte a été passé au cours d'un intervalle lucide; mais c'est à lui que le fardeau incombe, et ici, comme l'a trouvé le juge de première instance, "les défenderesses n'ont pu prouver que l'état de la disposante présentait des intervalles lucides au temps de la transaction".

J'ai voulu expliquer, peut-être un peu longuement, la façon dont j'envisage cette cause du point de vue des articles 335 et 986 du *Code Civil*, à raison du fait que ce n'est pas ainsi que l'affaire a été examinée en Cour d'Appel.

Pour ma part, en tout respect et en l'espèce, je n'attache pas d'importance à l'application de l'article 335, et, pour les besoins de la cause, je suis prêt à admettre que l'appelant n'a pas réussi à prouver que "la cause de l'interdiction de Mlle Rosconi existait notoirement à l'époque où ces actes ont été faits", car il me suffit d'arriver à la conclusion que le juge de première instance a eu raison d'appliquer ici l'article 986 du *Code*.

Mais il reste quand même la question subsidiaire soulevée par l'honorable Juge en chef Létourneau.

La déclaration en cette cause se contente d'alléguer l'état mental et la faiblesse d'esprit de Joséphine Rosconi et qu'elle était incapable de donner un consentement valable. Le demandeur, en sa qualité de curateur, a conclu à ce que le contrat de prêt, dont il est question, soit annulé et résilié, et qu'il soit enjoint au registrateur de radier l'enregistrement de ce contrat. Et c'est tout.

La défense écrite se contente de nier les faits; elle allègue la bonne foi de la défenderesse Yvonne Dubois et elle conclut, purement et simplement, à ce que le demandeur es-qualité soit débouté des fins de son action. Les autres pièces de procédure (réponse, réplique et duplique) n'ajoutent rien à ces deux pièces initiales. Donc, ni la demande ni la défense ne fait allusion au remboursement de la somme de $4,000 que Mlle Rosconi avait reçue. Mais si, comme je le crois, il est exact de dire que ce remboursement était une condition préalable du droit de demander l'annulation du contrat, c'était à la demande qu'il incombait d'offrir la somme reçue par la déclaration elle-même et d'en faire le dépôt avec le rapport de l'action; sans quoi, l'action ne pouvait être maintenue, même si aucune défense n'avait été produite.

Par l'application de l'article 1146 C.C., ce serait le devoir des intimées de prouver "que la chose payée a tourné au profit" des appelants. Mais cet article parle de débiteur et de créancier et l'on pourrait peut-être objecter qu'il ne s'applique pas ici, vu que, pour ce cas particulier, nous avons l'article 1011 C.C.

Je ne crois pas qu'il soit nécessaire de décider si le contrat consenti par une personne qui, "à raison de la faiblesse de son esprit, est incapable de donner un consentement va-

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lable", au sens de l'article 986 du *Code,* comporte une nullité de droit, comme l'enseigne Planiol, ou simplement une nullité relative. Mon collègue, l'honorable juge Taschereau, étudie à fond cette question dans ses notes, que j'ai eu l'avantage de consulter, et je n'ai rien à ajouter à ce qu'il dit sur ce sujet. Il est certain que le contrat consenti par un mineur ou un interdit pour prodigalité est, d'après l'article 987 C.C., d'une nullité relative dans le sens que seuls ils sont autorisés à invoquer leur incapacité pour faire mettre le contrat de côté. S'ils ne s'en prévalent pas, le contrat subsiste et lie ceux qui ont contracté avec eux. Il est même susceptible d'être confirmé par le mineur qui atteint sa majorité, ou par l'interdit pour prodigalité dont l'interdiction est mise de côté.

Pour les fins de la discussion dans le présent litige, l'on peut prendre pour acquit que la nullité est également relative, ainsi que l'enseigne M. Mignault, dans le cas des autres incapables énumérés aux articles 984 et 986 du *Code,* malgré que l'article 987 limite aux mineurs et aux interdits pour prodigalité le précepte que l'incapacité est établie en faveur de ces derniers, ce qui, de prime abord, implique que dans les autres cas chacune des parties contractantes pourrait se prévaloir de cette incapacité.

Mais, du moment que l'incapacité est invoquée de façon à obtenir l'annulation du contrat, il ne me paraît pas discutable que la règle, si l'annulation est prononcée, est que les parties contractantes doivent être remises dans l'état où elles étaient auparavant; et je crois que cette règle est de rigueur, qu'il s'agisse d'une nullité absolue de la même façon que s'il s'agit seulement d'une nullité relative.

Cette règle souffre l'exception contenue à l'article 1011 C.C. en faveur des mineurs, des interdits (et, cette fois, elle n'est pas limitée aux interdits pour prodigalité) et des femmes mariées.

Dans ces trois cas d'exception ces personnes sont admises à se faire restituer contre leur contrat et le remboursement de ce qui leur a été payé en conséquence de ces engagements n'en peut être exigé par leurs co-contractants "à moins qu'il ne soit prouvé que ce qui a été ainsi payé a tourné à leur profit".

Sur cette question, le dossier qu'on nous a présenté est absolument muet. Le point se résout donc à savoir à qui il incombait de le soulever.

L'on admet généralement que, dans les cas d'exception que nous venons de mentionner, c'est à l'autre partie contractante qu'il importe de prouver que ce qui a été payé à l'incapable a tourné à son profit. Ici, les intimées n'ont pas fait cette preuve et il en résulterait qu'elles ne peuvent réclamer la restitution de la somme de $4,000 qu'elles ont prêtée.

Mais si, au contraire, Mlle Rosconi ne peut se réclamer de l'exception contenue à l'article 1011, il s'ensuit qu'elle tombe sous la règle générale et qu'elle ne pouvait, ni par elle-même, ni par son curateur, conclure à l'annulation du contrat sans offrir le montant qu'elle a reçu en conséquence.

Il faut bien avouer que cette série d'articles 984, 986, 987 et 1011 C.C. aurait gagné à être rédigée d'une façon plus claire et que les codificateurs auraient bien dû nous faire bénéficier un peu plus de leur confidence.

Devant le texte explicite de l'article 1011, qui limite l'exception aux mineurs, aux interdits et aux femmes mariées, la seule interprétation juridique est que les autres incapables ne peuvent invoquer cette exception. Pourquoi, en effet, procéder à cette énumération alors que, si l'on voulait que cet article s'étende à tous les incapables, les codificateurs ne se soient pas bornés tout simplement à dire: "Lorsque les incapables sont admis en ces qualités... etc..."?

Je ne vois pas sur quoi l'on pourrait se baser pour dire que, malgré que trois catégories d'incapables sont spécifiquement mentionnées, l'article doit néanmoins s'appliquer à tous les incapables et contenir un principe général.

Le principe général c'est que les parties doivent être remises dans le même état qu'elles étaient auparavant. Les simples "faibles d'esprit" ne sont pas mentionnés dans l'exception de l'article 1011, et force nous est donc de décider cette cause conformément au principe général et de conclure que, pour obtenir l'annulation de son contrat, Mlle Rosconi, ou son curateur, était tenue en instituant son action d'offrir à la partie adverse le montant de $4,000 qu'elle avait reçu de cette dernière.

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Dans les circonstances, je suis d'avis que l'appel doit être rejeté et que les appelants doivent être déboutés de leur action avec dépens.

TASCHEREAU, J.:—Les faits de ce litige ont été complètement rapportés ailleurs, et il est en conséquence inutile d'y revenir. Je me bornerai donc à analyser uniquement l'aspect légal de la question, et à tirer des textes les conclusions qui s'imposent.

Trois articles du *Code Civil* doivent particulièrement retenir notre attention. Ce sont les articles 335, 986 et 1011 C.C. Les autres qui ont été discutés, ne peuvent servir qu'à aider à leur interprétation.

La première prétention des demandeurs-appelants est à l'effet que la transaction intervenue entre Joséphine Rosconi le 24 juillet 1942, devant Me Émile Beauchemin, N.P., et en vertu de laquelle elle a reconnu devoir à mademoiselle Yvonne Dubois, défenderesse-intimée, la somme de $4,000, que cette dernière lui avait prêtée, est nulle, de même que le transport d'une créance hypothécaire, fait en garantie. Le motif allégué est qu'au moment où l'acte a été signé, Joséphine Rosconi était dans un état d'imbécillité constant et *notoire,* qui justifie l'application de l'article 335 C.C. qui se lit ainsi:

335. Les actes antérieurs à l'interdiction prononcée pour imbécillité, démence ou fureur, peuvent cependant être annulés, si la cause de l'interdiction existait *notoirement* à l'époque où ces actes ont été faits.

Joséphine Rosconi a été interdite pour prodigalité le 1er juin 1944, et ce n'est que le 13 avril 1945, soit près de trois ans après la signature de l'acte que l'on veut maintenant faire annuler, qu'elle le fut pour imbécillité. Pour réussir, il est manifeste que les demandeurs-appelants doivent démontrer en premier lieu, que les causes qui justifiaient l'interdiction en avril 1945, non seulement existaient quand l'acte a été signé en 1942, mais qu'elles existaient *"notoirement"* à cette époque. C'est subordonnément à ces deux conditions que le juge au procès pouvait, sans y être tenu, prononcer l'annulation de l'acte.

Il est inutile, je crois, d'analyser toute la preuve qui a été faite, afin de déterminer l'état mental de Joséphine Rosconi, tant au moment de l'interdiction que durant la période qui l'a précédée. Malgré qu'il semble qu'elle ait

souffert de débilité mentale, et comme le dit M. le docteur Legrand, que son jugement n'était pas développé normalement, je crois que ces considérations ne peuvent pas influencer le résultat final de cette cause. Le seul fait de l'imbécillité n'est pas un facteur suffisant pour que l'acte soit frappé de nullité. Il faut nécessairement que cette imbécilité soit *notoire* pour justifier les tribunaux d'appliquer l'article 335 C.C. La notoriété d'un fait comme celui-là, ne se prouve pas par quelques personnes qui témoignent de faits isolés dont elles ont eu connaissance, ou par le témoignage d'experts, si savants qu'ils soient, et qui font part des constatations que leur science leur permet de déceler. Pour qu'un fait soit notoire au sens de la loi, il faut qu'il soit généralement connu, il faut qu'il soit su qu'il existe, non seulement par quelques intimes ou quelques hommes de science, mais aussi par les habitants du voisinage ou de la localité. Comme le dit avec raison M. le Juge Bissonnette de la Cour d'Appel: "En un mot, c'est la commune renommée qui fait la *notoriété* et qui pointe du doigt à tous et pour tout, le malheureux qu'on dit et qu'on juge être privé d'un usage suffisant de ses facultés". Je ne doute pas que la notoriété exigée par l'article 335 pour imbécilité, démence ou fureur, doit avoir au moins le même caractère que celui que le *Code Civil* (art. 336c) requiert lorsqu'il s'agit d'un ivrogne d'habitude.

La raison est évidente. Cette notoriété est la seule protection offerte à la personne qui se propose de contracter. La publicité qui est donnée aux interdits, pour démence, fureur, imbécilité, ivrognerie, prodigalité (C.C. 333 et 336q) ou aux autres incapables par le moyen des registres de l'état civil, est aux yeux de la loi suffisante pour mettre en garde ceux qui désirent contracter. Mais c'est uniquement la notoriété qui doit avertir celui qui veut contracter avec un dément ou un imbécile qui n'est pas encore interdit. Lorsqu'elle existe cette notoriété, le contractant agira à ses risques et périls. Comme le disent Colin et Capitant (Droit Civil Français, 11ème Ed., Vol. 1, page 687):

> S'il y avait en effet, *notoriété* de la démense habituelle, celui qui a contracté avec l'aliéné a été au moins imprudent; il est juste qu'il supporte les conséquences de cette imprudence.

Dans le cas qui nous occupe, il n'y a aucune preuve de notoriété au dossier, rien qui pouvait faire soupçonner

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l'existence d'un état d'imbécillité chez Joséphine Rosconi. L'intimée n'avait jamais vu cette dernière, ne la connaissait pas, et c'est par l'intermédiaire d'un notaire qu'elle a prêté cette somme de $4,000. Annuler le présent acte, serait sérieusement mettre en péril la sécurité des prêts hypothécaires, consentis de bonne foi, dans le cours normal des opérations financières. C'est précisément pour écarter ce danger que le législateur exige cet élément de notoriété, dont la preuve incombe à l'incapable ou à son représentant, et qui constitue la mise en garde nécessaire.

Les appelants ont également soutenu que Joséphine Rosconi ne pouvait, en raison de la faiblesse de son esprit, donner un consentement valable, et invoquent l'article 986 du *Code Civil* qui se lit ainsi:

> 986. Sont incapables de contracter:
>
> Les mineurs, dans les cas et suivant les dispositions contenues dans ce Code;
>
> Les interdits;
>
> Les femmes mariées, excepté dans les cas spécifiés par la loi;
>
> Ceux à qui des dispositions spéciales de la loi défendent de contracter à raison de leurs relations ensemble, ou de l'objet du contrat;
>
> Les personnes aliénées ou souffrant d'une aberration temporaire causée par maladie, accident, ivresse ou autre cause, ou qui, à raison de la faiblesse de leur esprit, sont incapables de donner un consentement valable;
>
> (Ceux qui sont frappés de dégradation civique.)

Cet article qui correspond à l'article 1124 du *Code Napoléon,* en diffère cependant en ce qu'il contient les paragraphes 3 et 5 qui n'existent pas en France. On a cru voir dans ce paragraphe 5, ajouté par les codificateurs, une contradiction avec les termes de l'article 335 C.C. En effet, comment concilier 335 C.C. qui dit que les actes faits antérieurement à l'interdiction peuvent être annulés, si les causes d'interdiction existaient *notoirement* à l'époque où ils ont été faits, avec 986 (5) C.C. qui veut que les personnes faibles d'esprit soient incapables de contracter, sans qu'entre l'élément de notoriété, et sans qu'il soit question d'interdiction?

Mais, cette contradiction est plus apparente que réelle.

Dans une cause comme celle qui nous occupe, il faut en premier lieu considérer l'article 335, qui est une loi particulière, de préférence à l'article 986 (5) qui d'une façon générale traite des incapables. Il y a entre les deux textes des différences fondamentales qui aideront à en arriver à

une conclusion. Ainsi, en vertu de 335, il faut qu'il y ait interdiction, que l'acte de l'incapable soit antérieur à l'interdiction, et que les causes d'interdiction aient existé notoirement au moment où l'acte attaqué a été posé. En vertu de 986 (5) l'acte sera mis de côté s'il y a déficience mentale au moment où il a été posé, mais si la preuve révèle que l'incapable a agi dans un moment d'intervalle lucide, son acte sera tenu pour valide. Il n'est question ni de notoriété, ni d'interdiction. Ainsi donc, si un incapable, ou son représentant établit la déficience mentale, l'interdiction, l'acte antérieur, alors qu'existait la cause notoire d'interdiction, le contrat sera annulé vu que toutes les conditions de l'article 335 auront été remplies. Il serait illogique de faire jouer en ce cas l'article 986 (5), et de prendre en considération la preuve que l'acte a été posé dans un moment d'intervalle lucide. Il sera suffisant qu'il soit établi que l'aliénation mentale existait à l'époque du contrat *généralement*. (Mignault, Vol. 5, page 195.)

Si la preuve n'établit pas la notoriété, le recours de l'incapable ou de son représentant n'est pas épuisé, car il a encore évidemment le droit de se prévaloir de la loi générale concernant les incapables, contenue dans l'article 986 et particulièrement au paragraphe 5. Mais la preuve sera plus onéreuse, et la Cour alors ne sera pas satisfaite de la preuve d'une déficience mentale qui a existé *généralement*, mais il faudra qu'il lui soit démontré qu'au moment où l'acte a été posé, le contractant n'avait pas la jouissance de ses facultés mentales. Dans le cas de l'article 335, quand la déficience mentale et la notoriété sont établies, il y a présomption d'incapacité au moment de la passation du contrat; au contraire, quand 986 (5) trouve son application, il y a présomption de capacité, ce qui d'ailleurs est la règle générale, sauf le cas où la preuve d'aliénation mentale est telle qu'elle fait naître la présomption d'absence d'intervalle lucide. (Mignault, Vol. 5, p. 195) (*Phelan* v. *Murphy*), (1).

Il a été établi dans la présente cause que l'imbécillité de Joséphine Rosconi n'avait pas le caractère de notoriété voulu pour que les appelants puissent invoquer l'article 335. Quel est donc maintenant le recours que leur donne

(1) Q.R. (1938) 76 S.C. 464.

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l'article 986? La preuve révèle-t-elle folie au moment où le contrat a été signé, ou une folie permanente telle qu'on ne puisse supposer la possibilité d'un intervalle de lucidité? Sur ce point, la preuve est très douteuse, mais je ne crois pas qu'il soit nécessaire de déterminer si oui ou non il existait un intervalle de lucidité pour en arriver à une conclusion.

Il ne fait pas de doute que, quand l'action en annulation invoque les motifs prévus à l'article 335, l'acte n'est pas nul de plein droit mais n'est qu'annulable. Ces actes, dit l'article 335, "peuvent cependant être annulés". C'est d'ailleurs ce que la jurisprudence de cette province a consacré et particulièrement dans la cause de *Normandin* v. *Nadon* (1), où M. le Juge Archambault dans un jugement très élaboré, fait une revue de la jurisprudence et conclut avec raison que la nullité des actes faits, soit par l'interdit, soit par la personne souffrant d'aliénation mentale notoire, n'est pas absolue, mais uniquement relative, et, comme elle est établie en faveur de ces deux classes de personnes, elle ne peut être invoquée que par elles-mêmes ou leurs représentants légaux.

Le même principe doit, je crois, s'appliquer au paragraphe 5 de l'article 986, et dans les deux cas, qu'il s'agisse de l'article 335 ou de l'article 986, paragraphe 5, la nullité n'est que relative. Il serait en effet étrange que l'acte ne soit qu'annulable sous 335, dans le cas où il y a interdiction et que la notoriété est établie, et que la nullité serait absolue s'il n'y avait pas d'interdiction ni de notoriété. Il suffira de se rappeler que dans les deux cas la demande en annulation ne peut être faite que par l'incapable lui-même ou par son représentant, ce qui ne serait pas le cas, si la nullité avait un caractère différent et était absolue. Tant que semblable action n'a pas été instituée par l'incapable, l'autre partie contractante demeure liée, et est tenue de remplir les obligations que lui impose son contrat.

Les caractères de la nullité absolue sont bien connus. Cette nullité est *immédiate,* c'est-à-dire qu'elle frappe l'acte aussitôt qu'il est fait. Toute personne intéressée à faire constater cette nullité peut s'en prévaloir, et celle-ci ne

(1) Q.R. [1945] R.L. (N.S.) 361.

peut pas être couverte par la confirmation de l'un des intéressés. Au contraire, Planiol enseigne (Droit Civil, Vol. 1, 9ème Ed., p. 128) que les vices de consentement comme la violence, l'erreur, le dol, et l'*incapacité* de l'un des auteurs de l'acte, sont les principales causes qui rendent un acte *annulable*. Dans ce cas, la nullité n'est pas immédiate, c'est-à-dire qu'elle produit ses effets tant que n'est pas rendue la sentence du juge. L'action n'est pas réservée à tout le monde, mais seulement à l'incapable ou à la personne dont le consentement a été vicié. C'est un moyen de protection pour une personne déterminée. Cette nullité relative peut évidemment se couvrir par l'effet d'une confirmation subséquente. Si les actes étaient inexistants, ils n'existeraient pour personne, mais pourtant ces contrats subsistent au moins quant à l'autre partie contractante, qui ne peut jamais demander la nullité et qui doit attendre l'action de l'incapable ou de son représentant.

Tous les auteurs français confirment cette théorie que l'acte d'un *incapable* n'est pas frappé de nullité absolue, mais bien de *nullité relative*.

Ainsi, c'est la doctrine exprimée dans les Pandectes Françaises (Répertoire "Obligations", p. 694, n° 6280):

> Dans les diverses hypothèses où la nullité est fondée sur l'*incapacité*, elle n'est que *relative*, et ne peut être proposée par les personnes avec lesquelles l'incapable a contracté.

Dans Dalloz, Nouveau Répertoire (Vol. 3, p. 260, n° 15) *Vide*:

> Il y a nullité absolue lorsqu'il y a défaut de consentement, lorsque l'acte est illicite ou immoral par son objet ou par ses causes, lorsqu'il n'a pas été entouré des règles de forme impérativement exigées par la loi; il y a nullité *relative* s'il y a vice de consentement ou *incapacité*, ou parfois lésion, s'il y a absence de causes ou fausses causes.

Et dans le même auteur (n° 24, page 260):

> Lorsque la nullité est relative, seule la personne déterminée, que l'inefficacité de l'acte est destinée à protéger, a le droit de prétendre que l'acte doit demeurer dénué d'effet; il lui appartient de voir si elle veut ou non demander la nullité, et c'est pourquoi l'on dit que l'acte est *annulable*.

Planiol (Droit Civil, Tome 1, 3ème Ed., Revue par Ripert, 1946 p. 152) traitant du caractère de la nullité relative, dit ce qui suit:

> La nullité est dite relative lorsque l'inefficacité de l'acte est destinée à protéger une personne déterminée. Il appartient à cette personne de

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voir si elle veut ou non demander la nullité. Il est certain ici que la nullité ne se produit pas de plein droit. Elle doit être demandée en justice et prononcée par jugement.

Cette doctrine n'est d'ailleurs pas nouvelle. Déjà à la fin du siècle dernier, Baudry-Lacantinerie dans son Droit Civil (Vol. 2, 4ème Ed., à la page 806) disait:

> Le contrat nul ou annulable est celui qui réunit tous les éléments essentiels à sa formation, mais qui renferme un vice susceptible d'amener son annulation par la justice.
>
> On doit considérer comme infirmant la validité du contrat, sans l'empêcher toutefois de se former,
>
> 1o Les simples vices du consentement, à savoir: la violence, le dol et l'erreur, auxquels la loi assimile la lésion;
>
> 2o *Le défaut de capacité* chez la partie qui s'oblige. L'incapacité n'est en effet qu'une cause de nullité ou d'annulabilité.

La doctrine ci-dessus est aussi la doctrine enseignée par Mignault, Vol. 5, à la page 196, où l'on verra qu'il s'agisse des interdits ou d'une personne aliénée, l'incapable seul peut demander l'annulation du contrat, "dans un cas, comme dans l'autre, la nullité est relative".

Il suit nécessairement de cela que les appelants, assumant que l'acte a été signé dans un moment de déficience mentale, ne peuvent obtenir autre chose que de remettre les parties dans l'état où elles étaient à la date où le contrat a été signé. Or, comme l'intimée a prêté la somme de $4,000, et s'est fait transporter, en garantie, une créance hypothécaire qui était due à Joséphine Rosconi, il s'ensuit qu'on aurait dû lui offrir le remboursement de la somme de $4,000 avant qu'on demande au tribunal de prononcer la nullité du contrat. Le droit que peuvent avoir les demandeurs-appelants de faire annuler le contrat est subordonné à leur obligation de rembourser. Il faut, lorsque la nullité est relative, offrir ce que l'on a reçu, avant de réclamer ce qu'on a donné. Si la loi protège l'incapable, ce n'est pas pour lui assurer un enrichissement, mais plutôt pour lui épargner une perte.

Sur ce point la doctrine n'a jamais varié. Aubry et Rau (Vol. 4, 5ème Ed. page 428) enseignent que:

> L'annulation ou la rescision d'un engagement contractuel oblige les parties à se restituer respectivement ce qu'elles ont reçu ou perçu par suite ou en vertu du contrat d'où procédait cet engagement.

Laurent (Vol. 19, page 64, Principes de Droit Civil Français) s'exprime ainsi:

Si le contrat annulé n'a reçu aucune exécution, l'effet de l'annulation est très simple; il n'y a plus de contrat, donc plus d'obligation, ni créancier, ni débiteur. Mais le contrat peut avoir été exécuté; dans ce cas, les parties doivent être remises au même état que si l'obligation n'avait pas existé; chacune d'elles doit donc rendre ce qu'elle a reçu en vertu du contrat.

Demolombe (Traité des Contrats, Vol. 6, page 172, n° 171) enseigne:

Et à l'égard des parties, la conséquence en est qu'elles sont tenues respectivement de se restituer ce qu'elles ont reçu par suite de l'acte, dont la nullité ou la rescision a été prononcée.

La même doctrine se trouve dans Dalloz (Nouveau Répertoire, Vol. 3, p. 263, verbo "nullité", n° 60):

Lorsque le contrat, tout en étant illicite, n'est pas entaché d'immoralité, les tribunaux, afin d'assurer le respect de l'ordre public, laissent produire à la nullité tous les effets, et admettent la répétition qui fera disparaître toute trace du contrat conclu.

Baudry-Lacantinerie (Droit Civil, Vol. 2, 4ème Ed., page 827, n° 1171) est aussi d'avis que:

La nullité ou la rescision prononcée en justice a pour résultat de mettre les choses dans l'état où elles étaient avant la formation de l'obligation annulée ou rescindée.

Traitant de l'article 1312, qui correspond à notre article 1011 C.C., Dalloz (Codes Annotés, 1905, Vol. 3, n° 10, page 293) dit:

L'annulation remet les parties au même état où elles étaient avant le contrat.

Et au numéro 12:

De là il résulte que les parties doivent se restituer respectivement tout ce qu'elles ont reçu ou tout ce qu'elles ont perçu en vertu de l'acte, s'il est synallagmatique, ou ce que l'une d'elles a reçu ou perçu si l'acte est unilatéral.

Larombière (Théorie des Obligations, Vol. 5, page 420) dit également:

Lorsqu'un contrat est annulé, rescindé, ou résolu, les parties sont remises au même et semblable état qu'avant la convention. Chacune d'elles doit faire compte à l'autre de ce qu'elle a perçu.

Enfin, (*Vide*: Juris-Classeur Civil, article 1312, Nullité et Rescision des Conventions, n^{os} 1-2-4):

L'article 1312 traite de l'effet de l'annulation en se plaçant au point de vue particulier du remboursement des sommes payées. Par l'effet de

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l'annulation, les parties se trouvent replacées dans la situation où elles étaient avant la convention annulée ou rescindée... Il en résulte qu'elles doivent se restituer tout ce qu'elles ont reçu en vertu de ladite convention.

Cette règle cependant comporte quelques exceptions. Elles sont contenues au *Code Napoléon* à l'article 1312, et à notre *Code Civil* à l'article 1011. L'article 1312 du *Code Napoléon* est à l'effet, depuis un amendement apporté en 1938, que lorsque *les mineurs* ou *les interdits* sont admis, en ces qualités à se faire restituer contre leurs engagements, le remboursement de ce qui aurait été, en conséquence de ces engagements, payé pendant la minorité ou l'interdiction, ne peut en être exigé, à moins qu'il ne soit prouvé que ce qui a été payé a tourné à leur profit. Notre article 1011 se lit comme suit:

1011. Lorsque les mineurs, les interdits ou les femmes mariées, sont admis, en ces qualités à se faire restituer contre leurs contrats, le remboursement de ce qui a été, en conséquence de ces engagements, payé pendant la *minorité, l'interdiction* ou le *mariage,* n'en peut être exigé, à moins qu'il ne soit prouvé que ce qui a été ainsi payé a tourné à leur profit.

Ces articles 1312 du *Code Napoléon* et 1011 de notre *Code Civil,* confirment clairement la règle, que les parties doivent être remises au même état qu'avant la convention, lorsqu'il y a nullité de cette convention, mais dans certains cas, la loi apporte des exceptions. En France, jusqu'en 1938, cette exception s'appliquait à l'*interdit,* au *mineur* et à la *femme mariée* pour les actes faits pendant la *minorité, l'interdiction* ou le *mariage,* mais depuis 1938, la femme mariée a cessé de bénéficier de cette exception. Au contraire, ici, tous trois bénéficient toujours de l'exception prévue à l'article 1011, et lorsque ces incapables mentionnés à l'article ont contracté pendant la *minorité, l'interdiction* ou le *mariage,* le remboursement de ce que les incapables mentionnés à l'article ont payé, ne peut être exigé d'eux, à moins que l'autre partie contractante démontre que l'incapable a bénéficié de la transaction. Il s'agit d'une loi d'exception, et comme le dit Larombière (Théorie des Obligations, Vol. 5, à la page 420):

L'article 1312 introduit une *exception* à cette règle en faveur des mineurs, des interdits, des femmes mariées.

On ne peut pas, je crois, étendre la portée de l'article 1011. Ce serait faire violence au texte qui stipule que ce qui a été payé *pendant la minorité, l'interdiction* ou le *ma-*

riage, ne peut être exigé, à moins qu'il ne soit prouvé que ce qui a été ainsi payé a tourné au profit de l'incapable, et l'appliquer à une convention faite par un faible d'esprit ou un imbécile avant l'interdiction. Il s'ensuit que lorsqu'il s'agit d'une personne autre qu'un mineur, qu'un interdit ou qu'une femme mariée, (ou du cas prévu à l'article 334 C.C.), la loi générale doit s'appliquer, et l'incapable qui ne bénéficie pas de l'exception doit être appelé à rembourser non pas seulement jusqu'à concurrence du montant qui a tourné à son profit, mais la totalité du montant qu'il a reçu comme résultat de la convention.

Larombière (Théorie des Obligations, Vol. 5, à la page 428) explique qu'il y aurait de bonnes raisons d'appliquer l'article 1312 du *Code Napoléon,* non seulement aux mineurs, aux interdits et aux femmes mariées (avant 1938), mais aussi aux autres incapables. Mais, comme ils ne sont pas frappés d'interdiction, la partie qui a contracté avec eux est fondée à exiger le remboursement intégral de ce qui leur aurait été payé, indépendamment de l'emploi qu'ils en auraient pu faire. Il complète sa pensée en disant que l'on doit tenir compte de la bonne foi de l'autre partie contractante qui a contracté dans l'ignorance de leur incapacité naturelle. Comment, en effet, pouvait l'autre partie contractante exiger la justification d'une incapacité, sur laquelle aucun soupçon ne devait s'élever? Dans la cause qui nous occupe, il est impossible de mettre en doute la bonne foi de mademoiselle Dubois.

Au cours de l'argument, on a soumis à la Cour la proposition qu'en France, en vertu de l'article 1312, on a admis que l'exception s'appliquait à la femme mariée, et qu'en conséquence, l'article 1312 du *Code Napoléon* comme l'article 1011 de la province de Québec, ne sont pas limitatifs et doivent comprendre les autres incapables même s'ils n'y sont pas expressément mentionnés. On trouve dans Juris-Classeur (*supra*), plusieurs autorités et plusieurs décisions disant qu'en effet, cette exception doit s'appliquer à la femme mariée. Mais, toutes ces décisions sont antérieures à 1938, date de l'amendement apporté à l'article 1312, et c'est avec bon droit que Laurent (Vol. 19, n° 71) s'étonne qu'il ait fallu deux décisions de la Cour de Cassation en France, pour appliquer l'exception à la femme mariée, et

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pour juger ce que dans le temps, la loi décidait formellement dans l'article 1312, qui met la femme mariée sur la même ligne que les mineurs et les interdits.

Cette jurisprudence et ces autorités m'amènent nécessairement à conclure que lorsqu'une action est instituée, comme dans le cas qui nous occupe, par un curateur à un interdit pour faire annuler une convention signée avant l'interdiction, par un faible d'esprit ou un imbécile, l'on doit nécessairement offrir le montant reçu avant que la nullité du contrat ne puisse être prononcée. Il est de principe que la demande en nullité ou en rescision suivie d'un jugement, remet les parties en état où elles étaient avant la conclusion de l'acte. Dans la présente cause, ce résultat ne pourrait être obtenu que par les offres et la consignation qu'auraient dû faire les appelants, de la somme de $4,000. C'est à ce prix seulement qu'ils peuvent faire réintégrer dans le patrimoine de mademoiselle Rosconi, la créance hypothécaire de $4,000, transportée en garantie à mademoiselle Dubois. (*Latreille* v. *Gouin*) (1).

Pour ces raisons, je suis d'avis que l'appel doit être rejeté avec dépens de toutes les cours.

RAND, J.:—This appeal raises a question in the law of Quebec relating to the effect of insanity on obligations purporting to have been entered into by a person so afflicted. In disposing of it, I take the fact to be that the deceased was, at the time of making the instrument now questioned, incapable of appreciating its nature or significance, but that her state of low mentality was not notorious in the community in which she lived.

In the Civil Law of Rome which is basic to that of France and Quebec, the rule was of the utmost simplicity: all apparent juristic acts of such a person were null; the lack of real consent prevented the operation of law upon what, in fact, had been done. That this rule prevailed in parts of Western Europe is shown by the decision of the Judicial Committee in *Molyneux* v. *Natal Land Company* (2), in which the Roman-Dutch law in force in Natal was in ques-

(1) [1926] S.C.R. 558.

(2) [1905] A.C. 555.

tion; and, speaking for the Committee, Sir Henry de Villiers invoked the view of Pothier set forth in his work on Obligatons, s. 51:—

> All contracts pretended to be made by persons interdicted for insanity, though before interdiction, are null, provided it be shewn that they were insane at the time of the contract, for then insanity alone, and of itself renders them incapable of contracting, independently of the sentence of interdiction, which is merely a declaration of insanity.

It is, I think, equally clear that the recovery of any money paid to the incompetent could be only on the principle of unjust enrichment.

That underlying law in Quebec has, however, been affected in some detail by provisions of the *Civil Code* and the conclusion on the controversy before us depends upon the extent and nature of that effect. The relevant articles are Nos. 334, 335, 986, 987 and 1011, the material provisions of which are as follows:—

> 334. All acts done subsequently (to interdiction) by the person interdicted for imbecility, madness or insanity, are null;.....
>
> 335. Acts anterior to interdiction for imbecility, insanity or madness may nevertheless be set aside, if the cause of such interdiction notoriously existed at the time when these acts were done.
>
> 986. Those legally incapable of contracting are:—
>
> .....
>
> Interdicted persons;
>
> .....
>
> Persons insane or suffering a temporary derangement of intellect arising from disease, accident, drunkenness or other cause or who by reason of weakness of understanding are unable to give a valid consent;
>
> .....
>
> 987. .....
>
> Parties capable of contracting cannot set up the incapacity of the minors or of the interdicted persons with whom they have contracted.
>
> 1011. When minors, interdicted persons or married women are admitted in these qualities to be relieved from their contracts, the reimbursement of that which has been paid in consequence of these contracts, during minority, interdiction or marriage, cannot be exacted unless it is proved that what has been so paid has turned to their profit.

As can be seen, these formulations, apart from 986, do not expressly touch the basic law; but they do embody matter of that law with new elements. For instance, it is not disputed that under art. 334 an act of a person interdicted for insanity is null notwithstanding that it was done in a lucid interval; proof of the latter is excluded as irrelevant. But art. 987 modifies the nullity de plein droit of the earlier day: only the incapable is permitted to raise

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the question; and there does not seem to be doubt that it is now to be treated as a relative nullity. Again, in interdiction, art. 1011 stipulates that restitution will be open to the capable party only upon his showing that what was advanced has been turned to the benefit of the incapable, which maintains recovery on the footing of unjust enrichment. In the absence of that provision, it would be arguable that the ordinary rule of *restitutio in integrum* in an action of annulment or rescission would apply.

Two questions then arise: does the character of relative nullity thus attributed to an act of apparent obligation by an insane person under interdiction attract the same character to such an act where the insanity comes under interdiction only at a later time? Mignault, Vol. 5 at p. 196 expresses the view that it does, and I have come to the conclusion that he is right. Interdiction, with its public registration, for such a cause is obviously of a higher rank in the legal scale than the cause itself: it subsumes the cause, and it would be illogical to interpret the provision of art. 987 as not implying that such an incident imposed on that legal formulation embodying the cause was not, a fortiori, to attach to that cause existing alone. Then, again, the language of art. 335, "peuvent cependant être annulés" is that of relative nullity, and it introduces a new element, notoriety; why should notoriety be required if its absence gives rise to a broader legal incident and one more beneficial to the incapable? The article cannot be taken as dealing only with a mode of proof. The proof here is of a congenital condition; it would be precisely the same under the article with the additional evidence of notoriety: and in each case actual incapacity would be shown at the moment of the act. If constructive proof only were the object, then an imbecility existing alone in notoriety would seem to be sufficient; but it is uniformly held that a general or habitual incapacity must be shown as well as notoriety.

That being so, are the ordinary incidents of relative nullity to attach to insanity alone? There is no inherent necessity that they should: relative nullity restricts the right to raise the question to the private interest intended to be protected, but it coexists with the ordinary incident,

in absolute nullity, of restitution limited to unjust enrichment under art. 1011. But art. 335, if it is to be taken as remitting the matters there mentioned to an annulment in justice with all that that implies, requires *restitutio in integrum* as a condition of relief; and in that view, the same character of nullity and incident would attach to insanity without notoriety. But even if in cases within the article, treating it as an extension of 334, notoriety as serving an equivalent purpose of registration, restitution followed as in interdiction under art. 1011, I should, for the reasons already stated, hold its necessary implication to be that insanity without notoriety is subject to the ordinary requirement of restitution in annulment.

Construing these provisions, then, together, and treating art. 986 as the general statement of basic rule, modified by the specific provisions of the other articles, I find them to place the claim to relief on the ground of insanity, without more, under the ordinary procedure of judicial annulment or rescission, and that consequently, as a condition of relief, there must be a return of what was received. As that is not offered here, the action fails.

This result is in accord with the weight of opinion of French commentators in their interpretation of the *Code Napoléon,* the articles of which, in this respect, are not materially different from those of the *Civil Code;* and with it, the Commissioners in 1866 were undoubtedly familiar. In the Roman days and in fact down to the latter part of the 18th century, the conceptions of mental disturbance were extremely crude notions of demonism; but by 1803 science had given its first intimations that understanding ranged in a continuous gradation from dementia to the highest intelligence. Extreme derangement demonstrates itself and excludes action in good faith. The cases most frequently met are those of an apparent competency on the strength of which the interests of others are engaged. The exigencies of ordinary business and commercial activities, in conjunction with the deeper knowledge of mind, necessitate a rule more adapted to realities. In the case here, one of two innocent parties must suffer; and one of them has in fact misled the other: in any sense of justice, the latter is in the stronger position. That these matters

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were appreciated in the framing of the *Civil Code* is indicated by the articles mentioned and particularly by the fifth paragraph of art. 986 which does not appear in the *Code Napoléon.*

The appeal must therefore be dismissed with costs.

The judgment of Cartwright and Fauteux JJ. was delivered by

FAUTEUX, J.:—A l'initiative de Paul Lussier,—l'un des appelants—, Joséphine Rosconi fut, le 1er juin 1944, interdite pour prodigalité; Lussier était alors nommé curateur à ses biens. Le 13 avril 1945, également sur la requête de Lussier, Joséphine Rosconi était interdite pour imbécillité et le requérant nommé curateur à sa personne autant qu'à ses biens. Immédiatement après cette dernière interdiction, Lussier, ès qualité de curateur, intenta une série d'actions—dont la présente—pour faire annuler les actes consentis par Joséphine Rosconi antérieurement à son interdiction.

La convention qui fait la base de la présente cause est un acte d'obligation reçu devant Me Émile Beauchemin, notaire, le 24 juillet 1942, aux termes duquel Joséphine Rosconi, célibataire majeure, alors frappée d'aucune incapacité judiciaire, reconnaissait et déclarait devoir aux défenderesses intimées la somme de $4,000, pour prêt d'autant à un taux d'intérêt de 5 p. 100, remboursable dans quatre ans, et à la garantie de ce remboursement cédait et transportait, jusqu'à due concurrence, partie d'une créance hypothécaire au montant de $29,000 qu'elle détenait contre le mis-en-cause Phoenix.

Comme cause d'annulation de ce contrat, on a invoqué comme motifs en l'action: 1° Que mademoiselle Rosconi a été victime de lésion, de fraude ou dol; 2° Que les causes ayant donné lieu à son interdiction pour imbécillité existaient de façon notoire à l'époque de cet acte d'obligation, soit en 1942, et: 3° Qu'à tout événement, elle souffrait, au moment de l'acte, d'une faiblesse d'esprit l'empêchant de donner un consentement valable.

En substance, les allégations de cette demande ont été niées par les intimées qui, en outre de leur bonne foi, ont plaidé que l'action était mal fondée en fait et en droit.

La Cour Supérieure a accueilli l'action du curateur, annulé l'acte d'obligation ci-dessus et enjoint au mis-en-cause, registrateur de la division de Montréal, d'en radier l'enregistrement au livre des Immeubles.

Ce jugement a été infirmé à l'unanimité par la Cour du Banc du Roi (Juridiction d'appel) (1), laquelle a rejeté l'action du curateur, avec dépens. Pendant l'instance en appel, Joséphine Rosconi décédait, *ab-intestat,* laissant comme héritiers légaux, Bernadette Rosconi et Eugénie Rosconi, respectivement mère et tante de Lussier. Ces héritières, la dernière représentée par son curateur Lussier, reprirent alors l'instance.

Dans leur factum ou à l'audition devant nous, les appelants font reposer leur appel sur les trois motifs invoqués à l'action avec, cependant, une insistance qui, inexistante au début de l'audition, s'est éventuellement fixée au cours d'icelle sur le troisième point, sans cependant expressément abandonner les deux autres.

Au seuil de l'examen de ces trois points, il est pertinent de rapporter les faits suivants. Mademoiselle Rosconi vivait avec sa mère jusqu'au décès de cette dernière en 1935, alors que, par testament d'icelle, elle est devenue, à l'âge de 67 ans, héritière d'une fortune assez considérable. Personne éminemment religieuse et charitable, elle cédait volontiers aux appels de souscriptions, aux demandes d'assistance en faveur d'œuvres sociales ou religieuses, ou d'œuvre qui lui étaient représentées comme telles. Que ce penchant, avéré éventuellement comme exagéré, ait été l'objet d'une exploitation croissante imputable particulièrement à deux laïques peu scrupuleux, dont un nommé Péladeau; que pour, à ces fins, réaliser de l'argent, elle ait en plus liquidé à perte de bonnes et importantes créances immobilières et que, comme résultat du tout, sa fortune en soit devenue, à la fin des dix années précédant l'action, considérablement amoindrie, la chose est certaine. Il faut préciser, cependant, que ce penchant de mademoiselle Rosconi, son état mental—quel qu'il fut au moment de l'acte attaqué, soit en 1942—aussi bien que l'ampleur des dilapidations subséquemment mises à jour en 1945 par la preuve dans la présente cause, tout cela était totalement inconnu

(1) Q.R. [1949] K.B. 473.

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des intimées. Entre ces dernières et toutes autres personnes poursuivies, impliquées ou non dans des transactions possiblement susceptibles de rescission, il y a absence totale de relations. Les intimées n'ont même jamais vu ni connu mademoiselle Rosconi à qui ce prêt a été consenti par l'intermédiaire du notaire instrumentant. Bref, les intimées étaient d'entière bonne foi; et ce fait a été concédé.

Ces préliminaires posés, il convient d'examiner chacun des motifs des appelants dont le premier couvre: la lésion, la fraude ou dol.

Sur la lésion: Il suffirait bien de mentionner qu'aux termes de l'article 1012, "les majeurs ne peuvent être restitués contre leurs contrats pour cause de lésion seulement" pour dire que la lésion, invoquée comme telle en ce premier moyen doit, vu la majorité de mademoiselle Rosconi, être écartée comme facteur pouvant justifier en droit les conclusions de l'action. Subsidiairement et en fait, il peut être ajouté que, vu objectivement, l'acte attaqué ne suggère aucune lésion. Il n'a rien d'anormal dans sa forme et, dans sa substance, il manifeste l'équivalence des prestations des parties contractantes. Les obligations et, en particulier, la garantie donnée par mademoiselle Rosconi sont limitées à la somme de $4,000 qui lui a été prêtée et effectivement versée le même jour par les intimées.

Sur les allégations de fraude ou dol: Péladeau, suivant la preuve, a été l'instigateur de cet emprunt et il a, de fait, subséquemment touché la majeure partie du produit d'icelui. Les manœuvres ou représentations qu'on lui impute, pour ainsi induire mademoiselle Rosconi à emprunter, à son avantage, fournissent en fait, suivant les appelants, l'élément de fraude ou dol en l'affaire. Ainsi limité et considéré avec l'admission de bonne foi des intimées, il n'y aurait pour disposer de ce point qu'à rappeler que suivant les termes de l'article 993: "La fraude ou le dol est une cause de nullité lorsque les manœuvres *pratiquées par l'une des parties ou à sa connaissance,* sont telles que, sans cela, l'autre partie n'aurait pas contracté". Clairement, les intimées n'ont été ni partie aux manœuvres de Péladeau ni n'en ont eu connaissance. Mais, suggère-t-on pour les appelants, le notaire instrumentant est leur mandataire et agissant dans l'exécution et limites du mandat et en

connaissance des manœuvres de Péladeau, il engage la responsabilité des intimées vis-à-vis mademoiselle Rosconi. Assumant que le notaire instrumentant puisse, en l'espèce, être considéré comme mandataire des intimées, il n'y a, en fait, aucune preuve qu'il ait eu connaissance des manœuvres dolosives que Péladeau ait pu faire pour les fins de l'acte attaqué. Envisageant même toutes les conventions faites par le notaire Beauchemin, celle attaquée—la première qu'il ait faite—, comme les subséquentes, et le reconnaissant comme devenu mandataire attitré de mademoiselle Rosconi, le juge au procès n'a pas conclu que le notaire Beauchemin avait acquis, durant tout ce temps, la connaissance des manœuvres dolosives de Péladeau à l'endroit de mademoiselle Rosconi. Bien au contraire et sur ce point, il s'exprime comme suit au jugement:

> En ces dernières années, son mandataire attitré, le notaire Beauchemin, aurait dû agir avec plus de sagesse et de circonspection. Les intrigues de Péladeau auraient dû lui ouvrir les yeux.

C'est la connaissance des manœuvres dolosives et non le défaut de sagesse ou de circonspection à les déceler qui constitue le fait juridique conditionnant l'application de l'article 993 déclarant la fraude ou dol comme cause de nullité des contrats.

Et, au fait, est-il bien établi que le notaire Beauchemin ait, en l'occurrence, agi en qualité de mandataire des intimées? Sans doute, il a généralement affirmé que ces dernières étaient ses clientes. Mais cette affirmation n'épuise pas la question. Parlant des caractéristiques propres à la profession notariale dans la province de Québec, M. le juge Mignault disait:

> There is another feature I might mention, and that is that in this Province the notary is the adviser of both parties... (Notaries and Notarial Deeds in the Province of Quebec, Canadian Bar Association, 1929, p. 33.).

Sur la nature même du contrat entre le notaire et ses clients, on lit dans Planiol et Ripert, Traité pratique de droit civil français, 1932, Vol. II, p. 776, n° 1433:

> Le notaire, dans l'exercice de ses fonctions propres, qui sont de conseiller les parties, et de monumenter leurs conventions, *n'est pas un mandataire*. C'est ce que reconnaît la jurisprudence elle-même, à laquelle on reproche à tort de méconnaître ce principe. Même lorsque c'est le notaire qui a mis en rapports les parties entre lesquelles a été conclu l'acte reçu

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par lui, la Cour de cassation ne lui reconnaît pas pour cela la qualité de mandataire, tant qu'il n'a pas été chargé par un client de conclure ou d'accomplir pour lui un acte juridique.

Il résulte clairement des réponses données par le notaire Beauchemin—et, sur le point, c'est la seule preuve au dossier—que ce ne sont pas les intimées mais bien Péladeau qui, pour le compte de mademoiselle Rosconi, a requis ses services pour les fins de l'acte attaqué. Tout au plus peut-on dire que Beauchemin, comptant déjà les intimées dans sa clientèle, y ajoutait, en l'occasion précitée, celle de mademoiselle Rosconi et qu'en somme, il n'aurait en l'instance que mis en rapports une nouvelle cliente, lui demandant de conclure un prêt, avec d'autres clientes, ayant de l'argent à prêter.

Pour les raisons ci-dessus, ce premier point des appelants doit être écarté.

Ajoutons, de plus, une autre objection fatale. Personne ne peut s'enrichir aux dépens d'autrui est un principe ayant comme corollaire une règle particulière aux actions en annulation de contrats voulant que, par l'annulation, les parties soient remises dans l'état où elles étaient avant. D'où l'obligation de rembourser et, pour cela, offrir avec l'action, le montant reçu en vertu de la convention attaquée.

Dans le cadre de l'argument soumis comme premier point des appelants, ce principe ne souffre pas d'exception. Les appelants ont fait défaut d'y satisfaire, ils doivent donc en subir les conséquences. (*Latreille* v. *Gouin*) (1).

En second lieu, se prévalant du fait de l'interdiction pour imbécillité prononcée moins de deux ans avant l'action, on invoque les dispositions d'un article faisant exception en droit commun, soit l'article 335, lequel se lit comme suit:

> Les actes antérieurs à l'interdiction prononcée pour imbécillité, démence ou fureur, peuvent cependant être annulés si la cause de l'interdiction existait notoirement à l'époque où ces actes ont été faits.

La lecture de cet article invite deux questions: d'abord, le dossier révèle-t-il la preuve des faits conditionnant le jeu de la disposition et, ensuite, les principes reconnus comme gouvernant l'exercice du pouvoir discrétionnaire accordé au juge quand la preuve de ces faits est au dossier, ont-ils été appliqués en l'espèce?

(1) [1926] S.C.R. 558.

En plus d'établir l'interdiction pour imbécillité, les appelants devaient prouver que l'imbécillité—et non la simple faiblesse d'esprit—était l'état habituel et notoire de mademoiselle Rosconi à l'époque de l'acte attaqué. En droit, la capacité mentale est présumée et, pour cette raison, la loi exige que lorsque cette présomption est écartée par la reconnaissance judiciaire de l'incapacité, ce fait juridique soit, par des publications prescrites, porté à la connaissance des tiers pour leur protection. Dans les conditions de l'article 335, cependant, c'est la notoriété du fait de l'incapacité qui tient lieu de cette publicité. La notoriété représente donc une condition très importante au jeu équitable de cet article qui, non seulement détruit la présomption de capacité, mais en fait naître une nouvelle—celle-ci *juris et de jure*—voulant que l'état d'incapacité mentale soit tenu comme ayant été connu de tous. L'ignorance de ce fait notoire ne peut pas être invoquée. Adoptant, sans qu'il soit nécessaire de les reproduire ici, les raisons et conclusions des juges de la Cour d'Appel (1) sur l'absence de preuve de notoriété, il me faut écarter ce second moyen des appelants.

Prenant même pour bien fondée la conclusion opposée à laquelle le juge de première instance en est venu sur ce fait, et lui reconnaissant ainsi la faculté de maintenir ou renvoyer l'action, a-t-il appliqué les principes propres à l'exercice de cette discrétion, principes précisés comme suit dans Planiol et Ripert, Tome 1, à la page 726:

> Si les deux conditions qui précèdent sont réunies, *l'acte peut être annulé*, mais, contrairement à l'acte postérieur à l'interdiction, il ne l'est pas obligatoirement. Le tribunal a sur ce point un pouvoir discrétionnaire qu'il exercera *en tenant compte* à la fois de *l'intérêt du dément*, de *la bonne foi des tiers* menacés par la nullité, enfin, de *l'existence possible* d'un *intervalle lucide* au moment où l'acte attaqué a été passé.

Au jugement, l'unique référence à cette question est dans le considérant suivant:

> Considérant que même si la preuve de ces deux faits existe, la loi n'impose nécessairement point aux juges l'obligation de prononcer la résiliation de l'acte incriminé, mais leur confère tout au plus la faculté ou le pouvoir discrétionnaire d'adjuger suivant les circonstances qui ont précédé la transaction, en tenant compte de la bonne ou mauvaise foi des tiers.

(1) Q.R. [1949] K.B. 473.

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Vainement, cependant, cherche-t-on ailleurs dans le jugement de première instance, qu'une application ait été faite de cet énoncé de droit en fonction des facteurs qu'il fallait considérer. Particulièrement, et sur la question de la bonne foi des intimées menacées par la nullité, rien n'est dit. Sur l'exercice du pouvoir discrétionnaire accordé au juge, on peut rappeler ici certains passages de ce qu'en dit Lord Halsbury dans *Sharp* v. *Wakefield* (1), particulièrement à la page 179:

> An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case*; .....
> It is to be, not arbitrary, *vague*, and fanciful, but legal and regular.

Bien qu'il soit très douteux que ce pouvoir discrétionnaire accordé par l'article 335 ait été, en l'espèce, judiciairement exercé, il n'est pas nécessaire de pousser davantage l'examen de cette question.

En dernier lieu, les appelants ont soumis, et c'est le point sur lequel on a insisté, que l'acte de juillet 1942 devait être invalidé parce que Joséphine Rosconi était, au moment de cet acte, aliénée ou faible d'esprit, et, pour l'une ou l'autre de ces raisons, incapable de donner un consentement valable.

Joséphine Rosconi était-elle, en 1942, aliénée ou simplement faible d'esprit? La distinction est utile à la discussion de ce troisième point même si elle est, pour les raisons ci-après mentionnées, non strictement nécessaire à la décision. Au Tome 1, Planiol et Ripert, Traité pratique de droit civil français, page 688, n° 661, nous lisons:

> L'interdiction nécessite une altération très grave des facultés intellectuelles. Ceci résulte implicitement de l'art. 499, qui permet au juge de se contenter de donner un conseil judiciaire au défendeur, s'il ne constate que de la faiblesse d'esprit.
>
> Il y a tous les degrés entre l'homme sain et le faible d'esprit, et entre le faible d'esprit et l'aliéné. Pour savoir si le degré d'aliénation mentale est tel qu'il doive entraîner l'interdiction, les juges se demandent s'il met l'aliéné hors d'état de conduire sa personne et de gérer son patrimoine.

Sous notre Code, les articles 331, 334 et 349 et suivants, sanctionnent cette même distinction. Il ne suffit donc pas qu'une personne soit incapable de gérer son patrimoine

(1) [1891] A.C. 173.

pour qu'elle soit reconnue comme aliénée. Il faut qu'elle soit "hors d'état de conduire sa personne". La distinction paraît avoir échappé au juge de première instance. Plusieurs passages du jugement le suggèrent. Et, quant à la Cour d'Appel, la majorité laisse entendre que la preuve ne révèle pas que Joséphine Rosconi était aliénée.

Sans doute, les juges siégeant en revision ne doivent pas, en principe, en pareille matière, changer les conclusions de fait auxquelles le juge de première instance en est arrivé dans l'examen de la preuve. Encore faut-il que la preuve existe. Or, rien au dossier, soit une opinion ou un fait rapporté, nous permet de dire que Joséphine Rosconi était, en 1942, "hors d'état de conduire sa personne". Exclusivement en relation avec la gérance de son patrimoine, la preuve, susceptible d'affecter la présomption de capacité mentale, ne révèle chez cette femme, âgée et fortunée, que ceci: une prodigalité inspirée de charité, une croyance aveugle dans la bonne foi des autres, de la naïveté dans l'examen des représentations qu'on lui faisait, de l'insouciance ou un défaut d'appréciation des pertes résultant des liquidations de ses valeurs immobilières. Bref, une réponse tombée de la bouche même du docteur Legrand peut possiblement résumer son état: "Oui, ce sont des gens que l'on ne désigne pas sous le nom de folles, mais sous le nom de pas fins".

Que mademoiselle Rosconi ait été, en 1942, soit aliénée ou simplement faible d'esprit, le défaut déjà indiqué du demandeur ès qualité d'offrir avec son action, pour être remboursée aux intimées, la somme de $4,000 effectivement par elles versée à mademoiselle Rosconi, empêche les appelants d'obtenir le jugement qu'ils recherchent. Mais, disent-ils, l'article 1011 fait exception à cette obligation de remboursement. Cet article édicte:

> Lorsque les *mineurs*, les *interdits* ou les *femmes mariées*, sont admis, en ces qualités, à se faire restituer contre leurs contrats, le remboursement de ce qui a été, en conséquence de ces engagements, payé pendant la *minorité, l'interdiction ou le mariage*, n'en peut être exigé à moins qu'il ne soit prouvé que ce qui a été ainsi payé a tourné à leur profit.

L'exception n'est donc établie qu'en faveur du mineur, de la femme mariée et de l'interdit, et ne couvre, au surplus, que le remboursement de ce qui a été payé pendant la minorité, le mariage ou l'interdiction. Or, mademoiselle

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Rosconi étant, au moment de l'acte d'obligation, majeure, célibataire, et non interdite, on ne saurait lui donner le bénéfice de la disposition sans d'abord y ajouter, et faire œuvre de législation et sans, ensuite, étendre cette exception faite au jeu du principe voulant que personne ne puisse s'enrichir aux dépens d'autrui. L'article 1011 reproduit substantiellement le texte de l'article 1312 du *Code Napoléon,* tel que ce dernier existait lors de notre codification. Et comme l'article 1124 du *Code Napoléon* —tel qu'alors existant—, notre article 986, indiquant les personnes inhabiles à contracter, mentionne d'autres cas que celui des mineurs, des femmes mariées et des interdits. Mais, ni sous le *Code Napoléon,* ni sous le nôtre, a-t-on jamais étendu à ces autres cas l'exception au principe sanctionnée par notre article 1011 et par l'article 1312 du *Code Napoléon.* Dans la permanence de la similitude des deux lois à cet égard, on peut reconnaître la volonté du législateur de ne pas ajouter d'autres cas à l'exception.

La présomption générale de capacité légale domine toute la question. D'une part, et dans le cas du mineur, de la femme mariée et de l'interdit, c'est la loi qui, déjà, a écarté cette présomption d'une façon relative ou absolue. D'autre part, et dans le cas du faible d'esprit ou de l'aliéné, cette présomption demeure jusqu'au jour où les tribunaux interviennent, soit pour prononcer l'interdiction ou pourvoir à la nomination d'un conseil judiciaire, ou soit pour annuler, faute d'un consentement valable dû à une insanité mentale la convention attaquée. Dans le premier cas, c'est le fait du législateur précédant l'acte attaqué; dans le second, c'est le fait du tribunal, postérieur à l'acte attaqué. Cette distinction se traduit nécessairement dans la différence du traitement des deux cas, lequel, inspiré et mesuré, d'une part, par le degré de protection requis par l'incapable et, d'autre part, par le degré de sécurité qu'il convient de donner aux contrats faits par les tiers de bonne foi, varie, suivant que la présomption de capacité était écartée ou non au moment de la passation du contrat attaqué. La jeunesse du mineur, la personne de la femme mariée, les publications officielles suivant le prononcé de l'interdiction, sont pour les tiers des avertissements que la présomption de capacité légale est menacée ou complètement écartée. Mais le germe d'invalidité, né de l'aliénation ou de la fai-

blesse d'esprit non judiciairement reconnue et, de fait, non toujours apparente, ne peut équivaloir à un même avertissement à l'endroit des tiers prudents et de bonne foi. Et on peut voir là la raison de ne pas obliger ces derniers à souffrir dans ces cas, outre l'annulation de leurs contrats, la perte du remboursement des sommes qu'ils ont payées, en conséquence.

De plus, et considérant mademoiselle Rosconi comme faible d'esprit en 1942, sa position, devant la loi, ne saurait être plus avantageuse que si elle eut été alors, non seulement faible d'esprit, mais judiciairement reconnue comme telle par les tribunaux et pourvue d'un conseil judiciaire. Or, il est clair des termes de l'article 334 qui, en cela, diffère fondamentalement de l'article 502 du *Code Napoléon*, d'où il est tiré, que sa position n'est pas, sous notre droit, identique à celle faite à l'interdit par notre article. Alors que l'article 502 du *Code Napoléon* prescrit que "L'interdiction ou la nomination d'un conseil a son effet du jour du jugement et que tous actes passés postérieurement par l'interdit, ou sans l'assistance du conseil, seront nuls de droit", notre article 334 répète bien que "tout acte fait postérieurement par l'interdit pour cause d'imbécillité, démence ou fureur, est nul"; mais diffère en disant "que les actes faits par celui auquel il a été donné un conseil sans en être assisté, sont nuls *s'ils lui sont préjudiciables*, de la même manière que ceux du mineur et de l'interdit pour prodigalité, d'après 987".

Ce qui veut dire, suivant Sirois, Tutelles et Curatelles, page 497:

qu'il faut prouver la lésion pour faire déclarer cet acte nul et qu'il ne suffit pas simplement d'établir que l'acte a été fait depuis la nomination du conseil judiciaire pour le faire annuler.

Cette différence fondamentale en notre droit, entre le cas de l'interdit et celui du faible d'esprit pourvu d'un conseil judiciaire, peut suggérer un autre motif pour ne pas étendre l'exception de l'article 1011 au bénéfice des appelants.

Pour toutes ces raisons, je rejetterais l'appel avec dépens de toutes les Cours.

Appeal dismissed with costs.

Solicitors for the Appellants: *Duranleau, Dupré & Duranleau.*

Solicitor for the Respondents: *C. H. Desjardins.*

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*Mar 14
*May 23

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED *(Plaintiff)* .. APPELLANT;

AND

WESTERN FAIR ASSOCIATION *(Defendant)* ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Copyright—Infringement—Performance of musical work at Agricultural-Industrial Fair—Admission Fee Charged—Whether "performance without motive of gain"—The Copyright Act, R.S.C. 1927, c. 32, s. 17(1) (vii).

The *Copyright Act*, R.S.C., 1927, c. 32 as amended by S. of C. 1938, c. 27, s. 2 provides that:—

17(1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright:—Provided that the following acts shall not constitute an infringement of copyright:—(vii) The performance without motive of gain of any musical work at any agricultural, agricultural-industrial exhibition or fair which received a grant from or is held under Dominion, provincial or municipal authority, by the directors thereof.

Held: In construing a Federal statute the English version is to be read with the French version; *The King* v. *Dubois*, [1935] S.C.R. 378 at 402-3; *Commissioner of Patents* v. *Winthrop*, [1948] S.C.R. 46 at 54. Section 17(1) (vii) of the *Copyright Act* when so construed is to be read as follows: "The performance without motive of gain of any musical work at any exhibition or fair" of the types therein described.

(Decision of the Court of Appeal, [1950] O.W.N. 126, reversed).

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming the judgment of LeBel J. (2).

H. E. Manning K.C. for the appellant.

M. J. Grant K.C. and *J. W. Cram* for the respondent.

The judgment of the Chief Justice, Taschereau and Kerwin JJ. was delivered by:

KERWIN J.:—This is an action for alleged infringement of copyright. The plaintiff appellant is the owner of the performing right in Canada of the musical works "Begin the Beguine" and "Tea for Two". That right falls within s. 3(1) of the *Copyright Act*, R.S.C. 1927, c. 32:—

(1) [1950] O.W.N. 475. (2) [1950] O.R. 121.

For the purposes of this Act, "copyright" means the sole right * * * to perform * * * the work or any substantial part thereof in public; * * * and to authorize any such acts as aforesaid.

By s. 17 of the Act as amended by s. 2 of c. 27 of the 1938 statutes:

17. Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright:

Provided that the following acts shall not constitute an infringement of copyright:—

* * *

(vii). The performance without motive of gain of any musical work at any agricultural, agricultural-industrial exhibition or fair which received a grant from or is held under Dominion, provincial or municipal authority, by the directors thereof.

Subsection 1 of s. 20 enacts:

Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.

Pursuant to its Act of incorporation, the respondent defendant corporation conducted, on lands in the City of London and in buildings erected thereon, an exhibition known as the "Western Fair". The action went to trial on an agreed statement of facts, from which it appears that the respondent alleges, and the appellant denies, that the "Western Fair" so conducted was an agricultural, agricultural-industrial exhibition or fair within the meaning of s. 17(1) (vii) set out above. The trial judge decided that the Western Fair as conducted in 1948 was an agricultural-industrial exhibition or fair within the meaning of this enactment, and the Court of Appeal affirmed that finding. Counsel for the appellant did not challenge that finding before this Court.

It was in the year 1948 that the alleged infringement occurred when special entertainment for those attending the fair was provided in two shows daily (afternoon and evening) before a grand-stand in a special enclosure to which admission fees were charged. This entertainment consisted of horse races and exhibition and judging of harness horses during the afternoon performances only; and for both performances, vaudeville and acrobatic acts, during the course of one of which a musical troop played

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"Begin the Beguine". These vaudeville and acrobatic acts were produced and directed by an American booking agency under a contract with the respondent. Band music was continuously played during the course of the vaudeville and acrobatic acts; such band music being provided by the London Technical Band under a contract with the respondent. During the course of each performance before the grand-stand such band played "Begin the Beguine". The respondent engaged, under contract, The White Rose Petrolia Concert Band to play music for the general entertainment of the public from a band-stand located upon the fair grounds and on one of the evenings during the exhibition such band performed "Tea for Two".

The first sentence in paragraph 15 of the agreed statement of facts makes it clear that these performances were authorized by the respondent. The second sentence in that paragraph is relied upon by the respondent as indicating that the parties agreed that within the meaning of s. 17(1) (vii) the performances were "without motive of gain". Paragraph 15 reads as follows:

> 15. The Defendant employed the said performers and bands mentioned in the preceding paragraphs 12, 13 and 14 foregoing for the purposes of performing the musical works therein mentioned and authorized and instructed them to perform the same as stated therein. The motive of the Directors of the Defendant in causing the Defendant to employ the said performers and bands and in having them play the said musical works was to provide entertainment for and to please those attending The Western Fair and to make the Western Fair one which would be largely attended by the public.

It is impossible to read the last part of this paragraph as disposing of the main contention between the parties.

The proper construction of s. 17(1) (vii) requires that attention first be directed to the concluding words "by the directors thereof". In this connection the enactment (1938, c. 27, s. 2) appears in the French version as follows:

> (vii) L'exécution, sans intention de gain, d'une œuvre musicale à une exposition agricole, ou à une exposition industrielle et agricole, ou à une foire, qui reçoit une subvention d'une autorité fédérale, provinciale ou municipale, ou qui est tenue par ses administrateurs en vertu d'une telle autorité.

It is clear, as was held by this Court in *The King* v. *Dubois* (1), that a statute in the English version must be read with the statute in the French version. So read, the

(1) [1935] S.C.R. 378 at 402.

former means that the words "by the directors thereof" refer to an exhibition or fair which is held under Dominion, provincial or municipal authority.

Before proceeding further to construe s. 17(1) (vii), it should be noticed that the first reference to an exhibition or fair appeared by an amendment to the *Copyright Act* in c. 8 of the Statutes of 1931. Prior thereto the provisos as to certain acts not constituting an infringement of copyright were contained in paragraphs (i) to (vi). In that year numbers (vii) and (viii) were added in the following terms:

(vii) The performance of any musical work by any church, college or school, or by any religious, charitable or fraternal organization, provided such performance is given without private profit for religious, educational or charitable purposes. (viii) The performance without private profit of any musical work at any agricultural exhibition or fair which is held under Dominion, Provincial or Municipal authority.

In this state of the law, Chief Justice Rose decided in *Canadian Performing Rights Society Ltd.* v. *Canadian National Exhibition Association* (1), that the exhibition or fair of the defendant could not be described as an "agricultural exhibition or fair" but would probably be an "agricultural-industrial exhibition". He held also that, even if it were the former, the performance was not one without private profit to the band that performed a certain musical work, and that, even if the words "the performance without private profit" meant without such profit to the holders of the exhibition or fair, the defendant acted for its private profit even if there were no net profits from the performances in the grand-stand enclosure during the year in which the infringement occurred.

By c. 28 of the 1936 statutes, the provisions above set out were repealed and the following substituted therefor:

(vii) The performance of any musical work by any church, college or school, or by any religious, charitable or fraternal organization, provided such performance is given without private profit for religious, educational or charitable purposes; provided, further, that such performance shall be deemed to be given without private profit if the only fees which are paid are paid to individual performers and that no fees or commissions are paid to any promoter, producer or contractor for services in promoting or producing the performance.

(viii) The performance without private profit of any musical work at any agricultural, agricultural-industrial exhibition, or fair, which

(1) [1934] O.R. 610.

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receives a grant from or is held under dominion, provincial or municipal authority, provided that such performance shall be deemed to be given without private profit if the only fees which are paid, are paid to the individual performers or their agents, and provided, further, that such fees are not dependent upon the attendance at the exhibition or fair.

Under this wording, Green J. decided in *Canadian Performing Rights Society Ltd.* v. *Canadian National Exhibition Association* (1), that although certain performances complained of were given at the agricultural-industrial exhibition held by the defendant, yet they were not without private profit since fees were paid in connection with the entertainment at which the musical works were performed to persons (such as ticket sellers) other than the individual performers or their agents.

Then came the 1938 amendment with which we are concerned and under which J. G. Kelly J. in *Canadian Performing Rights Society Ltd.* v. *Lombardo* (2), held that the motive of the Canadian National Exhibition Association in holding the exhibition at which the defendant performed certain musical works was to please the guests and not to make pecuniary gain although gain might result. The Court of Appeal allowed the appeal from this decision on the ground that in order to secure the benefit of exception (vii) as enacted in 1938, it was essential that the defendant should shelter himself under the aegis of the directors of the association because, in the view of the Court of Appeal, it was a performance *by the directors* immediate or mediate that conferred immunity under the statute. It was held that an onus rested upon the defendant of establishing that the directors exercised control over the performances complained of, which he had failed to satisfy.

Flowing logically from this decision, Mr. Justice LeBel in the present case, and the Court of Appeal, held that the performances in question were by the directors. It was also held that the performances were without motive of gain on their part. With respect I am unable to agree. For reasons already given, the words "by the directors thereof" do not qualify "performance" or "performance without motive of gain". "Motive of gain" is a much wider expression than that used in 1931 "without private profit" and it cannot be restricted to circumstances where the motive

(1) [1938] O.R. 476. (2) [1939] O.R. 262.

of gain is the main or the only motive. Even considering the word "gain" as indicating financial advantage, the agreed statement of facts makes it clear that the respondent intended, or had as one object, that financial profit should accrue. Furthermore, as to the proviso in its present form, I agree with Chief Justice Rose when he stated that the proviso considered by him must be construed in the same way whether the action for infringement is taken against the actual performer or against one who has authorized the act.

Commencing with the basic proposition that the appellant is entitled to copyright in the musical works mentioned unless the respondent is able, on a fair reading of the exceptions in s. 17, to bring itself within one of them, and bearing in mind the history of the enactment, and particularly the fact that in 1936 special provision was made with respect to fees paid to the individual performers or their agents, I conclude that the respondent has not succeeded in bringing itself within exception (vii) and that the appeal should be allowed. The appellant is entitled to a declaration that the respondent has infringed the appellant's copyright in the musical works referred to by the performances thereof in public without the consent of the appellant, and that it is entitled to damages and its costs of the action and of the appeals. As this is a test action, the damages should be fixed at the nominal sum of $5. The costs in the Courts below should be taxed on the scale of the Supreme Court of Ontario.

The judgment of the Chief Justice, Rand, Kellock, Locke, Cartwright and Fauteux JJ. was delivered by:

KELLOCK J.—This appeal involves the interpretation of s. 17 subsection 1 (vii) of the *Copyright Act*, R.S.C. 1927, c. 32, as amended. In considering this paragraph it is helpful to refer to the history of the legislation:

In 1931, by 21-22 Geo. V, c. 8, s. 6, the following clauses were added to s. 17:

(vii) The performance of any musical work by any church, college or school, or by any religious, charitable or fraternal organization; provided such performance is given without private profit for religious, educational or charitable purposes.

(viii) The performance without private profit of any musical work at any agricultural exhibition or fair which is held under Dominion, Provincial or Municipal authority.

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Following this enactment, the case *Canadian Performing Right Society Limited* v. *Canadian National Exhibition Association* (1), came before the late Chief Justice of the High Court. There, the plaintiff complained of the playing of a composition in which it held the copyright, by a paid band at a performance in front of the grandstand at the defendant exhibition. For entrance to the grandstand the defendants made an admission charge in addition to the charge for entry to the exhibition grounds. The entertainment before the grandstand cost the defendants something more than the money taken in at the entrance to the stand. The entertainment itself was furnished because it was supposed to serve as a drawing-card to bring to the exhibition many persons who would not otherwise come. The learned trial judge, Rose C.J.H.C., held that the defendant was not an "agricultural exhibition or fair" within the meaning of the statute and further, that the performance was not "without private profit" as, from the standpoint of the performers, they were paid, and from the standpoint of the defendant itself, it desired to make the performance as nearly as possible self-supporting, and directly profitable if possible. In his view, the fact that there were no actual profits, was immaterial.

In 1936, by 1 Ed. VIII, c. 28, s. 6 of the Act of 1931 was repealed and the following paragraphs substituted for the former paragraphs (vii) and (viii):

(vii) The performance of any musical work by any church, college or school, or by any religious, charitable or fraternal organization, provided such performance is given without private profit for religious, educational or charitable purposes; provided, further, that such performance shall be deemed to be given without private profit if the only fees which are paid are paid to individual performers, and that no fees or commissions are paid to any promoter, producer or contractor for services in promoting or producing the performance.

(viii) The performance without private profit of any musical work at any agricultural, agricultural-industrial exhibition or fair, which receives a grant from or is held under dominion, provincial or municipal authority, provided that such performance shall be deemed to be given without private profit if the only fees which are paid, are paid to the individual performers or their agents, and provided, further, that such fees are not dependent upon the attendance at the exhibition or fair.

I think it is reasonable to conclude that these amendments were made as a result of the decision of 1934. Paragraph (viii) was extended to include agricultural-industrial

(1) [1934] O.R. 610.

exhibitions or fairs, evidently to take in such an exhibition as that of the defendant in the 1934 litigation, and the restriction enacted with respect to the meaning of "without private profit" in both paragraphs was apparently intended to render inapplicable the view expressed by Rose C.J.H.C. as to the earlier statute.

Following this legislation, the case, *Canadian Performing Right Society Limited* v. *Canadian National Exhibition Association* (1), came before the late Mr. Justice Greene. The alleged infringement of copyright in that case consisted again in the performance of copyright music by a paid band as part of the grandstand performance under the same circumstances as the performance in question in the action before Rose C.J.H.C.

Greene J. held that the addition of the word "agricultural-industrial" in paragraph (viii) rendered the former judgment inapplicable to the defendant, and brought it within the protection of the paragraph subject to the question as to the meaning of the words "without private profit." As to this the learned judge held that there was private profit by reason of the fact that there were

> fees paid to various people in connection with the entertainment in front of the grandstand, such as ticket sellers, ticket takers, ushers, and probably, various other attendants.

This decision was not appealed, but shortly after the delivery of the judgment, Parliament, by 2 Geo. VI, c. 27, s. 2 subsection 2, repealed the former paragraphs (vii) and (viii) and enacted other provisions. For paragraph (viii) was substituted the present paragraph (vii). For the former paragraph (vii), s. 5 of the statute substituted a proviso at the end of subsection 1 of s. 17, as follows:

> Further provided that no church, college or school, and no religious, charitable or fraternal organization shall be liable to pay any compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational or charitable object.

It will be seen that the change in this paragraph followed a somewhat different course from that adopted with respect to the paragraph here directly in question.

Following upon this amendment, the case, *Canadian Performing Right Society Limited* v. *Lombardo* (2), was decided. The defendant was an orchestra leader employed

(1) [1938] O.R. 476. (2) [1939] O.R. 262.

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by the Canadian National Exhibition Association to play music for dancing at a dance pavilion on the grounds of the association in connection with its annual exhibition for the year 1938. A fee for entry to the pavilion was charged in addition to the entrance fee for admission to the grounds. The association paid a flat fee to the defendant for the services of himself and his orchestra, and it was in connection with certain musical numbers played by the defendant that the action was brought.

It was argued for the plaintiff that the "motive of gain" referred to in the paragraph was the motive of the actual performers and that, as the defendant, who was a professional musician, was paid for the performance, he was clearly within the section. The learned trial judge rejected this contention and construed the paragraph as though it read

> The performance of any musical work at any exhibition or fair (of the sort described) where such performance is authorized by the directors of such exhibition, and where the directors in authorizing the performance, have not been induced by any motive of pecuniary gain to such exhibition or fair.

The learned judge further held that the word "gain" in the paragraph meant pecuniary gain. Under the legislation under which the association was brought into existence, it could not make profits in the ordinary sense, as it was required to hand over to the City of Toronto all surplus of receipts over disbursements except for the sum of $15,000.

Evidence was given to the effect that the directors never considered the question of pecuniary profit with regard to any individual attraction held during the exhibition; that no books of account were kept which would show whether there was a profit made on the defendant's engagement; and that the price charged for entry to the dance pavilion was nominal and was fixed with the object of controlling the attendance rather than with a view to profit.

The learned trial judge held that the motive of the directors was to please their guests and not to make pecuniary gain, although gain might result.

An appeal to the Court of Appeal was allowed. Masten J. A., who gave the leading judgment, construed the legislation as though the words "by the directors" modified

the word "performance." He held that it was for the defendant, in connection with what he had done, to establish that the directors had exercised control over the performance of the musical numbers in question, and that he failed so to do.

This decision throughout is predicated on the express view that the "performance" with which the paragraph deals is a "performance by the directors" of the exhibition or fair. However, when one consults the corresponding text in French of the paragraph under consideration *(The King* v. *Dubois* (1) at 402-3; *Commissioner of Patents* v. *Winthrop* (2) at 54) it is plain that the interpretation placed upon the section in the case cannot stand. The French text reads as follows:

(vii) L'exécution sans intention de gain, d'une œuvre musicale à une exposition agricole, ou à une exposition industrielle et agricole, ou à une foire, qui reçoit une subvention d'une autorité fédérale, provinciale ou municipale, ou qui est tenue par ses administrateurs en vertu d'une telle autorité.

Accordingly, it would appear that the section is to be read as follows:

The performance without motive of gain of any musical work at any exhibition or fair.

of the types described in the paragraph. In my opinion, if this be so, the effect is to render applicable the decision of Rose C.J.H.C. in 1934, although the words which the learned Chief Justice had to construe in that case were "without private profit" instead of the words "without motive of gain." I think the following passage from his judgment in 1934 O.R. at p. 621, paraphrased as follows, is applicable and I would so apply it.

Whether it was or was not a performance without motive of gain on the part of the defendants, it was not a performance without motive of gain to the band concerned, whether the performance was before the grandstand to which a separate entry fee was charged or whether it was in the bandstand within the exhibition grounds outside the grandstand; and I cannot find any justification for reading the paragraph as meaning that so long as the performance is without motive of gain to the persons holding the exhibition, it is protected even if the actual performer is deriving

(1) [1935] S.C.R. 378. (2) [1948] S.C.R. 46.

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private profit. The objection to such a construction is perhaps more clearly evident when the action is brought against the person who was paid for his performance than when it is brought against the persons who held the exhibition. It seems to me to be equally clear that in order to make the subsection protect the person who performs the work for his own private profit, that is, with a motive of gain, words must be interpolated and the paragraph must be read as a proviso excluding from the general law as established by the Act the performance (to which the Act but for the proviso would extend) of a musical work at an exhibition or fair (of the kind described in the proviso) so long as such performance is without motive of gain to the persons holding the exhibition or fair. I think that the subsection could not in an action brought against the paid performer be read in the way suggested; and if I am right as to that, I do not see how it is possible so to read it in an action brought against other persons. The reading of the section, I think, must be the same no matter who may be the defendant in the action in which the benefit of the proviso is invoked.

In the courts below in the case at bar, the judgments are founded on the view as to construction of the legislation taken in Lombardo's case, and the judgment in appeal, therefore, cannot stand. It should be mentioned that any question as to the exhibition or fair of the defendant not being one within the class described was abandoned before us by counsel for the appellant.

While it is evident that Parliament has intended to give some measure of freedom from liability to pay royalties in connection with the use of copyright material at these exhibitions, it is equally plain, from the presence in paragraph (vii) of qualifying language, that complete immunity was not intended. The difficulty arises from the failure on the part of Parliament to define without ambiguity the measure of immunity intended in paragraph (vii).

As the matters mentioned above are sufficient to dispose of this appeal, it is unnecessary to pass upon Mr. Manning's argument, founded on *Performing Right Society* v.

Bradford Corporation (1), *Performing Right Society* v. *Bray Urban Council* (2), and *Sarpy* v. *Holland* (3), namely that it being admitted that one of the motives of the directors in causing the works in question to be played was to make the Western Fair one which would be largely attended, and that admission fees were charged for entrance to the fair grounds and to the grandstand, these facts were sufficient of themselves to destroy the conditional immunity created by s. 17(1) (vii).

I would therefore allow the appeal with costs throughout. For the reasons given by Rose C.J.H.C. in the case already referred to, I think the only relief should be nominal damages of $5. The costs below should be taxed on the scale of the Supreme Court of Ontario.

ESTEY J.:—I agree, for the reasons expressed by my brothers Kerwin and Kellock, that this appeal should be allowed with nominal damages in the sum of $5 payable to the plaintiff. The plaintiff should have its costs throughout.

Appeal allowed.

Solicitors for the appellant: *Manning, Mortimer and Kennedy.*

Solicitors for the respondent: *Dyer, Grant and Mitchell.*

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(1) (1921) Macgillivray's Copyright Cases, 390.
(2) [1930] A.C. 377.
(3) (1908) 2 Ch. 198.

1950

*Nov. 16, 17, 20, 21.

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*May 10.

REDERIAKTIEBOLAGET PULP, OWNERS OF THE SHIP *DAGMAR SALEN (Defendant)* ... APPELLANT;

AND

PUGET SOUND NAVIGATION CO., OWNERS of the MOTOR VESSEL *CHINOOK (Plaintiff)* ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT.

Shipping—Collision at sea—Fog—Both ships equipped with radar—Speed —Passing port to port—Change of course.

Two ships, both equipped with radar, collided in fog-shrouded waters of Puget Sound, U.S.A. The trial judge found the *Dagmar Salen* two-thirds to blame and the *Chinook* one-third on the grounds that the *Dagmar Salen* disregarded the general practice of vessels on this seaway to pass port to port and that both were proceeding at too great speed.

Held (Estey and Locke JJ. dissenting) and reversing the percentage findings of the trial judge, that the *Chinook* should be charged with two-thirds of the responsibility and the *Dagmar Salen* with one-third.

Both ships were going at excessive speed under the circumstances and there was no rule nor invariable custom requiring vessels to pass port to port, but the main fault rested with the *Chinook* for changing her course just prior to the collision. If the *Chinook* had maintained her original course or if, at that point, the engines had been reversed, the accident would have been avoided; and if the radar screen on the *Chinook* had been closely and accurately observed, the course of the other ship would have been made clear and the risk eliminated. That blind action at the critical moment was primarily responsible for the collision.

APPEAL from the judgment of the Exchequer Court of Canada, British Columbia Admiralty District (1) holding that the *Dagmar Salen* was more at fault than the *Chinook* when the two ships collided in the fog in Puget Sound, U.S.A.

R. C. Holden K.C. and *J. I. Bird* for the appellant.

F. A. Sheppard K.C. for the respondent.

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

(1) [1950] Ex. C.R. 283.

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The judgment of the Chief Justice and of Taschereau, Rand, Cartwright and Fauteux JJ. was delivered by

RAND J.:—The facts of the collision in controversy in this appeal can be stated shortly. The *Chinook* is a motor ship 273·5 feet in length and of 4,106 gross tons, engaged in a daily service between Victoria and Seattle. The *Dagmar* is likewise a motor ship 405 feet long and 5,000 tons gross. The former was passing through Admiralty Inlet and approaching Puget Sound on the way to Seattle and the latter, well laden, was proceeding north from Seattle bound for Vancouver. The critical time runs from 8.00 o'clock in the evening of September 28, 1947. At that moment, *Dagmar* was abeam Double Bluff Point and about one-half mile off the Horn buoy; equipped with four six-cylinder diesel engines of 1,100 H.P. each and a radar detector screen, she was making about 12½ knots through the water with an ebb tide that may have brought the speed to approximately 14 knots over land. She was then running on a course 328 degrees true. Three minutes later, the radar screen indicated a vessel 4½ to 5 miles distant about one-half a mile northerly beyond Bush Point and approaching that point one-half a mile off. At 8.05, the pilot, concluding the craft to be on a generally south-easterly course along Whidby Island and too close to that land to allow *Dagmar* to pass on the port side, changed his course by five degrees to 323 degrees true for a starboard passing. At 8.07, the vessel entered thick fog and the engines were reduced to half speed; at 8.08, a further alteration of course of 10 degrees to 313 degrees was made; at the same time, the whistle of a vessel was heard from the direction of that indicated on the radar screen and the engines were stopped. At 8.11, an alteration of course to starboard by the unknown ship was detected on the screen and full speed astern was ordered; at 8.13½, the red and masthead lights of *Chinook* were seen about 10 degrees on the starboard bow, the vessel passing from right to left; visibility was about 600 feet. Both vessels blew three blast signals indicating engines at full speed astern. The starboard bow of *Dagmar* at 8.14 came into contact with the forward port side of *Chinook* just aft of the bridge. Neither

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vessel had more than bare way on it and the collision was not severe. After *Dagmar* pulled back, each continued on its course.

The *Chinook*, likewise equipped with radar, had been running through heavy fog for over an hour at 18 knots, and assuming it to be against the ebb tide, was making, say, 16 knots over the land. It claimed to have passed abeam of Bush Point at a distance of 1½ miles and that at that time, 8.04, *Dagmar* appeared on the screen 5 miles distant and at about 30 degrees on the port bow. As this would have placed *Dagmar* to the east of Double Bluff Point, it was obviously wrong and was admitted to be so by the captain. This time of 8.04 is only a difference of about one minute from that of the appearance of *Chinook* to *Dagmar* and it can be taken that they came into view of each other at approximately the same time. *Chinook* claims at 8.06 to have changed its course from 133 degrees to 150 degrees compass bearing, the speed to have been reduced to one-half, and at 8.07 the engines to have been stopped; at 8.08 the whistle of *Dagmar* is said to have been first heard; the white masthead light of *Dagmar* to have been first seen at 8.10; at 8.10½ the engines to have been put full astern; and at 8.11½ the collision. But as of 8.06 and on, these times, taken from the entries on the deck log, were found to be unreliable and were disregarded by the trial judge.

The *Dagmar* puts the position of the collision at a point two miles northwest by west from Double Bluff buoy. As located on the chart, the point is 7/10 of a mile west of a line drawn through the buoy to Bush Point. The *Chinook* places it much farther to the north, at a point 1·1 miles, 210 degrees true, from Bush Point. From an examination of the evidence and the charts, and keeping in mind the fact that Smith J. at the trial remarked both on the frankness of the pilot of *Dagmar* and on the unsatisfactory testimony of officers of *Chinook* and disregarded the deck log of *Chinook*, I have come to the conclusion that the collision took place approximately at the point and time fixed by *Dagmar*, a finding which the trial judge (1) did not find it necessary to make. Disregarding that as well as what he considered other subordinate con-

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siderations, he placed his judgment on two overriding factors: first, the disregard by *Dagmar* of a general practice of vessels on this seaway to pass port to port; and the excessive speed of both. The former, in effect, superseded all questionable behaviour other than speed on the part of *Chinook*, and by reason of it he charged *Dagmar* with two-thirds and *Chinook* with one-third of responsibility. I agree with his findings of excessive speed, but I must qualify in some respects the effect of his finding of a violation of the practice.

It was not contended that the waterway was a narrow channel within the meaning of Article 25 of the Inland Navigation Rules governing the vessels here, and there was, therefore, no rule requiring the vessels to pass port to port. Nor was it contended that there was any invariable custom binding the vessels to a port passing; at most, and the point was mentioned neither in the preliminary Act nor in the statement of claim, it was the "usual practice", more frequent than not; the question itself seems to have been brought up casually or incidentally in the course of the evidence. There was, therefore, no legal or quasi-legal obstacle to a starboard passing; but the practice is a circumstance relevant to the actual navigation of a vessel proceeding on the northerly run.

The *Dagmar* at one-half a mile off Double Bluff buoy was on the course that would ordinarily be taken for a port passing; for two minutes, immediately after the radar indication of *Chinook*, that course was maintained; then for three minutes there was the five degree and for six minutes the 15 degree alteration, the latter with the engines stopped. This seems to me to have been a faulty initiation of a starboard passing. The original indication was of a vessel approaching "pretty fast"; on the testimony of the first officer of *Dagmar* who attended the radar screen, the outline of a ship on the screen at a distance of several miles may take up five or six degrees: her position is thus somewhat approximate: and assuming radar equipment in the other vessel, a departure of five degrees from a course would not at once be apparent. There was nothing to prevent the swing of 15 or even 20 degrees from the first sighting to take *Dagmar* without delay out of the easterly lane preparatory to a starboard passing.

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The result of the failure to do this was that the accident took place within the range of the usual northbound course of *Chinook* itself which may be taken to be that of ships, generally, observing the practice. In the existing conditions of fog and courses, there was an obvious risk of becoming involved with the incoming vessel, whatever her equipment; and to that extent, I agree with the trial judge that the actual position of *Dagmar* introduced an element of potential danger.

On the other hand, *Chinook,* relying on radar and the stopping power of its engines, was travelling at a speed that, in the absence of radar, would have been greatly excessive, and it called for unremitting attention to the screen and the sharpest appreciation of what it revealed. If radar is to furnish a new sight through fog, then the report which it brings must be interpreted by active and constant intelligence on the part of the operator.

It is a general rule as old as navigation that in fog, when by one vessel the course of another within a danger zone is not yet ascertained, without sufficient indication to justify action, no change of course should be made: *Vindomora* v. *Haswell* (1); and in *The "Wear"* (2) Hill, J. used this language:

> It has been said over and over again in this court that when in a fog you sight a ship whose direction or course you do not know the worst thing you can do is to take helm action.

The same principle was applied in *Crown Steamship* v. *Eastern Navigation Co.* (3), *"Lundy"* v. *"Miltistone"* (4), and in the *"Rona"* and the *"Ava"* (5). On the evidence, chiefly of the independent witness, Gordon, a passenger on *Chinook,* I take the fact to have been that the engines of *Chinook* were still working when the exchange of whistle signals was on between the vessels and when *Chinook,* in his opinion, swung to starboard about 20 degrees. With Smith, J., I take this as the change in course of 17 degrees which *Chinook* claims to have made at 8.06, and likewise I take it to be the swing to starboard noticed on board *Dagmar* and recorded as at 8.11 in the order for full speed astern. That change, in the circumstances, would have

(1) [1891] A.C. 1.
(2) (1855) 2 Ecc. & Ad. 256; 164 E.R. 419.
(3) (1918) S.C. 303.
(4) (1920) 3 Ll. L.R. 95.
(5) (1873) 2 (N.S.) Asp. R.M.C. 182.

been bad seamanship in the absence of radar, but it was much more so in the presence of unattended radar and under the speed which radar was felt to have made safe. If the original course had been maintained or if, at that point, the engines had been reversed, the accident would have been avoided; and if the radar screen had been closely and accurately observed, the course of *Dagmar* would have been made clear and the risk eliminated. That blind action at the critical moment was primarily responsible for what took place.

This last circumstance has not, in the attribution of fault, been taken into account by the trial judge. I would, therefore, reverse his percentage findings and hold *Chinook* responsible for two-thirds and *Dagmar* for one-third of the damages. The costs in both courts should be in the same percentages to both parties.

The dissenting judgment of Estey and Locke JJ. was delivered by

ESTEY J.:—These actions arise out of a collision between the motor ship *Chinook* and the Swedish vessel *Dagmar Salen* between Double Bluff and Bush Point in Puget Sound, U.S.A., on the evening of September 28, 1947. The cross actions claiming damages were consolidated and tried in the British Columbia Admiralty District (1).

The learned trial judge found:

> Both vessels must be held blameworthy. Both were proceeding at too great speed, the *Chinook* originally, and the *Dagmar Salen* as she approached the fog-shrouded area. Both failed to reduce sufficiently when their respective radars (properly observed) gave indication of the other's approach on a bearing that changed but little, if it changed at all.

and again:

> I think, however, that the main fault (apart from excessive speed) lay with the *Dagmar Salen*. She knew that the customary rule was for north and south bound vessels to pass port to port, yet she chose to pass starboard to starboard.

The learned trial judge found that two-thirds of the fault rested with the *Dagmar Salen* and one-third with the *Chinook* and apportioned the liability accordingly.

The *Dagmar Salen* appeals, contending that it was not at fault and, therefore, the action should be dismissed or, alternatively, that the *Chinook* be found to be more blameworthy and the apportionment of liability varied accord-

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ingly. The *Chinook* submits that the judgment at trial should be affirmed or, alternatively, that it be exonerated from fault and the *Dagmar Salen* held to be entirely at fault.

The *Dagmar Salen* had left Seattle and was proceeding outward through Puget Sound. She is a motor vessel of 5,000.65 tons gross, length 405 feet, beam 51·3 feet, equipped with four six-cylinder Diesel engines of 1,100 Horse Power each and a single propeller. Upon this voyage she was carrying a general cargo of 7,000 tons.

The *Chinook*, a motor vessel ferrying between Victoria and Seattle, was inbound to Seattle. This motor vessel is of 4,106 tons gross, length 273·5 feet, beam 65.6 feet, equipped with four 1,600 Horse Power Diesel electric engines and twin propellers.

There was no fog at Double Bluff. A mile or two north thereof there was a dense fog which continued northward and covered the area around and beyond Bush Point. The *Dagmar Salen*, therefore, in proceeding outward bound at Double Bluff, was not in the fog, but did enter the fog a mile or two beyond.

Both vessels were equipped with radar.

These ships were, at all relative times, subject to the United States "Rules to Prevent Collisions of Vessels and Pilot Rules for Certain Inland Waters". All courses and bearings given are magnetic.

The collision occurred between Double Bluff and Bush Point and, due to a difference in their respective clocks, the *Chinook* fixed the time at 20.11½ and the *Dagmar Salen* at 20.14.

It will be convenient to deal first with the learned judge's finding that the *Dagmar Salen* was the greater in fault because she violated the customary rule of port-to-port passing. On behalf of the *Dagmar Salen* it is contended that this requirement of a port-to-port passing was not proved and, even if it was, the Pilot had a right, in the circumstances, to attempt a starboard-to-starboard passing.

The Pilot of the *Dagmar Salen* deposed:

. . . it is a common practice amongst the local pilots to follow a course outbound close on the Whidby Island shore, passing Bush Point approxi-

mately half a mile off. Inbound vessels usually steer southbound from Marrowstone, a course to pass Bush Point at least one and a quarter miles off, which always results in a port-to-port meeting.

As to his own practice he stated:

> Also due to the fact in running a course from Double Bluff to Bush Point I considered it good seamanship to stay on the right side of the channel, which I follow at all times, . . .

and then as to the trip in question he stated:

> Well, I am sure I must have realized it was a vessel approaching before I ever altered course. If it was a vessel going the same way I was, I don't think I would have made any alteration, because I was on a track that I have followed out there ever since I have been piloting, and before that.

The Master of the *Chinook* deposed that vessels pass "port-to-port as a rule" and when questioned as to the northbound vessels he stated:

> All the vessels steer the same course. It does not make any difference in the size, close on Double Bluff and approximately half a mile off Bush Point.

This evidence is not in any way contradicted. While it does not establish a port-to-port passing as an absolute rule, it supports the learned trial judge's finding that there existed a "well-established practice" requiring a port-to-port passing.

At 20.00 o'clock visibility was fair. The *Dagmar Salen,* as the Pilot estimated, was then three-tenths of a mile off the buoy at Double Bluff. At 20.03 the Chief Officer informed the Pilot of a target in the vicinity of Bush Point at a distance which he fixed to be four and one-half miles. The target was in the fog and this information was obtained from the radar screen. The Pilot himself examined the radar. At first he could not determine what it was. Then he thought it might have been "a small craft in on the point bound for Mutiny Bay". However, he soon concluded that it was "a vessel approaching" and the Chief Officer estimated that it was passing a half mile off Bush Point. (The approaching vessel was, in fact, the *Chinook*).

In that position off Bush Point the *Chinook* would be following the usual course of outbound vessels and, therefore, well off its usual inbound course. Both the Pilot and the Chief Officer of the *Dagmar Salen* make it clear that from the radar they could only approximately determine the position of the *Chinook* off Bush Point. The

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latter thought he could do so within four or five degrees. The Pilot himself deposed: "it was hard for me to estimate her exact position." The truth of this statement is emphasized by the fact that when asked, at his examination for discovery, the position of the *Chinook* off Bush Point he replied:

> I truthfully don't know; I don't want to answer the question.

He also stated that "it is impossible to tell on a radar if it is on a parallel course at that distance." Nevertheless he concluded that the *Chinook* was proceeding "on a parallel course, following the left-hand channel southbound," which he described as "a peculiar course." In these circumstances, at or about 20.05, the Pilot, having concluded the position of the *Chinook* to be half a mile off Bush Point and that the *Dagmar Salen* was drawing 24 feet aft, decided he must keep away from the shallow water which he described as "the 4-fathom spot approximately 2½ miles, or 3 miles south of Bush Point" and that he should make a starboard-to-starboard passing. It was at 20.05 he entered the fog and altered his course five degrees to port, or from 305 to 300 degrees.

The Master of the *Chinook* determined by his radar that he passed one and one-quarter miles off Bush Point. The learned trial judge thought "it was rather less—certainly not more than one mile." This distance of a mile would not have made it difficult for the *Dagmar Salen* to pass Bush Point upon her regular course outbound and would not have interfered with a port-to-port passing, which apparently the Pilot of the *Dagmar Salen* intended and only abandoned because he thought the *Chinook* was a half mile off Bush Point.

It was contended that the area here in question constituted a narrow channel within the meaning of Art. 25 under which a "steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." However, it is important to note that the general rule followed in this area is to the same effect. Vessels outward bound follow the east and those inbound the west side of this channel. If the *Dagmar Salen* was right in fixing the

location of the *Chinook* off Bush Point she was well over in the outbound channel and, as the Pilot of the *Dagmar Salen* stated, she was following "a peculiar course."

Moreover, at Bush Point the *Chinook* was following a course of 133 degrees and at Double Bluff the *Dagmar Salen* was following a course of 305 degrees. The learned judge stated that at that time their courses intersected at an angle of only eight degrees and added: "I think there can be little doubt that the *Chinook* then had the *Dagmar Salen* closely on her port bow, while the *Dagmar Salen* had the *Chinook* very slightly on her starboard bow."

The *Chinook* was in the fog, but would be emerging therefrom in a few minutes. The *Dagmar Salen* did not enter the fog until it was aware of and had concluded that the *Chinook* was upon a peculiar course. In these circumstances it would have been, as the learned trial judge points out, good seamanship on the part of the *Dagmar Salen* to have proceeded with caution and not to have altered her course, as she did, to port. *The Vindomora* (1); *The Counsellor* (2); and 30 Halsbury, 2nd ed., p. 733, para. 944.

The Pilot's decision to make a starboard-to-starboard passing was made, therefore, just before he entered the fog, in relation to a vessel, itself in the fog and approaching him upon a peculiar course, the position of which was at most only approximately ascertained. This explanation on the part of the Pilot in justification of his decision was described by the learned trial judge as "unconvincing."

Not only was the decision of the Pilot of the *Dagmar Salen* to attempt a starboard-to-starboard passing not justified in the circumstances, but, having made that decision, he continued to conduct his vessel in a manner that, upon the evidence, cannot be accepted as good seamanship.

Art. 16 of the above-mentioned Inland Rules reads:

> Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

(1) [1891] A.C. 1. (2) [1913] P. 70.

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Neither at 20.05, when the *Dagmar Salen* entered the fog and altered its course five degrees to port, nor at 20.08, when it altered its course a further ten degrees to port, was the *Chinook* an ascertained vessel within the foregoing Art. 16, as explained by Lord Macmillan in *Nippon Yusen Kaisha* v. *China Navigation Co.* (1):

> In order that the position of a vessel may be ascertained by another vessel within the meaning of the Article she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision.

The Pilot, notwithstanding that the *Chinook* was then an unascertained vessel, altered its course to port and attempted a starboard-to-starboard passing which, under the circumstances of fog, and having regard to the usual courses of vessels and the passing rule in this area, would tend to confuse the Master or Pilot of an approaching vessel and be more likely to increase than to diminish the possibility of a collision.

This alteration in course was contrary to the rule as expressed by Lord Watson in *The "Vindomora"* supra at p. 8:

> . . . that when a vessel at sea, overtaken by a fog, becomes aware that another vessel is in her neighbourhood she ought, whilst complying with the regulations as to speed, to keep on her course unless she has some indications more or less reliable that it would be proper or at least safe to change it.

It cannot be said, upon the Pilot's own evidence, that he had indications "more or less reliable" that justified his alteration to port in order to make a starboard-to-starboard passing. He, of course, knew the *Chinook* was in the fog, but, upon his own evidence, he did not know, with a reasonable degree of certainty, its position off Bush Point, nor did he have, at any relevant time, sufficient, if, indeed, any, reason to believe that the *Chinook* would not follow the usual course and pass port to port. His evidence that he concluded the *Chinook* was half a mile off Bush Point is a part thereof which the learned trial judge described as "unconvincing." A reading of this evidence leaves the same impression. His statement that he concluded the *Chinook* was half a mile off Bush Point must be read with the other portions of his evidence, which have already been mentioned, to the effect that it was hard for him "to

(1) (1934) 104 L.J. (P.C.) 34 at 37.

estimate her exact position" and his earlier statement, upon discovery, that he did not know her position off Bush Point. That appears to be the only point at which he attempted to determine her distance off shore, being thereafter content with his conclusions from the radar that the *Chinook* remained on his starboard bow. Apart from the difficulties he had in determining the exact locations on the radar, he himself had altered the *Dagmar Salen* twice to port, which would appear to leave the *Chinook* upon his starboard bow for some time even after she would be attempting a port-to-port passing. All these circumstances of fog, the *Chinook's* unusual position and the practice of a port-to-port passing, would require, as prudent and seamanlike conduct, that the *Dagmar Salen* should have proceeded with caution and upon the expectation that the usual practice would have been followed by the *Chinook* at least until such time as she had given sufficient indication to the contrary. *Toronto Railway Company* v. *King* (1). In this connection the words of Lord Wright are also appropriate:

> Nor does any one doubt that it should not be lightly assumed that a wrongdoing ship might not correct her error in time, and that it is not desirable to prejudice her repentance so long as action can properly be deferred.

S.S. Heranger (2).

The Pilot of the *Dagmar Salen* did not know how long it would take to stop that vessel, but he did know, as he stated, that it was "heavily loaded, and she carried her way." Its engines were stopped at 20.08 and, notwithstanding that his radar indicated only the approximate position of the *Chinook,* the Pilot waited until 20.11 when he heard the first fog signal from the *Chinook* before putting his engines full astern, with the result that the *Dagmar Salen* had headway at the point of collision. The Pilot was, therefore, proceeding without knowing whether he could avoid the *Chinook* once it might come into sight. His conduct was in disregard of the general rule requiring that only such speed should be maintained in the fog after the presence of a nearby vessel is known as will permit the avoiding of that vessel once it is seen. *The Campania* (3); *The Oceanic* (4); *The Counsellor* (5).

(1) [1908] A.C. 260.
(2) [1939] A.C. 94 at 103.
(3) [1901] P. 289.
(4) (1903) 88 L.T. 303.
(5) [1913] P. 70.

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The *Chinook* was also at fault. It was, at all times material hereto, in the fog. The Master admits that he observed upon his radar screen a vessel which he subsequently found to be the *Dagmar Salen* when he was off Bush Point. The learned trial judge was not convinced that the Master of the *Chinook* "paid any proper attention to the radar screen during the vital eight minutes preceding the collision;" and further that he did "not altogether accept the evidence given by the *Chinook's* Master and Chief Officer." These comments are fully justified upon the evidence. It is, however, clear that the learned trial judge accepted the Master's evidence that he altered his course from 133 to 150 degrees, but did not accept his evidence as to the time of his making this alteration, in regard to which he stated: "The exact time when the *Chinook* made this alteration is one of the unsettled features of her evidence."

The appellant's contention that the *Chinook's* alteration from 133 to 150 degrees was not more than three minutes before the collision was not established by the evidence. The learned trial judge has already indicated that he did not accept the evidence of the officers of the *Chinook* that it was made at 20.06, nor does he accept the evidence of other parties who sought to fix that time. The evidence of Gordon, upon which the appellant laid great stress, goes no further upon this point than to state that when he heard the fog whistle of the *Dagmar Salen* the *Chinook* was swinging slowly to starboard and he estimated it was a twenty-degree swing up to the moment of the impact. It was only an estimate and he did not speak with certainty as to any time. All of the evidence upon this point supports the view of the learned trial judge that the time of this alteration cannot be fixed.

Apart, however, from the exact time of the making of this alteration, it was admittedly made after the Master of the *Chinook* was aware of the near presence of the *Dagmar Salen,* which vessel, upon his own evidence, could not be regarded as ascertained. Whether he was or was not upon his usual course and notwithstanding the customary rule of a port-to-port passing, his vessel was in the fog and, in these circumstances, this alteration constituted negligence on the part of the Master of the *Chinook.*

The contention that the practice of a port-to-port passing does not obtain in the fog is well founded to the extent that, instead of their following the rules as where visibility is such that vessels can be checked, good seamanship requires that every move must be determined by the circumstances and one of the primary rules appears to be that, once a vessel is known to be nearby, engines should be stopped and no change in course should be made until such vessel is ascertained. Neither of the vessels here observed this rule. The action of the *Dagmar Salen* in entering the fog when the approaching vessel was pursuing a peculiar course upon which it was not ascertained, and in making the alteration to port in these circumstances, constituted the greater negligence.

The appellant's submission that the entire cause of the collision should be attributed to the conduct of the *Chinook* cannot be supported upon the evidence. In support of this contention it is submitted that had the *Chinook* used reasonable care it would have observed the *Dagmar Salen's* alteration to port and realized it had decided upon a starboard-to-starboard passing and would not have altered its course seventeen degrees to starboard, or from 133 to 150 degrees. It is not established at what time the *Chinook* made this alteration. Even if the Master of the *Chinook* had been giving sufficient attention to his radar and observed the *Dagmar Salen* had altered her course to port, it does not at all follow that the reasonable man in the Master's position would, as he first noticed that alteration, have concluded that the *Dagmar Salen* had decided upon and was making a starboard-to-starboard passing. It was an unusual course and there was no reason therefor so far as the *Chinook* was concerned. At what time, in these circumstances, the Master of the *Chinook* ought to have concluded that the starboard-to-starboard passing was being attempted by the *Dagmar Salen* it is not possible to determine, nor can it be determined whether at that time he could have done more than he actually did do. Moreover, there would be a period after he noticed the *Dagmar Salen's* alteration during which the Master of the *Chinook* would be apprehensive lest at any moment the *Dagmar Salen* would again alter its course to effect the usual port-to-port passing and should, therefore, stop his engines. We cannot know, because the learned trial judge

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did not accept his log nor his evidence, at what point he did stop his engines. This, however, is established, that at some time before the *Dagmar Salen* came into sight some 400 yards distant the *Chinook* had stopped its engines and placed them in reverse so that at the point of collision the *Chinook* had no headway. Under these circumstances the evidence does not establish that the *Chinook* is entirely to blame, but rather, when read as a whole, supports the view that both were negligent and that such negligence continued up to and contributed to the collision.

While the learned trial judge's finding "that at the time of the collision neither vessel had more than trifling headway, that each was blowing the appropriate fog signals, and that each gave the full astern signal" is generally supported by the evidence, a careful reading thereof indicates an important difference between the *Chinook* and the *Dagmar Salen* in this respect, that the *Chinook* was either dead in the water or proceeding slightly astern at the time of the collision, while the *Dagmar Salen* still had a slight headway. Not only is this to be gathered from the evidence of the various witnesses, but the point of collision and the consequent damage make this rather clear. The stem of the *Dagmar Salen* collided with the *Chinook* "right at the wing of the bridge on the port side" and the nature and character of the damage would indicate that the *Chinook* was not making headway at that time. Gordon and Holmes, who, in their respective positions, had an opportunity to observe the vessels as they approached each other, both agreed that the impact on the *Chinook* was aft of where they thought it would be—Holmes says to a point of 25 or 30 feet—which would indicate that the *Chinook* was dead in the water, or slightly astern. This is rather important in assessing the degree of fault to be attributed to each of these vessels, as it tends to show that at the critical time the officers of the *Chinook* had the better control of their vessel. It is true the evidence establishes that the way of the *Chinook* could be run off rather quickly. That, however, was only a circumstance to be taken into account by those in charge. Against this the Pilot of the *Dagmar Salen* did not know how much time it would take

to run off the way of that vessel and did not adequately provide for either his lack of knowledge in this regard, or the fact that he had a two-knot tide in his favour.

The parties differed as to the place of the collision. They respectively placed it at points separated by a distance of one and one-half miles, each locating the place of the collision upon or close to their respective courses, as they had deposed to them. The *Dagmar Salen* contended that, having regard to its speed and distance, it could not have reached the place where the *Chinook* said the collision occurred until some time after it admittedly did occur. The same contention was made on behalf of the *Chinook* in relation to the place of the collision as fixed by the *Dagmar Salen.* In fact, the discrepancies in the evidence were such that, having regard to the fact that all distances are more or less approximate and the respective times questioned, it is impossible to draw any conclusion of assistance to either party from the evidence as to the point of collision.

Both of these vessels were equipped with radar. The learned trial judge was of the opinion that the Chief Officer on the *Chinook* had "paid no attention to it" after 19.50 and, as to the Master, he did not pay "any proper attention to the radar screen during the vital eight minutes preceding the collision." On the other hand he was satisfied that the Chief Officer on the *Dagmar Salen* did pay proper attention to the radar but on this ship, while they made more continuous and accurate observations, "they, too, changed too narrowly to permit of a safe distance for passing in fog." The radar is no doubt of the greatest assistance to navigation in the fog, provided the reading of the screen is made with care and that, having regard to what is there disclosed, reasonable precautions are taken. In this case it would seem that on the *Chinook* sufficient attention was not paid to the radar, while on the *Dagmar Salen,* although greater care was exercised in the use of the radar, the Pilot did not exercise the care that the radar indicated to be reasonably necessary.

Both of these vessels were at fault, but the greater must rest with the *Dagmar Salen.* In my opinion the learned

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trial judge arrived at the proper conclusions and his judgment should be affirmed and this appeal dismissed with costs.

Appeal allowed.

Solicitors for the appellant: *Campney, Owen, Clyne, Murphy and Owen.*

Solicitors for the respondent: *Locke, Guild, Lane, Sheppard and Yule.*

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*May 23

JOY OIL COMPANY LIMITED and JOY OIL LIMITED, *(Suppliants)*.. } APPELLANTS;

AND

HIS MAJESTY THE KING *(Respondent)*..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown—Petition of Right—Claim of subsidies on sale of gasoline—P.C. 1195, February 19, 1941—Orders 010 and 010A of the Oil Controller—"in any place", meaning ambiguous—Orders misconstrued—Reference back to Commodity Prices Stabilization Corporation.

By P.C. 1195 of February 19, 1941, the Oil Controller was empowered to regulate the maximum price at which oil (which term included petroleum and gasoline) might be sold "in any place, area or zone." By Order 010 dated Oct. 21, 1941, the Controller directed that from and after that date "the price to be paid in any place shall not exceed the maximum price at which such petroleum product was sold * * * in such place * * * on Sept. 30, 1941, plus any applicable price increase confirmed by this Order * * *". The increase permitted in the price of grade 2 gasoline was one cent per gallon. The appellants operated service stations in Montreal, Toronto and Windsor where they retailed grade 2 gasoline at a price lower than their competitors. They imported their supplies from Trinidad but following the outbreak of war this source was cut off and they were forced to import from the U.S.A. at a higher cost. In November and December 1941, the Wartime Prices and Trade Board issued two statements of policy announcing the coming into force of a complete control of all prices, and that higher prices would not be permitted than those at which goods were actually sold during the four weeks Sept. 15 to Oct. 11, but that importers could continue to import in the normal manner with the assurance that appropriate subsidies would be provided. The appellants construed the Order to restrict the price increase permitted them to one cent per gallon above the price at which

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

gasoline had been sold at their various "places of business", i.e., each service station. Their application for a subsidy was refused by the Commodity Prices Stabilization Corporation on the ground that there were similar goods available in Canada at a reasonable price and that the price ceiling was not on an individual but on a geographical basis and the appellants could have increased their price to that of their competitors.

An appeal was taken to the Exchequer Court of Canada where the ruling of the Corporation was upheld.

Held: that the expression "in any place" used in the Orders of the Oil Controller of Oct. 1, 1941, and Jan. 28, 1942, was ambiguous and the appellants' application for subsidies had been refused on a misconstruction of such Orders: the judgment appealed from should therefore be set aside and the matter referred back to the Commodity Prices Stabilization Corporation to deal with such claims on the footing that the Orders permitted the appellants to increase their prices only to the extent of one cent per gallon on Sept. 30, 1941.

Appeal from the judgment of the Court of Exchequer, O'Connor J. (1) dismissing suppliants' Petition of Right by which they claimed to be entitled to, and sought to recover from His Majesty, subsidies on motor gasoline imported by them in the period December 1, 1941 to July 1, 1942.

J. J. Robinette K.C. and *W. H. Thompson K.C.* for the appellants.

Hugh O'Donnell K.C. and *Luc André Couture* for the respondent.

The judgment of the Chief Justice, Locke and Fauteux JJ. was delivered by:

LOCKE J.:—The disposition to be made of the present matter depends, in my opinion, upon the construction to be placed upon the language of the Orders of the Oil Controller of October 21, 1941, and January 28, 1942. That the expression "in any place" in these Orders is ambiguous is undoubted and it is accordingly necessary, in order to resolve the question, to examine such of the documents as may properly be referred to in order to construe the language.

It was by Order-in-Council P.C. 2516 made on September 3, 1939, that the Wartime Prices and Trade Board was constituted in the exercise of powers conferred upon the

(1) Ex. C.R. [1949] 136.

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Governor General in Council by *The War Measures Act, 1914*, and by the Regulations then enacted the Board was empowered, *inter alia*, to fix maximum prices or margins of profit at which any necessary of life might be sold or offered for sale in Canada by manufacturers, producers, jobbers, wholesalers or retailers. P.C. 3398 made on December 5, 1939, rescinded P.C. 2516 and enacted Regulations which defined more fully the duties and powers of the Board. By Order-in-Council P.C. 2715 of June 24, 1940, a Wartime Industries Control Board was set up, to consist of the Controllers from time to time appointed by the Governor in Council on the recommendation of the Minister of Munitions and Supply, and by Order-in-Council P.C. 2818 made on June 28, 1940, regulations respecting oil were made and George R. Cottrelle appointed oil controller with powers which included that of fixing, with the approval of the Minister of Munitions and Supply, maximum prices or maximum markups at which oil and oil products might be sold or offered for sale. Order-in-Council P.C. 1195 of February 19, 1941, rescinded the regulations respecting oil enacted by P.C. 2818 and substituted new regulations which, *inter alia*, empowered the oil controller, subject to the approval of the Minister of Munitions and Supply, to fix or regulate the price or fix the minimum or maximum price at which oil might be sold "in any place, area or zone", and further:

> to prohibit or regulate any practice or mode of dealing in or with oil or related thereto or used or followed in connection therewith which, in the judgment of the Oil Controller, would or might increase or tend to increase the price of oil to any person or class of persons or which would or might affect or tend to affect the orderely purchase, sale or distribution of oil;

and, subject to the approval of the Minister, to fix or limit the quantity of any oil which might be sold or distributed by any person or classes of persons for any specified use.

Order-in-Council P.C. 6834 of August 28, 1941, rescinded the regulations of the Wartime Prices and Trade Board enacted by P.C. 3998 as thereafter amended. The recital to this order declared in part that it was deemed to be in the national interest that the Wartime Prices and Trade Board regulations should be extended to goods and services

not within the jurisdiction of the Wartime Industries Control Board or any of the various controllers that had been appointed:

> in order that, in co-operation with other governmental departments and agencies, there may be co-ordination of administrative action in respect of good and services;

and that it was deemed desirable that public control of the prices of goods or services, when imposed, should be exercised by or with the concurrence of the Wartime Prices and Trade Board, and that to effectuate such purpose it was necessary to establish new regulations in regard to the operations of that board. The powers of the board were declared to include that of fixing specific or maximum or minimum prices or markups at which any goods or services might be sold. By a further Order-in-Council P.C. 6835 of August 29, 1941, the order of June 24, 1940 was amended and regulations were prescribed for the operations of the Wartime Industries Control Board and the powers of that board and of its members defined with particularity. The preamble to this Order-in-Council recited, *inter alia,* that in view of the increasing complexity of the duties of the various controllers and of the problems which confronted them and of the fact that the functions and duties of each of them were to a considerable degree interdependent and correlated, not only with those of other controllers but with those of the Wartime Prices and Trade Board, it was deemed advisable to take further measures to promote co-ordination and integration of the functions and activities of such controllers and by creating a closer relationship between them and the Wartime Industries Control Board and the Wartime Prices and Trade Board "to promote co-operation between them and reduce the possibility of any confusion arising as a result of the exercise and discharge of their various powers, functions and duties." The regulations made were designed to effectuate that purpose. Regulation 8 provided that every controller should have power, subject to the approval of the chairman of the Wartime Industries Control Board and the concurrence of the Wartime Prices and Trade Board to fix maximum prices or markups at which any goods under his jurisdiction might be sold or offered for sale generally or in any place,

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area or zone. Regulation 10 (iii) authorized each controller to exercise his powers in respect of, or in relation to, such things:

either generally throughout Canada or in any particular province, place, area, zone or locality designated by the Controller.

On September 26, 1941, the oil controller in the exercise of the powers conferred on him by Orders-in-Council P.C. 2818, 1195 and 6835 and, with the approval of the chairman of the Wartime Industries Control Board and presumably the concurrence of the Wartime Prices and Trade Board, revoked his prior order 008 and by order 008A directed, *inter alia*, that after October 1, 1941, no person should sell any motor fuel (defined in a manner to include gasoline and lubricating oil) other than graded motor fuel as defined by the order. Further terms of the order were designed to restrict and control the quality and quantities of motor fuel sold in Canada required that all such fuel delivered to passenger cars should be obtained only from service stations. Thereafter P.C. 6835 was amended by P.C. 7824 adopted on October 8, 1941, but effective as of August 29, 1941, whereby subsection 1 of section 8 of the prior order was rescinded and the powers of the controllers to regulate prices and to fix maximum or minimum prices declared to be exercisable only with the concurrence of the Wartime Prices and Trade Board in lieu of that of the Minister of Munitions and Supply.

It was under these circumstances that the oil controller issued order No. 010 dated October 21, 1941. While his powers permitted him to establish maximum prices in any "area, place or zone", the price fixed was that to be paid "in any place." In so far as is relevant to the present inquiry the order read:

9. From and after the date of this Order, the price to be paid for petroleum products, or any of them, by any purchaser thereof shall be regulated as follows:

(*a*) The price to be paid in any place shall not exceed the maximum price at which any such petroleum product was sold or offered for sale in such place or for delivery to such place on the 30th day of September, 1941, plus any applicable price increase confirmed, authorized or required by this Order and having regard to the quantity purchased;

(*b*) For the purposes of the foregoing clause (*a*) as applied to graded motor fuel, the maximum price applicable in any place on the 30th day of September, 1941, shall be ascertained having regard

to the price of motor fuel having the same or the nearest qualities to those specified by Order 008A for either grade of graded motor fuel;

(c) No greater price shall be charged to any person for petroleum products or any of them than that provided by paragraph 7 and by this paragraph 9 of this Order.

10. Any person who sells petroleum products, or any of them, at a price greater than is authorized by this Order as applicable at the place of delivery thereof, shall be guilty of a breach of this Order and liable to the penalties provided by law.

The increase permitted to be made in the price of grade 2 motor fuel, being the quality sold by the appellant, was 1 cent per imperial gallon "in any place." This order was approved by the chairman of the Wartime Industries Control Board and of the Wartime Prices and Trade Board.

On November 1, 1941, Order-in-Council P.C. 8527 was adopted on the recommendation of the Minister of Finance establishing what were described as the Maximum Prices Regulations to be administered by the Wartime Prices and Trade Board. The order defined the expression "goods" as including any articles, commodities, substances or things and provided that the maximum price at which any goods might be sold should be the highest lawful price at which a person sold or supplied goods of that nature during the basic period, being the four weeks from September 15, 1941, to October 11, 1941, both inclusive. After providing that no person should after November 17, 1941, sell goods at prices higher than the maximum price for such goods as provided in the regulations, unless otherwise permitted under their provisions, it was provided *inter alia* that:

3. (7) For the purposes of these regulations, each separate place of business of a seller or supplier shall be deemed to be a separate seller or supplier.

Section 4 provided in part that:

4. The provisions of Section 3 of these Regulations shall not apply with respect to:

* * *

(g) any price fixed by the Board, or fixed or approved by any other federal, provincial or other authority with the written concurrence of the Board.

and Section 5(1) that:

Where under any other law any federal, provincial or other authority has jurisdiction with respect to prices, or with respect to the supplying of or trading in goods or services, such jurisdiction shall not be deemed to be superseded by these regulations or by any action of the Board,

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except that any action heretofore taken or that may hereafter be taken under such jurisdiction which is repugnant to any of the provisions of these regulations or to any action of the Board pursuant to its powers shall be of no force or effect so long as and to the extent that it is so repugnant.

(2) No such federal, provincial or other authority shall fix or approve any specific, minimum or maximum prices or markups in respect of any goods or services without the written concurrence of the Board.

Heavy penalties were prescribed for any breach of the regulations which were declared to be punishable, either upon indictment or upon summary conviction under part 15 of the *Criminal Code,* and it was declared that the regulations were to be read and construed as one with the Wartime Prices and Trade Regulations which, as above indicated, had been adopted by Order-in-Council P.C. 2516 on September 3, 1939. On the same date P.C. 8528 rescinded the Wartime Prices and Trade Board regulations made by P.C. 6834 and prescribed new regulations, which included the power to fix specific or maximum prices or markups at which any goods might be sold and extended the powers of the board to take measures deemed desirable in the national interest, for the purpose of restraining increases in the cost of living.

On November 21, 1941, the Wartime Prices and Trade Board published what was called its "Preliminary Statement of Policy", reciting the reasons which had led the government to decide upon a complete control of all prices to become effective on the first of the following month, and outlining generally the steps proposed to be taken to make such control effective. Since the operations of the oil controller were but part of the general scheme of price control and were exercisable only with the approval of the Wartime Prices and Trade Board, the terms of this statement are to be considered. After stating that higher prices would not be permitted than those at which goods were actually sold during the four weeks September 15 to October 11 and that the fundamental duty of the board was to see that prices would not rise higher than the level reached during this basic period, it was said that in particular the prices paid by consumers of goods and services must not rise and that such consumers might not lawfully be charged more for any goods than the highest price charged by the storekeeper or supplier of such goods during that period. It was declared that the price ceiling applied to each individual store, department or branch on the basis

of its own prices for each separate kind and quality of goods during the basic period, that the lower-price stores were not permitted to raise their prices to the level of the higher-price stores. Those engaged in selling goods at retail were directed that, if necessary, they must reduce their prices on December 1, so that no price should be higher than the highest price charged by the same store, branch or department of a department store for goods of the same kind and quality during the basic period, and dealers were warned that any price increases above that level would render them liable to prosecution and to have their licences to do business suspended or cancelled. The statement further indicated that if the burden of restraining prices fell too heavily upon an industry the board would recommend to the government that the people as a whole should take a share of the burden and that subsidies be granted or the price of raw materials controlled. It was stated that it was intended to establish a government corporation to deal with cases in which it might be deemed advisable to stabilize raw material cost. Dealing with those engaged in the import of goods the statement declared that the whole question of imports in relation to the price ceiling was being studied by the board and that a statement of policy might be expected in the near future.

On December 2, 1941, the board issued a further statement of its import policy. Since it is contended by the appellants that in the circumstances of the present case they had acquired contractual rights as against the Crown, its terms are of importance. Dealing with goods imported for civilian purposes, within which class those of the appellants fell, it was said that the general principle was that imported goods would in general cost the importer no more than was appropriate in relation to retail selling prices and that:

> Importers may, therefore, continue importing in the normal manner, with the assurance that appropriate subsidies will be provided with respect to goods imported on and after December 1, 1941, on the basis outlined below. The methods will in the first instance consist of direct subsidies to importers, with the possibility that from time to time duties and taxes on imported goods may be reduced in such a way as to make subsidies unnecessary.

Having said this, however, the above quoted statement was followed immediately by a clause stating that the

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board reserved the right to exclude any goods or kind of goods from the import subsidy, that it could not be expected to approve subsidies if the increase in import prices was not of significant proportions for those concerned, but that if the increased cost was greater than the amount which could reasonably be expected to be absorbed the board, acting whenever possible on the advice of its administrator, would set the subsidy at a reasonable level. It was further declared that importers must realize that the board in carrying out its import policy must have regard for the position of domestic producers and that:

> diversion from domestic to foreign sources of supply, if not occasioned by a shortage of supplies in Canada, may require reduction or elimination of the subsidy with respect to such imports or exclusion of the importer concerned from the benefits of the subsidy system.

It was said further that subsidies would be paid on all eligible goods imported through normal trade channels for eventual sale to domestic consumers and that claims for subsidies were to be submitted monthly by all importers concerned. As to imports by retailers within which class the appellants fell, the statement proceeded:

> The Board will endeavour to measure the amount of the subsidy in such a way that the retailer will receive his goods at a cost which is reasonable in relation to his retail ceiling price. It follows that those who maintained low retail prices during the basic period will be able to continue to sell at those prices without undue hardship. Each retailer who imports direct should prepare a list of his ceiling prices for imported goods.

Dealing with imported fuel, it was said that, *inter alia,* petroleum and its products "will be dealt with on much the same basis as raw materials if circumstances so require." Having said that the document represented the most comprehensive general statement which could be made, importers were urged to have confidence that the board and the Commodity Prices Stabilization Corporation (a Crown company later organized) would deal with individual problems "fairly and reasonably" and that at that time the important thing was that the import trade should be continued in accordance with past practice, even if the present import prices involved an actual loss to the importers concerned and that such subsidy adjustments would be made retroactive to December 1. The statement declared further that the organization of the Commodity

Prices Stabilization Corporation was proceeding and that it would supervise and handle subsidy arrangements in accordance with procedures to be thereafter established.

Order-in-Council P.C. 9870 of December 17, 1941, authorized the Minister of Finance to cause to be incorporated and organized a private company under the *Companies Act* to be wholly owned by His Majesty in right of the Dominion of Canada, to be known as Commodity Prices Stabilization Corporation, with an authorized share capital:

for the purpose of facilitating, under the direction of the Wartime Prices and Trade Board, the control of prices of goods, wares and merchandises in Canada.

The Board was authorized from time to time to delegate such of its powers to the company as it might deem advisable and the Minister of Finance was authorized to execute an agreement between His Majesty and the company in the terms of a draft annexed to the Order-in-Council, with such changes that he might consider proper, and from moneys appropriated by Parliament under the *War Appropriation Act, 1941* the minister was authorized to direct advances from time to time up to the amount of $10,000,000 for the purpose of paying, *inter alia*, sums by way of subsidy. The proposed agreement which was apparently executed on January 6, 1942, authorized the company in the discharge of such duties and responsibilities as might from time to time be delegated or committed to it by the Minister of Finance or the Wartime Prices and Trade Board, to pay such moneys by way, *inter alia,* of subsidies:

to any person, firm or corporation as may be deemed advisable in accordance with the principles stipulated from time to time by the Wartime Prices and Trade Board and approved by the Minister.

While this agreement was rescinded and replaced by a new agreement made on the following July, the substituted document in like manner required that any payments by way of subsidy should be in accordance with the principles formulated from time to time by the Wartime Prices and Trade Board.

The appellant companies were at the time of the outbreak of the Second World War and in the following years engaged in operating service stations in Montreal, Toronto and Windsor for the retail sale of gasoline and lubricating oils. Joy Oil Limited, incorporated in the Province of

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Quebec, operated in Montreal a marine terminal for the purpose of receiving gasoline by ocean tankers and distributing it to their service stations in the city of Montreal, and Joy Oil Company Limited, an Ontario corporation, operated a terminal in Toronto for the purpose of receiving supplies of gasoline by boat and also in tank cars for its service stations operated in the Toronto district. The gasoline sold by the Quebec company during the years 1940 and 1941 had been imported by water from Trinidad. This was also the source of the gasoline sold at its filling stations in Toronto throughout the year 1940 and for a portion of 1941. In the latter year, however, owing to the activities of enemy submarines, this source of supply was shut off and, according to the appellants, it was necessary for them to resort to the United States market for their supplies, this resulting in a large increase in their costs. The oil controller's order 010 provided that from and after its date (October 21, 1941) the price at which graded motor fuel might be offered for sale in the provinces of Ontario and Quebec should not exceed the maximum price at which such product was sold or offered for sale in such place on the 30th day of September, 1941, plus one cent per imperial gallon, the increase provided by the order. On that date the prices charged by both appellants for gasoline to consumers were substantially less than those charged by the large oil companies operating in Canada and it is this fact which renders the interpretation of the word "place" in the orders of the oil controller of decisive importance. In Quebec the price charged was 2·7 cents a gallon less than the prices charged by the large companies, while in Toronto it was approximately 4·7 cents lower.

The appellant companies interpreted order 010 as enabling them to increase the prices charged at each of their service stations by one cent above that charged at such station on September 30, 1941, and acted on that understanding. P.C. 1195 authorized the appointment of a deputy oil controller to have all of the powers of the oil controller, subject to any restrictions thereof which the latter might from time to time impose and subject in all cases to review by him. Charles E. Austin, the vice-president of both of the appellant companies said that, at

a time which he thought preceded the date of order 010 having heard a rumor that an order was to be made, he had an interview with Stewart, the deputy oil controller, who informed him that each company was bound by its own prices which had been in effect, that the controller was following the policy of the Wartime Prices and Trade Board, that each station was to be considered as a unit, and that the appellant companies could not raise their prices to the level of the other companies. Stewart was not called as a witness: Austin's evidence, however, as to the date of this discussion is vague and unsatisfactory. Whatever may be said as to its admissibility if the discussion took place following the making of the order, it was clearly inadmissible if it was before that date. On October 28, 1941, a week after the order had been made, the Joy Oil Company Limited wrote to the oil controller apparently asking an increase in their quota of supplies. The letter was not put in evidence and its contents can only be inferred from the written answer of Stewart as deputy oil controller on November 6, 1941. That letter referring to earlier orders of the board said in part:

> Furthermore, your application is based on a complete misunderstanding of the Order. You apparently entertain the view that a quota can be fixed for your Toronto division regardless of the gallonage dispensed at any unit within the Division. Paragraph 6 of Order 007 has not been affected by the amendments contained in 007A and 007B.
>
> This paragraph makes it clear that every station operated by your Company is prohibited from selling more than its particular quota. If any station operated by your Company is permitted to sell more gasoline than the quota applicable to such station, the result is clearly a breach of the Order.
>
> Your application for an increased quota for the Toronto Division cannot be entertained as it is utterly inconsistent with the terms and principles of the Order. Any application made under paragraph 4D of Order 007B must be in respect of an individual station but, as mentioned above, any such application cannot be granted if based only on the consequences of competitive practices.

According to Austin, after receiving this letter he was referred by Stewart to Frederick G. Cottle, a chartered accountant, apparently acting as executive assistant to the oil controller, and was informed by him that he agreed with Stewart's construction of the earlier orders and that the regulations of the oil controller were based on treating each gasoline station as a separate unit, both in so far as prices and the allocation of gasoline under the rationing order

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were concerned. This evidence was admitted without objection. Cottle, called by the Crown, while admitting the discussion as to the earlier orders referred to in the letter of November 6, 1941, said first that he could recall no discussion on that occasion or any other occasion with Austin regarding prices and that he had not told or would not have told him that individual stations were the basis for the administration of order 010 "for the simple reason that it was not true". When Austin, when recalled later, repeated the statement as to what Cottle had said and the Crown was permitted to recall Cottle he than said that he had no recollection at any time of ever discussing the meaning of order 010 with Austin and that, if he had, he was positive he would never have given the interpretation to him that he says. Cottle's evidence, when read as a whole, appears to be indecisive and more in the nature of argument than a positive statement on the point. The learned trial judge, however, made no finding as to credibility as between these witnesses.

The claims advanced by the appellants in the present matter are in regard to their operations between December 1, 1941, and the latter part of June 1942. According to Austin, when supplies of gasoline imported from Trinidad were no longer available, he went to the oil controller to enlist his assistance in purchasing supplies and approached all the larger oil companies in an attempt to buy from them but without success, whereupon both companies commenced to import gasoline from the United States. According, however, to various witnesses employed by the larger oil companies, they had gasoline available for sale and the learned trial judge accepted the evidence of Frank G. Hall, a director of the Imperial Oil Limited, to the effect that graded gasoline was available which the appellants could have purchased at any time during the period in question at a tank wagon price of 17½ cents in Toronto and 17 cents in Montreal, both prices exclusive of taxes. The contention of the appellants is that at these prices they could not have maintained the prices at the figure authorized by orders 010 and 010A of January 28, 1942, which revoked the prior order and substituted other regulations. The price increase in the latter order was, however, the same as that in order 010 for graded motor fuel,

that is one cent per imperial gallon above the price in effect on September 30, 1941 "in such place". The necessity of importing from the United States substantially increased the cost of gasoline to both of the appellants and it is this fact which gives rise to the claims for subsidy.

By letter dated May 23, 1942, the appellant Joy Oil Company Limited filed its first application for a subsidy, explaining the circumstances which made it necessary to import their supplies from the United States. By letter dated July 14, 1942, the Commodity Prices Stabilization Corporation Limited wrote in reply saying that the applications were rejected: the ground assigned for the rejection was that it had been stated in the statement of import policy of the Wartime Prices and Trade Board that no subsidy would be paid if similar goods were available in Canada at reasonable prices, that the information before the Corporation indicated that the maximum retail price of Grade 2 gasoline at Toronto, as established by the oil controller, was 32·5 cents per gallon and that, accordingly, the applicants could have purchased supplies in Toronto at prices which would have allowed them to sell at this level and realize a fair profit. The statement referred to in this letter in the declaration of policy made by the Wartime Prices and Trade Board on December 2, 1941, was that it was fundamental that imported goods would not be eligible for subsidy if such goods could be obtained in Canada in sufficient volume and at reasonable prices, and followed earlier statements in the order that, as to retailers, those who maintained low retail prices during the basic period would be able to continue to sell at those prices without undue hardship, and urged importers to have confidence that the board and the Commodity Prices Stabilization Corporation would deal with individual problems fairly and reasonably. Thus, while disclaiming the applicability of one term of the Wartime Prices and Trade Board policy statement, the corporation insisted on the application of another as an answer to the claim. A considerable correspondence followed between the Commodity Prices Stabilization Corporation Limited and the solicitors for the appellants. The corporation maintained its stand and its grounds for the position taken. Ultimately, by letter dated November 18, 1942, the appellants, through their solicitors, made a lengthy submission to the Honour-

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able the Minister of Finance in which their position was fully stated. The Minister replied to this letter on March 11, 1943, saying that while the statement of policy of the Wartime Prices and Trade Board clearly referred only to goods affected by the Maximum Prices Regulations of December 1, 1941, he considered that vendors of petroleum products would also be entitled to claim for payment of subsidies if the same were necessary in order to enable them to sell at the selling price established under the oil controller's orders 010 and 010A. The letter further said in part:

> The question as to whether the Joy Companies are entitled to receive payment of a subsidy would appear to depend upon the interpretation of the word "place" as contained in the Orders above referred to. If, as you contend, this word means "place of business", your clients are entitled to payment of a subsidy. If, on the other hand, it means a geographical area, i.e., a municipality or adjacent district, they are not, since my advice is that no subsidy would have been required to enable your clients to sell gasoline at the maximum price permitted in the Montreal and Toronto areas.

and, after discussing the dictionary definition of the word "place", said that the question as to the interpretation to be placed upon the word, as used in the orders, had been submitted to the solicitor of the Wartime Prices and Trade Board for his opinion and that he had expressed the view that the word, as used in the orders, did not mean "place of business" but rather a geographical locality, and that accordingly the Minister had decided not to intervene.

The claim of the appellants is for a stated sum by way of subsidy on the footing that the Crown became indebted to them in these amounts. The claims are said to be based upon contract on the footing that there was an offer or promise extended to the appellants by an authorized agent of the Crown upon which "the suppliants acted to their detriment". By this, however, I understand it is meant that the statement and declarations of policy by the Wartime Prices and Trade Board were in effect an offer which had been accepted by them by importing supplies from the United States and selling them at the restricted prices. I agree with the conclusion of the learned trial judge that the claim cannot be sustained on this basis. The further contention that such a contractual relationship was "ratified" by the Minister of Finance in his letter to the solicitors for the appellants is not, in my opinion, well

founded. I think that the letter was clearly not intended to be more than an expression of the Minister's view as to the decisive point in the matter and to indicate his intention to abide by the advice he had received from the solicitor for the Wartime Prices and Trade Board.

I am, however, of the opinion that these conclusions should not dispose of these claims. Their rejection was based upon the grounds stated in the letter from the Commodity Prices Stabilization Board to the appellants of July 14, 1942, and in reliance upon the interpretation placed by the corporation on the language of the orders of the oil controller. If the proper interpretation of those orders is that the "place" referred to was the individual filling stations of the appellants in Toronto and Montreal and not those cities respectively, it is plain that there has been no consideration given to the claims for subsidy on their merits. The word "place" and the expression "in any place" are clearly capable of either meaning. The order of the oil controller does not fall within subsection (*b*) of section 2 of the *Interpretation Act* (R.S.C. 1927, c. 1) and the provisions of that statute do not apply to its interpretation. In my opinion we are entitled, in order to assist in determining the meaning to be assigned to this language, to consider, in addition to the other terms of the orders, the Orders-in-Council which vested the powers in the controller in the exercise of which the order was made, the terms of the Orders-in-Council which constituted the Wartime Prices and Trade Board and the other agencies set up for the purpose of controlling prices in Canada and the statements of policy and the regulations made by or on behalf of these various government agencies. The office of the oil controller constituted by Order-in-Council P.C. 2818 was merely to be one of the instruments used by the Wartime Prices and Trade Board to control prices and margins of profit in Canada. The power vested in the controller by P.C. 1195 to prohibit or regulate any mode of dealing which "would or might increase or tend to increase the price of oil to any person or class of persons" did not merely vest him with these powers but contemplated their exercise and this overall purpose of the plan was made manifest in all of the orders and regulations dealing with the subject of control. The oil controller was not to conduct a species of control differing from that to be applied

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to the sale of all other commodities or to act independently of the Wartime Prices and Trade Board, except to the extent that that body should permit. The preamble to P.C. 6835 of August 29, 1941, which prescribed regulations for the Wartime Industries Control Board, stressed that the functions and duties of the various controllers were interdependent and correlated not only with those of other controllers but with the functions and duties of the Wartime Prices and Trade Board, and that it was desirable to take further measures to promote co-ordination and integration of their activities by creating a closer relationship between them and the Wartime Industries Control Board and the Wartime Prices and Trade Board. It was with this end in view and with the purpose of ensuring uniformity of policy that the orders of the oil controller were made subject to the approval of the Wartime Prices and Trade Board in lieu of that of the Minister of Munitions and Supply, a change affected by P.C. 7824 of October 8, 1941. It is, I think, clear both from the language of P.C. 1195 and that of regulation 10 (iii), enacted by P.C. 6835, that the word "place" is not to be construed as synonymous with the words "area" or "zone" used in the former Order-in-Council, or with any of the words "area, zone or locality" used in the regulation. The fact that these words were used in addition to the word "place" indicates, in my opinion, a restricted meaning for the latter term. If the increase in price to be permitted by the order was one cent above the maximum charged in the cities of Toronto or Montreal or other centres of settlement on September 30, 1941, one would expect that, if not mentioned by name, the areas would have been at least generally defined as the city, town, village or locality within which the businesses affected were carried on. When, shortly after order 010 was made, the appellant Joy Oil Company Limited asked for an increased quota of supplies for its Toronto division, the controller, refusing the request, replied that allocations could not be made in this manner, but that every station operated by the company was prohibited from selling more than its particular quota. The orders which affected this aspect of the matter antedated order 010 and were not introduced in evidence, but the ruling made by the controller's letter of November 6, 1941 indi-

cated the intention, at least from the standpoint of regulating supplies, of treating each filling station as a separate unit.

The matter is not to be determined, in my opinion, merely by deciding what was the intention of the controller. As Phipson (8th Ed. p. 97) puts it, in construing a written document, the question is not as to the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer. Some assistance is, I think to be obtained from other terms of the orders. Order 010 defined consumer as any person who acquires petroleum products for use only and not for the purposes of resale, and by paragraph 7 provided that the price to be paid by a consumer for graded motor fuel delivered by tank wagon should be one cent per gallon more than the dealers' tank wagon price applicable at the place of delivery. The price referred to was that in effect on September 30, 1941, and the place of delivery the consumer's premises. I think the same meaning is to be assigned to paragraph 9 of that order. The place referred to there was also, in my opinion, the place of delivery which, in the case of service stations selling gasoline, was their premises where delivery was made to the motor car of the consumer. To construe the order otherwise, as applied to the present case, would restrict dealers who delivered motor fuel to the premises of consumers to an increase of one cent over their price at such place on September 30, 1941, while permitting the appellant companies at their service stations to increase their prices for gasoline delivered to motor cars by 5·7 cents a gallon in Toronto and 3·7 cents a gallon in Montreal. While order 010 preceded P.C. 8527 by ten days and the latter order provided that the various provisions of its paragraph 3, which included the provision that for the purpose of the regulations each separate place of business of a seller should be deemed to be a separate seller, should not apply to any price fixed by some other authority with the written concurrence of the board, I think that the order, the preliminary statement of policy and the further statement of import policy may be considered as aids to the construction of order 010 as well as order 010A. The regula-

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tions which had been enacted provided for the closest liaison between the various controllers and the Wartime Prices and Trade Board, and the chairman of that board had concurred in the order and was thus aware of its terms. It must be assumed that the Wartime Prices and Trade Board was following a consistent policy with all sellers of goods and not favouring some vendors of gasoline over other retailers by permitting large increases in their maximum prices. The fact that it was made clear by P.C. 8527 and the subsequent statements that permitted increases were to be made on each individual seller's price during the basic period supports rather than detracts from the appellants' contention. That the matter was dealt with more specifically than had been done by order 010 does not alter my view as to the construction of the former document. It was not merely the appellants who construed the oil controller's order in this way; I think it was so construed by those directing the Wartime Prices and Trade Board. It is also significant, in my opinion, that on January 28, 1942, when the oil controller had before him P.C. 8527 and the declarations of policy of the Wartime Prices and Trade Board, the expressions "in any place" and "in such place" were again used. I think if, at that time, there had been any intention to treat the matter of permitted increases in the price of oil on a different basis than all other commodities, the oil controller would have taken pains to see that the order said so in clear language.

The appellants in the present matter are not, in my opinion, in the same favourable position as the taxpayer in *Pioneer Laundry and Dry Cleaners Ld.* v. *Minister of National Revenue* (1), where there was a legal right to an allowance for depreciation. Here, I do not think the appellants have an enforceable right to a subsidy. I, however, consider that they are entitled in law to have their claims considered upon a proper basis. There has been here no exercise of discretion but merely a rejection of the claims based on a misconstruction of the orders of the oil controller. I would set aside the judgment appealed from and direct that the matter be referred back to the Commodity Prices Stabilization Corporation to deal with the claims for subsidies advanced in this action, on the footing that the

(1) [1940] A.C. 127.

orders of the oil controller permitted the appellants to increase their prices only to the extent of one cent per gallon on September 30, 1941.

I agree with the disposition of the costs proposed by my brother Rand.

RAND J.:—This appeal concerns a claim made against the Crown for subsidies on gasoline imported from the United States between December 1, 1941 and July 1, 1942. The importers were companies which, at their own filling stations, sold directly to consumers in Toronto, Montreal and Windsor. They had, for some years, brought the gasoline in chiefly from Trinidad, and the retail price at which it was sold ranged between 2½c and 3½c a gallon under that of their competitors. Owing to the war, the supply from Trinidad was cut off, and they were forced to enter the higher price market of the United States.

Under *The War Measures Act*, Order-in-Council P.C. 1195 of February 19, 1941, amending a previous order of 1940, was issued dealing, among other things and subject to certain approvals, with petroleum products and empowering the oil controller,

> to fix or regulate the price or fix the maximum price or the minimum price at which oil may be sold or offered for sale in any place, area or zone by or to any person or class of persons and for such purpose to designate any such person or class of persons or any such place, area or zone;

Acting under that authority, the controller, by order No. 010 of October 21, 1941, fixed maximum prices at which oil products could be sold. Clauses 7 and 9 were as follows:

> 7. Subject to paragraph 8 of this Order, the tank waggon price to be paid by a consumer for graded motor fuel delivered by tank-waggon shall be one cent per imperial gallon more than the dealer's tank-waggon price applicable at the place of delivery.
>
> 9. From and after the date of this Order, the price to be paid for petroleum products, or any of them, by any purchaser thereof shall be regulated as follows:
>
> (*a*) The price to be paid in any place shall not exceed the maximum price at which any such petroleum product was sold or offered for sale in such place or for delivery to such place on the 30th day of September, 1941, plus any applicable price increase confirmed, authorized or required by this Order and having regard to the quantity purchased;
>
> (*b*) For the purposes of the foregoing clause (*a*) as applied to graded motor fuel, the maximum price applicable in any place on the

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30th day of September, 1941, shall be ascertained having regard to the price of motor fuel having the same or the nearest qualities to those specified by Order 008A for either grade of graded motor fuel;

(c) No greater price shall be charged to any person for petroleum products or any of them than that provided by paragraph 7 and by this paragraph 9 of this Order.

As of November 17, 1941, general price control was set up by Order-in-Council P.C. 8527 which excepted from its operation prices fixed by any federal agency and approved by the chairman of the Wartime Prices and Trade Board: within that exception were the maximum prices for petroleum products.

On December 2, 1941 and later, on January 1, 1942, the Prices Board issued statements of policy on matters arising out of the sale of imported goods for civilian purposes. The former laid down the general principle that imported goods would cost the importer no more than was appropriate to the retail ceiling prices, and declared that:

Importers may, therefore, continue importing in the normal manner, with the assurance that appropriate subsidies will be provided with respect to goods imported on and after December 1, 1941, on the basis outlined below. The methods will, in the first instance, consist of direct subsidies to importers, with the possibility that from time to time duties and taxes on imported goods may be reduced in such a way as to make subsidies unnecessary.

The Board reserved the right to exclude any goods from the subsidy and "to adjust the amount of that subsidy from time to time as may be fair and reasonable in the circumstances". Consideration was to be given, however, to "forward commitments" entered into after the date mentioned. It was emphasized that the board would not approve subsidies where the increase in import prices was not of significant proportions for those concerned; that increases which the importer or his trade customers could absorb without "undue hardship" should not "even" be brought to the attention of the board. If, however, the increased cost was greater than could be expected to be absorbed, the board would set the subsidy at a reasonable level. It stated that if foreign suppliers should attempt to raise prices unduly, the subsidy might be withdrawn as to their goods.

More specifically it declared that the retailer who found his import prices to have risen "significantly above the

level which prevailed for goods sold by him during the basic period" might submit a claim to the board, and that the board would endeavour to measure the subsidy in such a way that the retailer would "receive his goods at a cost which is reasonable in relation to his retail ceiling price". It was declared also to follow that "those who maintained low retail prices during the basic period" would be able to continue to sell at those prices without undue hardship. In some cases, it might be more suitable to adjust subsidy by reference to average costs of a number of retailers.

Finally, importers were urged to have confidence "that the board and the Commodity Prices Stabilization Corporation (not at that time incorporated) will deal with individual problems fairly and reasonably. At the present time, however, the important thing is for import trade to be continued in accordance with past practice, even if present import prices involve an actual loss to the importers concerned, for subsidy adjustments will be made retroactive to December 1st. Importers should, therefore, adjust their own selling prices so as to enable retailers to carry on under the retail ceiling". The statement of January 1, 1942, involved no change in principle but clarified and amended the earlier one in certain details. By it, also, certain goods previously eligible for subsidy were excluded. The trade was notified that no subsidies would be paid if similar goods were available in Canada at reasonable prices. It was stated that:

> No definite rules can be laid down for raw materials, including fuel. Each commodity may require separate treatment on the position of the industry as a whole after intermediate selling prices of wholesalers, secondary manufacturers and primary manufacturers have been adjusted.

On December 17, 1941, Order-in-Council P.C. 9870 authorized the organization of a Crown company under the *Companies Act* to be known as "Commodity Prices Stabilization Corporation" to be the agency for facilitating, under the direction of the Prices Board, price control generally, including the payment of subsidies, as part of the general price stabilizing policy. With this corporation, the Crown entered into an agreement by which accountable advances were to be made and by which the company was authorized in the discharge of such duties and responsibilities as might from time to time be delegated or committed to it

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to pay such sum or sums by way of subvention, subsidy, bonus or otherwise, to any person, firm or corporation as may be deemed advisable in accordance with the principles formulated from time to time by the Wartime Prices and Trade Board and approved by the Minister.

Subsequently, on July 7, 1942, by Order in Council P.C. 5863, the corporation was authorized by section 1, ss. (2):

to pay such sum or sums by way of subvention, subsidy, bonus or otherwise to any person, firm or corporation as may be deemed advisable; provided, however, that the said company shall not enter into any agreement binding itself to pay any such sum or sums to any person, firm or corporation except with the approval of the Minister of Finance.

The appellant companies continued to import gasoline from the United States during the period mentioned and submitted statements of costs and prices in support of an application for subsidy. It was declined on the ground that paragraph 9 of the controller's order 010 and paragraph 8 of the controller's order 010A established maximum prices applicable generally in geographical places; that the prices of the company's products as of September 30, 1941 were below the maximum prices in the three cities mentioned; and that they could have purchased gasoline in Canada at a price which would have enabled them to realize a reasonable profit within the *maxima* so prescribed. The companies, contending that their own highest prices had become fixed as *maxima,* laid their complaint before the Minister of Finance. His reply contains the following paragraph:

The question as to whether the Joy Companies are entitled to receive payment of a subsidy would appear to depend upon the interpretation of the word "place" as contained in the Orders above referred to. If, as you contend, this word means "place of business", your clients are entitled to payment of a subsidy. If, on the other hand, it means a geographical area, i.e. a municipality or adjacent district, they are not, since my advice is that no subsidy would have been required to enable your clients to sell gasoline at the maximum price permitted in the Montreal and Toronto areas.

The claims asserted in this proceeding are based on contract: they treat the statements of policy as contractual offers made by an authorized agency of the Crown and accepted by the action of the companies in continuing to import; and the letter of the Minister, as creating a contractual obligation conditional upon the interpretation of the language of the orders as meaning their individual selling stations.

These contentions were rejected in the Exchequer Court (1), and I agree with that result. The short answer in each case is that neither the Board nor the Minister is shown to have evidenced the slightest intention of entering into contractual obligations or of establishing legal relations of any kind whatever. The language quoted from the declaration of policy shows that it was what it purported to be, a statement of general principles to be followed; and its qualifications and reservations and its references to modifications which would affect the amount or payment of subsidies demonstrate the purpose to perform the task of meeting price consequences of the emergency imposed by the government on the corporation by an administration of practical and fair measures carried out in good faith and according to the corporation's best judgment in the light of all the circumstances. It was this the Minister had in mind in his reference to the price maximum; but that he intended to take the matter out of its ordinary channels and place the issue of the subsidies as claimed on the interpretation of the clauses mentioned, is quite unwarranted. Conceding the interpretation to be as urged by the companies, many other factors would remain on which the decision of the corporation must be based, and there was neither intention nor authority in the Minister to supersede that jurisdiction.

But the interpretation adopted played a significant part in the rejection of the claim, and it must, I think, be examined. Admittedly the general price order fixed actual prices wherever they were being charged during the basic period, and expressly provided that each separate place of business should be deemed a separate seller or supplier. In a previous order of the oil controller, a quota had been placed on permissible sales which likewise applied to the individual place of sale such as, for example, a filling station. It is in part against this background that the orders of the oil controller should be viewed even though the first, 010, was issued prior to the general order. The Prices Board had been in existence since 1939 and as individual price controls were in substance merely particular cases of the general control, the companies were

(1) [1949] Ex. C.R. 136.

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entitled to assume that the regulation of prices on petroleum was intended generally to be similar to that of the broader measure.

It is seen that the words "place, area or zone" in the authorizing regulation of P.C. 1195 apply to all goods placed under controllers. It is unquestionable that they were intended to meet the exigencies of widely differing commodities, and that they were not themselves to be used in the specification of a special order. It was meant that the controller could prescribe the maximum prices in relation to any particularly described "place, area or zone", not that these words themselves were to be put to such use. When, then, the word employed is so general as to fit many different particulars, we must have regard not only to the evidence of its meaning as afforded by other provisions of the order, but, as well, the fact that the order was to be read and interpreted by laymen as a practical business directive with the background of the general control; and that its interpretation must respect the meaning that could fairly and reasonably be given it by the trade, not something that lay hidden in the mind of the draftsman.

Of the internal evidence in order 010, it will be noticed that paragraph 7, which I have quoted, provides that the tank-waggon price to be paid by a consumer shall be one cent a gallon more than the dealer's tank-waggon price "applicable at the place of delivery." Now the place of delivery to a dealer is generally, or certainly includes, a filling station. It would be an extravagant use of business language to say that the place of delivery to a dealer at his filling station by tank-waggon was "at Toronto". It is a reasonable interpretation of that language that what is intended is the actual point of delivery, not some indefinite geographical area. There are hundreds of gasoline pumps set up near farm houses along the main highways all over the country which are supplied by tank-waggons; what could their "places of delivery" be except the farmer's yard? Then clause 10 provides a penalty for any person who sells petroleum products at a price greater "than is authorized by this order as applicable at the place of delivery," i.e. to a dealer or a private consumer at a filling station. Clause 11 likewise refers to the authorized price "at the place of delivery". Clause 8(1) of order 010A

refers to "delivery to such place" and clause 9, providing a penalty, contains the same language "at the place of delivery" as clause 10 of 010.

Against this, the preposition "in" is urged as excluding the particular point of a sale or delivery, and no doubt it lends itself somewhat to that view. But there are other considerations to which that circumstance leads. In Toronto the appellants have 16 service stations. The larger oil companies do not themselves sell to the retail trade, and the retail prices are fixed by the proprietors of the individual stations. There is no evidence that a uniform price is maintained throughout the city even of the gasoline supplied by any one of the large refiners, yet the order, on the interpretation given by the corporation, would fix as a maximum retail price the highest charged by any service station in the city on September 30, 1941. This, ordinarily superseded by competition, might easily be material in the presence of quotas and short supply.

The price, not only of retail but of tank-waggon and rail or water delivery in tank quantities, was also envisaged, and it is obvious that if the appellants were compelled to purchase in Canada, they would purchase on a large scale basis. What were the means open to them to determine the maximum wholesale price, say, in Toronto? They had none themselves of ascertaining it, and their competitive relation may be assumed to have been such as was not conducive to exchanges. Not being refiners, they would have to submit themselves to their competitors and as their purchases would call for greater importation of crude oil, the only difference in the international aspect would be the addition to the monetary exchange of the cost of refining in the United States; but however repugnant all this might have been, if the circumstances were such as to make the necessity clear, they would have had to submit to it.

These considerations, in the setting of the total control and the generality of the language used, justified the companies in concluding that the maximum price was intended to be that of the individual place of sale or delivery. But even if that had not been so, the restriction to that at which the product was sold, say, "in" Toronto, implied, as sold by the applicant for subsidy. He would

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know only his own maximum price and, at the most, some of those publicly advertised. In the large centres, the maximum geographically could have been ascertained and announced by the controller rather than to have had it disclosed at a trial by private witnesses after the event; and it would have been out of the ordinary course of public regulation to charge the applicant with responsibility for discovering business facts of his competitors.

The final question is whether, under the terms of the various orders, these appellants have acquired any right which can be recognized as of a juridical nature. I think it indisputable that keeping in mind the broad discretionary authority vested in the corporation, the times, the unprecedented control of business, the absolute necessity for fair, equal and impartial treatment in matters so immediately affecting the fortunes of individuals, a duty arose to enter upon the adjudication of a claim for subsidy in good faith and upon the basis of its relevant considerations. That their range would be spacious does not convert the power into a privilege of acting or not acting at pleasure: *Julius* v. *Bishop of Oxford* (1).

That duty has its correlative right in the individual. In adjudicating, the corporation must proceed within and on proper interpretations of the administrative legislation, and where, as here, it has misconstrued a material provision, its adjudication is vitiated and its conclusion nullified.

The appeals should therefore be allowed and the matters referred back to the government to pass upon the applications in the light of the interpretation given to the order and all other proper circumstances.

In view of the fact that this declaratory relief was not asked for and the claims as submitted must be rejected, the appellants should recover one-third of their costs in both courts.

ESTEY J.:—The appellants, incorporated in 1934, imported gasoline from Trinidad and sold it to consumers at a price lower than that of their competitors. After the outbreak of war, and because of the scarcity of shipping facilities, they were forced to discontinue importation from

(1) (1880) 5 A.C. 214 at 222.

Trinidad, but did so from the United States, where prices were so much higher as, in their opinion, to justify an application to the Commodity Prices Stabilization Corporation Ltd. for a subsidy covering the period between December 1, 1941, and July 1, 1942. The amount claimed was $459,845.73, with interest from September 15, 1942.

While the appellants are two separate companies, one carrying on business in the province of Quebec and the other in the province of Ontario, the issues raised are identical and for convenience only the claim of the Joy Oil Company Limited, arising out of its Toronto business, will be discussed. In Toronto it operates a marine terminal and sixteen service stations.

The Joy Oil Company Limited based its claim for a subsidy upon three statements issued by the Wartime Prices and Trade Board, which they construe as an offer to pay a subsidy accepted by them in continuing to import gasoline and sell it at the price fixed by either the oil controller or the Wartime Prices and Trade Board. They contend that in this way a contract was made which was ratified by the Minister of Finance in his letter to the solicitors for the suppliants dated March 11, 1943.

The first of these statements was issued on November 21, 1941, entitled "Preliminary Statement of Policy", the second, December 2, 1941, entitled "Import Policy", and the third, dated January 1, 1942, entitled "Statement on Import Policy." These are lengthy statements and need not here be reproduced. It is sufficient to observe that they are written in neither the language of an offer nor that of orders or documents purporting to create rights. They are rather statements of policy, introducing price control, giving the reasons that made it necessary, and an explanation of how it would be carried out. They also constitute an appeal that because of the necessity for, the magnitude of and the difficulty involved in price control, it could only be successful if all co-operated. Throughout it is clear that these documents are related to others. This appears from the opening paragraph of the first statement:

> On December 1, 1941, there will come into force in Canada a complete control of all prices. Higher prices will not be permitted than those at which goods were actually sold during the four weeks September 15 to October 11. This far-reaching action will affect everyone. It is in the common interest of all. It has an essential part to play in the successful carrying on of the war.

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They specifically make reference to importers, and the language, rather than constituting an offer, indicates that the importer who follows the outline contained in these statements of policy will be dealt with "fairly and reasonably." This is particularly evident in para. 9 of the statement of December 2, 1941, which reads, in part:

> 9. The above represents the most comprehensive general statement which can be made. Importers are urged to have confidence that the Board and the Commodity Price Stabilization Corporation will deal with individual problems fairly and reasonably * * *

A reading of these statements leads to the conclusion that subsidies were to be paid, not on the basis of a contract, but upon the basis of a fair and reasonable consideration of each application made therefor.

The contention that the letter of the Minister of Finance dated March 11, 1943, constituted a ratification cannot be maintained. Under the authority hereinafter quoted (Order-in-Council P.C. 9870) the Commodity Prices Stabilization Corporation Ltd. could agree to pay only such sums by way of subsidies as it "deemed advisable" and even then the agreement was not binding "except with the approval of the Minister of Finance." The corporation had refused the subsidy and, therefore, there was no proposed agreement that could be approved. The letter was an answer to a complaint suggesting that the appellants had been discriminated against which, in effect, asked that their application receive fair and equitable treatment. The Minister reviewed the facts, particularly the opinion received by the corporation relative to the word "place," and concluded that he could not "interfere with the decision of the Commodity Prices Stabilization Corporation that your clients are not entitled to payment of the subsidy claimed." In these circumstances, even if the authority to approve could be construed to include that to ratify, the Minister did not purport either to approve or to ratify, nor, indeed, was there any agreement which he could approve or ratify.

It is necessary, therefore, to determine whether the appellant is entitled to a subsidy apart from any question of contract. These statements must be read and construed with the Orders-in-Council already passed relative to the creation of (September 3, 1939) and the powers conferred upon the Wartime Prices and Trade Board; to the

appointment of (June 28, 1940) and the powers conferred on the oil controller and his order 010, October 21, 1941; to the creation of (June 24, 1940) and powers conferred upon the Wartime Industries Control Board; as well as the steps taken by these respective bodies relative to a fixing of prices and, in particular, with respect to gasoline. That these respective bodies were duly created and vested with all the powers they have exercised in relation to this litigation, as well as the fact that their efforts were co-ordinated and at all relevant times they were acting in concert, is clearly established. It is unnecessary to examine in detail the origin, powers and purposes of these bodies, except to emphasize that they were engaged in the regulation and control of essential commodities and the fixing of maximum and minimum prices with regard thereto.

The appellant made its application to the Commodity Prices Stabilization Corporation Ltd. This corporation was incorporated "with the intent and for the purpose of facilitating, under the direction of the Wartime Prices and Trade Board, the control of prices of goods, wares and merchandise in Canada, and with such powers, in addition to those conferred by the Companies Act, as may be set forth in the Letters Patent" (Order-in-Council P.C. 9870, December 17, 1941). Letters Patent were issued on the 24th day of December, 1941, and expressly provided for the payment of such subsidies "as the company may deem fit and proper." The foregoing Order-in-Council P.C. 9870 was subsequently amended on July 7, 1942, by Order-in-Council P.C. 5863, to provide that the company should pay only

> such sum or sums by way of * * * subsidy, * * * as may be deemed advisable; * * *

subject, however, to a further provision

> that the said Company shall not enter into any agreement binding itself to pay any such sum or sums to any person, firm or corporation except with the approval of the Minister of Finance.

The corporation, under date of July 14, 1942, refused the appellant's application for a subsidy on the basis that gasoline was available in Canada and, therefore, the provisions of para. 4(*c*) of the "Statement on Import Policy", dated January 1, 1942, prohibited the payment of a subsidy.

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4. Importers should observe the following points in connection with goods eligible for subsidy:

* * *

(c) * * * No subsidies will be paid if similar goods are available in Canada at reasonable prices.

In its letter refusing payment of a subsidy the corporation pointed out that the oil controller's order 010 (October 21, 1941) established maximum prices as of October 1, 1941, for gasoline which at Toronto, for the grade (Grade 2) here in question, was 32·5c per gallon, and that gasoline was available in Toronto which, when sold at 32·5c per gallon, would give to the retailer a spread of 4c to 5·5c per gallon, depending upon whether it was purchased on the basis of tank wagon or tank car. It was also pointed out that quantity buyers might obtain jobber's prices which would provide an even greater spread. In fact, throughout the negotiations that followed, the corporation took the position that it was open to the appellant to increase its retail price of 27·8c to the ceiling of 32·5c and to purchase gasoline on the same basis as other distributors, while the appellant maintained it was not permitted to increase its price above 27·8c per gallon. It was at this price that it was selling gasoline on October 1, 1941, the effective date of the price under oil controller's order 010, and also the price at which it was selling gasoline in the basic period September 15 to October 11 as fixed by Order-in-Council P.C. 8527 dated November 1, 1941, which provided:

The maximum price at which any person may sell or supply any goods or services shall be the highest lawful price at which such person sold or supplied goods or services of the same kind and quality during

the period September 15, 1941, to October 11, 1941. The appellant contends that its price of 27·8c per gallon was fixed, whether the matter be dealt with under the oil controller's order 010 or under Order-in-Council P.C. 8527. It is conceded that, if the latter applies, the price was so fixed. It is, however, contended that it does not apply because in para. 4(*g*) of the latter (Order-in-Council P.C. 8527) it is provided:

4. The provisions of section 3 (price fixing) of these regulations shall not apply with respect to:

* * *

(*g*) any price fixed by the Board, or fixed or approved by any other federal, provincial or other authority with the written concurrence of the Board.

It is established that oil controller's order 010 was issued prior thereto with the concurrence of the board. The question, therefore, arises particularly under oil controller's order 010. Item No. 9 of this order reads, in part, as follows:

> 9. From and after the date of this Order, the price to be paid for petroleum products, or any of them, by any purchaser thereof shall be regulated as follows:
>
> (*a*) The price to be paid in any place shall not exceed the maximum price at which any such petroleum product was sold or offered for sale in such place or for delivery to such place on the 30th day of September, 1941, plus any applicable price increase confirmed, * * *

and Item No. 10 thereof, in part, as follows:

> 10. Any person who sells petroleum products, or any of them, at a price greater than is authorized by this Order as applicable at the place of delivery thereof shall be guilty of a breach of this Order * * *

The corporation's contention is that under oil controller's order 010 prices were "set for gasoline on a geographical basis and not on an individual basis," and, therefore, the word "place" in the foregoing Item No. 9(*a*) should be construed to refer and be applicable to all service stations in Toronto and not to the individual service stations. This construction, if accepted, permitted the appellant to raise its price to 32·5c per gallon at its service stations in Toronto.

The word "place" is not defined in order 010, nor is it defined in any other of the oil controller's orders. Not only does the oil controller not define the word "place," but he never did fix any "place, area or zone" within which a particular price would obtain. The oil controller was a member of the Wartime Industries Control Board, which was created, *inter alia*, in order that the controllers "should act in respect to common problems along similar lines" (Order-in-Council P.C. 2715, June 24, 1940); and then by a further Order-in-Council (P.C. 6835, August 29, 1941) another step was taken to

> further measures to promote co-ordination and integration of the functions and activities of such Controllers, * * * by creating a closer relationship between the Controllers, the Wartime Industries Control Board and the Wartime Prices and Trade Board, to promote co-operation * * * and reduce the possibility of any confusion arising as a result of the exercise and discharge of their various powers, functions and duties.

P.C. 6835 was one of the Orders-in-Council under which the oil controller issued his order 010.

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In these circumstances it is significant that The Maximum Prices Regulations, as fixed by Order-in-Council P.C. 8527, November 1, 1941, provided in sec. 3, subsection (7):

> 3. (7) For the purposes of these regulations, each separate place of business of a seller or supplier shall be deemed to be a separate seller or supplier.

The first of the three above-mentioned statements included:

> The price ceiling applies to each individual store, department or branch on the basis of its own prices for each separate kind and quality of goods and services during the basic period. The lower-price stores are not permitted to raise their prices to the level of the higher-price stores.

It is also significant that the corporation, in refusing the appellant's request for the allotment of a larger quota, stated:

> If any station operated by your Company is permitted to sell more gasoline than the quota applicable to such station, the result is clearly a breach of the order.

Moreover, provision 8(1) of Order-in-Council P.C. 6835, under which the oil controller issued his order 010, repealed the oil controller's original authority in this regard, as contained in Order-in-Council P.C. 1195. In the latter in particular the word "place" appears several times and sometimes clearly means an individual place of business. Indeed, in reading the order as a whole, it is quite open to the construction that the word "place" throughout has that meaning. It will be further observed that in issuing order 010 the oil controller used the word "place" only and not the phrase "place, area or zone," as those words appear in para. 8(1) of Order-in-Council P.C. 6835.

This order 010 was issued October 21, 1941, before any of the three statements above referred to. On January 28, 1942, after these statements were issued, as well as Order-in-Council P.C. 8527, all making it clear that prices generally were fixed in relation to the individual store or place of business, the oil controller amended his order 010 by his further order 010A, and even then did not define the word "place" to mean, in effect, an area or zone as he now contends. It would seem that if he intended the word "place", in his order, to have a meaning different from that which obtained otherwise throughout price control that he would at least have made it clear in order 010A.

Throughout it is obvious that it was the intent and purpose of the Governor in Council that the provisions respecting price fixing should be read and construed together and that all bodies engaged in administering price control should act together and in concert. It follows that the word "place" ought to be construed as having the same meaning throughout, unless in a particular order it is used in a context which shows some other meaning was intended. Such is not found in Orders-in-Council P.C. 1195 and P.C. 6835, nor is it found in oil controller's order 010, and, therefore, the word "place," as used therein, should be construed to mean the individual service station. The appellant, therefore, could not raise its retail prices to 32·5c per gallon and gasoline was not "available in Canada at reasonable prices" within the meaning of para. 4(*c*) above quoted.

The respondents contended that as the corporation was authorized to pay such subsidy "as the company may deem fit and proper" and then only "with the approval of the Minister of Finance," its decision was the exercise of an "administrative discretion" over which there was no control other than that it "shall be in accordance with principles formulated from time to time by the Wartime Prices and Trade Board and approved by the Minister." The difficulty in applying the authorities cited by the respondents in support of the view that the exercise of such a discretion is not reviewable by a court is that here the company, upon the evidence, did not exercise a discretion, but rather acted upon its construction of the above para. 4(*c*). The construction of such a provision is a matter of law and not the exercise of a discretion.

Oil controller's order 010 does not deal with importation of gasoline. That was otherwise dealt with. In addition to para. 9, already quoted, of the statement of December 2, 1941, it contained this specific reference:

> *Imported fuel*—Coal, coke, petroleum and its products, will be dealt with on much the same basis as raw materials if circumstances so require.

Indeed, throughout it is not contested but that it was intended those carrying on business would continue to do so and that if it were necessary for them to import merchandise and to pay higher prices therefor an application

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for a subsidy would be considered. Gasoline was not available to the appellant in Canada at a reasonable price that would permit of its carrying on business and selling its gasoline at the price fixed by the oil controller at 27·8c per gallon.

The appellant's application was only considered upon the basis that gasoline was available to it in Canada at reasonable prices. Under these circumstances it would appear that the appellant is entitled to have its application further considered. The matter should be referred back on the basis suggested by my brother Locke and adopted by the Chief Justice and the costs disposed of as my brother Rand suggests.

The appeal is allowed and the matter referred back to the Commodity Prices Stabilization Corporation to deal with the claims for subsidies advanced in this action on the footing that the orders of the oil controller permitted the appellants to increase their prices only to the extent of one cent per gallon on Sept. 30, 1941. In view of the fact that this declaratory relief was not asked for and the claims as submitted must be rejected, the appellants will recover one third of their costs in both Courts.

Solicitor for the Appellants: *E. A. R. Newson.*

Solicitors for the Respondent: *Magee, O'Donnell and Byers.*

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ABRAHAM ALIAS ADOLPHE ZUSMAN (*Defendant*) ..... APPELLANT;

*Mar. 6, 7.
*May 10

AND

CHARLES-EUGÈNE TREMBLAY (*Plaintiff*) ..... RESPONDENT.

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

Sale—Immovable property—No immediate tradition—Civil fruits—Possessor in good faith—Arts. 409, 1025, 1472, 1498 C.C.

In 1942, the appellant authorized an agent to sell an immovable property at Jonquiere, P.Q. A willing buyer, the respondent, was found but the appellant refused to sign the deed tendered. An action en passation de titre was brought and was maintained by the Superior Court and the Court of Appeal with certain modifications to the contract, which had been produced with the action and which had been signed by the respondent. In 1944, following the judgment of the Court of Appeal, the appellant signed the contract which retained the original provision that the purchaser would be entitled to possession ninety days after the signature of the deed. The appellant kept possession up to the expiration of the ninety days following his signature as vendor and then claimed and received all the monthly instalments alleged to be due since 1942. The respondent, by the present action, sought to recover the civil fruits of the property as from the date of his own signature as purchaser in 1942. The action was maintained by the Superior Court and by a majority in the Court of Appeal.

Held (The Chief Justice and Rand J. dissenting), that by virtue of Art. 1472 C.C. the sale was made perfect in the year 1942 by the acceptance of the offer of sale; delivery of the property was not needed to complete the sale since what was alienated was a thing certain and determinate (Art. 1025 C.C.). The judgment of the Court of Appeal in 1944 did not have the effect of creating new rights but rather to declare the pre-existing rights of the parties as of 1942. Therefore, as the respondent had had the ownership of the property since 1942, he was entitled to the civil fruits from that date by virtue of Arts. 1498 and 409 C.C., and the appellant could not be considered a possessor in good faith within the terms of Art. 411 C.C.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming, Marchand J.A. dissenting, the judgment of the Superior Court which had maintained respondent's claim for the civil fruits of a property sold to him by the appellant.

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

(1) Q.R. [1950] K.B. 79.

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Rinfret C.J.

E. Masson, K.C. for the appellant.

Roland Fradette, K.C. for the respondent.

The CHIEF JUSTICE (*dissenting*): L'intimé a poursuivi l'appelant pour lui réclamer la valeur des fruits civils d'une propriété immobilière située sur la rue Saint-Dominique, à Jonquière, et il a obtenu de la Cour Supérieure un jugement lui octroyant une somme de $6,714.37, avec intérêts et dépens, comme représentant le montant de sa réclamation. La Cour du Banc du Roi (en Appel) (1), a confirmé ce jugement, M. le juge Marchand dissident. Ces deux jugements nous sont maintenant soumis et il s'agit pour cette Cour de décider s'ils doivent être maintenus.

Cette décision dépend, à mon humble point de vue, exclusivement de l'interprétation d'un contrat de vente, en date du 26 octobre 1944, par lequel l'appelant transmet à l'intimé le titre à la propriété dont il s'agit.

La signature de ce contrat s'est faite dans des circonstances assez compliquées et nécessita un jugement de la Cour Supérieure, en date du 9 décembre 1943, puis un jugement de la Cour du Banc du Roi (en Appel), en date du 17 juin 1944.

Ce qui donna lieu à ces deux jugements successifs, c'est que l'appelant avait donné à un agent d'immeubles, du nom de J.-E. Bergeron, une procuration, en date du 7 juillet 1942, par laquelle il chargeait Bergeron de vendre la propriété en question. Bergeron trouva un acheteur dans la personne de l'intimé. En vertu de la procuration, l'appelant s'engageait "à donner un titre régulier" à la personne qui accepterait les conditions mentionnées dans la procuration.

Prenons pour acquis que l'appelant se montra dilatoire pour consentir ce "titre régulier", et l'intimé présenta donc à l'appelant un projet d'acte de vente par l'entremise du notaire Brown, qui mit l'appelant en demeure de signer ce projet d'acte.

Tel que présenté, ce projet portait la date du 6 août 1942. L'appelant refusa de le signer dans les termes où il était écrit.

(1) Q.R. [1950] K.B. 79.

Il s'ensuivit une action en passation de titre. M. le juge P.-E. Côté, saisi de la cause, arriva à la conclusion que le projet d'acte n'était pas conforme à la procuration que l'appelant avait donnée à Bergeron et il y ordonna certaines corrections indiquées au jugement qu'il prononça alors, en ajoutant que, si le projet ainsi corrigé était complété par les parties, il constituerait le contrat qui devait les lier, mais que, si l'une ou l'autre des parties se refusait à signer l'acte ainsi corrigé par lui, le jugement équivaudrait à titre en faveur de l'intimé et en aurait tous les effets légaux.

Ce jugement ayant été porté en appel, la Cour du Banc du Roi ordonna encore d'autres corrections au projet d'acte offert par l'intimé, prononça que ce projet, ainsi corrigé, vaudrait comme s'il avait été signé tel quel par l'intimé et condamna l'appelant à signer l'acte de vente, ainsi corrigé, dans un délai de quinze jours de la signification du jugement, à défaut de quoi le jugement de la Cour du Banc du Roi équivaudrait "à un titre de vente en faveur de l'intimé aux conditions de l'acte de vente ainsi corrigé".

La Cour du Banc du Roi, en conséquence, maintint l'appel du présent appelant, avec dépens, contre l'intimé, tout en ordonnant que, en première instance, chaque partie supporterait chacune ses frais.

Suivant moi, pour les fins du jugement que nous avons maintenant à rendre, l'un des considérants du jugement de la Cour du Banc du Roi, lors de ce premier litige, entre les parties, doit recevoir une attention particulière. Il se lit comme suit:

> CONSIDERANT alors que la preuve démontrant sans place pour aucun doute que par un jugement maintenant l'intimé dans son action et condamnant l'appelant à signer l'acte offert, tel que modifié pour le rendre conforme aux conventions intervenues entre les parties, elles seront réglées comme elles doivent l'être; qu'il y a lieu cependant en accordant à l'appelant ses frais à l'appel de lui refuser ses frais de défense et de refuser pareillement à l'intimé ses frais d'action, les parties n'étant réglées que par le présent jugement.

Les deux passages suivants de ce considérant sont à noter: "... elles seront réglées comme elles doivent l'être" et "les parties n'étant réglées que par le présent jugement".

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Ce jugement a été rédigé par M. le juge Marchand et il n'est pas sans signification que le même juge, dans l'appel qui nous est soumis, ait exprimé sa dissidence de la décision de la majorité de la Cour du Banc du Roi. Je dois dire immédiatement que je partage l'avis que contient cette dissidence.

Ce ne sont plus, en effet, les jugements de l'honorable juge Côté et de la Cour du Banc du Roi sur le premier litige qu'il s'agit d'interpréter et qui règlent les relations des parties qui sont actuellement devant nous. C'est le contrat qu'elles ont signé; non seulement parce que ses termes en ont été déterminés en dernier ressort par la Cour du Banc du Roi, le 17 juin 1944, et qu'il est passé en force de chose jugée, mais c'est véritablement le contrat lui-même que l'appelant a été condamné à signer par ce premier jugement de la Cour d'Appel, auquel les parties se sont conformées, comme d'ailleurs elles y étaient tenues, dont elles ont accepté les termes et auxquels, de part et d'autre, elles ont acquiescé.

C'est ce contrat qui doit régir leurs relations et que nous sommes tenus d'appliquer à l'action pour paiement des fruits civils que l'intimé a intentée à l'appelant.

Comme le fait remarquer M. le Juge Marchand dans ses notes sur le présent appel, l'intimé "s'est soumis à accepter les corrections qui pourraient être faites par la Cour à l'acte qu'il demandait d'imposer à l'appelant" et "les renvois à la marge constatant les modifications par les deux jugements, celui de la Cour Supérieure et celui de la Cour du Banc du Roi, ont été initialés le même jour (i.e. le jour de la signature du contrat) par les deux parties". Jusqu'à la signature du contrat, ainsi que le fait remarquer le juge dissident, "l'appelant n'a pas été en demeure légalement de signer l'acte de vente préparé et offert par l'intimé, puisque la Cour Supérieure d'abord, la Cour du Banc du Roi ensuite, ont dû corriger cet acte pour qu'il contienne les vraies conventions et obligations des parties ... quant aux corrections, il (l'intimé) les a acceptées d'avance, et après qu'elles ont été faites, les a acceptées encore".

"Enfin, et à moins de contredire la présomption irréfragable de la *res judicata,* il y a *évidence* que le contrat tel que signé par les parties contient toutes leurs conventions,

constate et les lie à toutes leurs obligations réciproques et à toutes les modalités de leur exécution". Et l'intimé n'a pu acquérir "d'autres droits que ceux que la signature de l'appelant lui a reconnus".

Or, la première énonciation authentique certaine de ce contrat ainsi définitivement réglé par la Cour d'Appel, c'est qu'il est fait l'an mil neuf cent quarante-quatre le vingt-sixième jour du mois d'octobre. Cette date "du 26 octobre 1944" a été alors acceptée par la comparution de l'intimé et les initiales qu'il a apposées aux renvois.

La première déclaration que l'on trouve dans ce contrat, c'est que le vendeur (l'appelant) "déclare vendre par ces présentes,... à l'acquéreur (l'intimé) qui accepte, savoir:" (l'immeuble en question en cette cause).

De même que l'honorable juge Marchand, je ne puis voir comment l'une ou l'autre des parties, quels que soient les faits qui sont intervenus avant ou depuis, puisse être reçue à dire aujourd'hui que ce n'est pas à cette date du 26 octobre 1944 ("par ces présentes"), "qu'une convention de vendre d'une part, d'acheter de l'autre part, un contrat de vente, le seul existant, a été conclue entre elles. C'est à cette date, ce jour seulement, que l'appelant a transféré la propriété de son immeuble à l'intimé qui en est devenu alors seulement propriétaire à son tour".

Le contrat fait la loi entre les parties, à moins qu'il ne contienne des clauses illégales, ou contraires aux bonnes mœurs ou à l'ordre public. Sans doute, la loi générale (C.C. article 1472) est que la vente est parfaite par le seul consentement des parties; mais il n'est pas illégal, ni contraire aux bonnes mœurs ou à l'ordre public, que les parties conviennent que la vente ne sera parfaite qu'à partir de la signature, de part et d'autre, d'un contrat en bonne et due forme.

Or, toutes les circonstances ici démontrent qu'il n'y a eu véritablement consentement des parties que le jour où elles ont signé le contrat, le 26 octobre 1944.

La procuration à Bergeron comportait, de la part de l'appelant, l'engagement "à donner un titre régulier". Il n'y

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avait donc pas consentement complet jusqu'à ce que la convention, quelle qu'elle fut, fut consignée dans un acte régulier.

Il est à remarquer que le protêt signifié à l'appelant par le notaire Brown et le sommant de signer le projet d'acte de vente qui lui fut soumis en même temps a été fait à la réquisition de l'intimé Tremblay et de l'agent d'immeubles Bergeron, mandataire de l'appelant Zusman. Dans ce protêt, la qualité prise par l'intimé Tremblay est seulement celle de "promettant-acheteur" de la propriété. Il ne se considérait pas, dès lors, comme étant devenu propriétaire par le fait que, comme il le prétend maintenant, il aurait, dès le début, donné son consentement à la vente. En plus, le fait même que l'intimé et l'agent se sont joints dans ce protêt pour soumettre à l'appelant le projet d'acte de vente qui l'accompagnait, conduit nécessairement à la conclusion que le projet d'acte contenait toutes les conventions et les seules conventions que l'intimé avait acceptées. Or, successivement, la Cour Supérieure (l'honorable juge Côté) et la Cour du Banc du Roi (en Appel) ont décidé catégoriquement que ce projet, ainsi présenté, ne contenait pas des conventions conformes à celles qui étaient stipulées et spécifiées par l'appelant dans la procuration qu'il avait donnée à Bergeron.

On ne peut donc pas dire que le consentement des parties s'était rencontré dès le début puisque, au contraire, les deux Cours ont décidé que ce consentement intégral n'existait pas.

Pour répéter de nouveau le considérant même de la Cour du Banc du Roi sur le premier litige, ce n'est que par ce jugement de la Cour d'Appel, rendu le 17 juin 1944, que "les parties ont été réglées". En règle générale, je l'admets, le jugement final qui est prononcé dans une cause a un effet rétroactif à la date, ou bien où l'action a été entendue, ou bien même, dans certains cas, à la date des événements qui y ont donné lieu. Mais on ne peut reconnaître un effet rétroactif aux jugements qui ont été rendus, lorsque la Cour a condamné l'appelant à signer le contrat de vente, tel qu'elle l'a corrigé, si le jugement lui-même déclare que

les parties n'ont été réglées que par ce jugement et que l'intimé a été condamné à payer les frais des procédures devant la Cour d'Appel.

Si, au début, le projet de vente proposé n'était pas conforme à la procuration donnée par l'appelant à Bergeron, au point que ce projet a dû être amendé par les deux Cours, il est impossible de dire que pareils jugements puissent rétroagir. La véritable position des parties n'a été établie que le jour du jugement de la Cour du Banc du Roi et ce n'est qu'à partir de ce moment-là que l'appelant a été obligé vis-à-vis de l'intimé, suivant les termes qu'il a été condamné à accepter et qui n'étaient pas ceux que lui avait proposés l'intimé.

Je ne puis donc admettre que, en l'espèce, l'on doit considérer le premier jugement de la Cour du Banc du Roi comme ayant un effet rétroactif. Il a reconnu, au contraire, que la position prise par l'intimé, lors de son action en passation de titre, n'était pas celle que l'appelant était tenu de reconnaître, et que la véritable situation n'a été "réglée" entre les parties que le jour même du jugement. Puis, reprenant ce que j'ai dit au début de mes notes, ce jugement ayant été accepté par les parties, étant devenu entre elles chose jugée et le contrat qui devait véritablement régir leurs relations de vendeur et d'acheteur étant celui qui a été approuvé par ce jugement, c'est lui et lui seul qui doit maintenant être opposé à l'action intentée par l'intimé en recouvrement des fruits civils.

Partant de là, ce contrat ne présente aucune difficulté d'interprétation, ni aucune ambiguité. Il porte la signature de l'intimé et il lie ce dernier. Il déclare que la vente a pris effet "par ces présentes". Cela veut dire évidemment le 26 octobre 1944, date que porte le contrat. C'est donc ce jour-là que le consentement des parties s'est rencontré et que la vente a pris effet en vertu même de l'article 1472 du *Code Civil*. Et, dès que l'on admet cette proposition, la cause ne présente plus la moindre difficulté. Cette date-là même a été respectée par l'intimé dans l'exécution du contrat, puisque sa prise de possession n'a été réclamée par lui que dans les "quatre-vingt-dix jours après la signature des présentes", tel que le contrat le comportait.

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S'il fallait donner effet à sa présente prétention, il aurait dû réclamer la possession dès le jour de la signature du contrat, car alors les 90 jours, à compter de la date qu'il a voulu imposer dans son action (le 6 juillet 1942), étaient depuis longtemps expirés.

Il essaie de faire une comparaison entre la réclamation de l'appelant pour le paiement de la somme de cent dollars par mois, avec intérêt, à compter du 6 septembre 1942, et le fait que lui-même ne bénéficierait pas de la même date pour le point de départ du droit aux fruits civils de la propriété vendue. Je suis incapable de voir quel avantage il peut tirer de cette comparaison puisque le paiement des mensualités que lui a réclamées l'appelant est stipulé dans le contrat lui-même comme devenant dû et exigible à partir du 6 septembre 1942 et "ainsi de suite le sixième du jour de chaque mois subséquent pour jusqu'à parfait paiement".

Je n'ai pas à me demander si la Cour d'Appel, en condamnant l'appelant à signer le contrat tel qu'il se lit, a commis une erreur ou a été victime d'une distraction et si elle n'aurait pas dû ordonner que la date du 6 septembre 1942 fut modifiée. Je constate simplement qu'elle ne l'a pas fait et que ce que l'appelant a exigé de ce chef est strictement conforme aux termes mêmes du contrat. Il n'y a rien d'illégal ou de contraire aux bonnes mœurs ou à l'ordre public qu'un vendeur et un acheteur conviennent que le paiement du prix d'une propriété devra compter d'une date antérieure au contrat. Cela peut être une convention inusitée mais, du moment que les parties sont d'accord, il n'y a rien en soi qui puisse permettre aux tribunaux de refuser d'en tenir compte.

Par contre, les seuls éléments du contrat qui nous permettent de décider à quel moment l'appelant a cessé de posséder les droits du propriétaire sont la déclaration que la vente s'est effectuée "par ces présentes" et donc le 26 octobre 1944. Jusque là, rien ne permet de conclure que la vente remonte à une date antérieure et qu'un consentement identique de part et d'autre aurait eu pour effet de la rendre parfaite. L'appelant avait mentionné dans sa procuration qu'il faudrait "un titre régulier" et ce titre n'a existé que le 26 octobre 1944.

La clause qui traite de la prise de possession vient encore confirmer cette situation, puisque, de part et d'autre, on a bien compris que cette prise de possession ne devait s'effectuer que 90 jours après la signature du contrat, c'est-à-dire, encore une fois, le 26 octobre 1944.

C'est donc en faisant l'application exacte des articles 409 et suivants du *Code Civil* que l'on doit arriver à la conclusion que le propriétaire jusqu'à la date du contrat signé à la suite du premier jugement de la Cour du Banc du Roi était bien l'appelant et que c'est lui qui avait droit aux fruits civils. Il ne s'agit pas de se demander s'il était resté en possession en vertu d'un titre ou non, et de bonne ou de mauvaise foi; il était propriétaire avant de donner à Bergeron la procuration qui lui a permis d'offrir la propriété à l'intimé et il est tout simplement resté propriétaire jusqu'au 26 octobre 1944, alors que seulement les consentements de vendeur et d'acheteur se sont rencontrés, et, par sa signature du contrat que lui a imposé le premier jugement de la Cour du Banc du Roi, il a consenti à l'intimé un titre translatif de cette propriété.

Cela dispense de décider (ce qui n'est pas nécessaire pour la décision de l'appel) si l'intimé, au cas où il aurait eu droit à une réclamation, n'eut pas dû plutôt procéder par voie d'action en reddition de comptes; car, dans ce cas, l'appelant eut pu faire valoir les améliorations qu'il prétend avoir apportées à la propriété avant qu'il n'en fasse la délivrance à l'intimé.

Je suis donc d'avis que, pour toutes les raisons qui précèdent, l'appel doit être maintenu et l'action de l'intimé doit être rejetée, avec dépens dans toutes les Cours.

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

TASCHEREAU J.:—Le 7 juillet 1942, l'appelant, Adolphe Zusman, constitua Joseph Eugène Bergeron son mandataire et intermédiaire avec pouvoir de vendre en son nom, dans un délai de 30 jours, un immeuble situé sur la rue St-Dominique à Jonquière, pour le prix de $16,500.00, payables, $5,000.00 comptant, et la balance à raison de $100.00 par mois avec intérêt au taux de 6 p. 100. Cette procuration stipulait également que si l'acheteur que pouvait

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trouver M. Bergeron n'achetait pas les marchandises qui se trouvaient dans le magasin, M. Zusman se réservait le droit d'occuper les lieux durant trois mois après la vente. Cet immeuble comprenait un magasin où l'appelant exerçait son commerce, et quatre logements occupés par des locataires.

Le 6 août de la même année, soit moins d'un mois après que l'appelant lui eût confié le mandat de vendre, Bergeron a trouvé en la personne de l'intimé Charles Eugène Tremblay, un acheteur pour l'immeuble en question. Ce dernier et Bergeron mirent alors Zusman, qui semblait vouloir se dérober à son obligation, en demeure de signer un acte de vente par l'intermédiaire de M. le Notaire Brown, et lui offrirent avec le projet d'acte, signé par Tremblay, la somme de $5,000.00, le premier versement exigible en vertu de l'entente. Ce projet de vente porte la date du 6 août 1942, et comme Tremblay ne désirait pas se porter acquéreur de la marchandise, il fit inclure à l'acte une clause à l'effet que "la prise de possession des susdits lieux par l'acquéreur aura lieu 90 jours après la signature des présentes". On y trouve également la clause suivante: "Ledit Charles E. Tremblay est consentant à le modifier, mais toujours de façon à ce que les termes du susdit écrit sous seing privé soient suivis à la lettre". Ceci, évidemment, pour se conformer à la jurisprudence de la Cour d'Appel. (*Langlois* v. *Chaput* (1); *Charlebois* v. *Baril* (2)).

Le défendeur Zusman ne signa pas ce projet, et en conséquence Tremblay institua une action en passation de titre, avec laquelle il renouvela et consigna son offre de $5,000.00, et dans laquelle il conclut à ce que le défendeur, appelant dans la présente cause, soit condamné à lui signer l'acte de vente auquel il avait droit, ou à ce qu'à son défaut, le jugement à être rendu équivaille au titre. Par sa défense, Zusman plaida que les conditions mentionnées au projet d'acte de vente qu'on voulait lui faire signer n'étaient pas conformes à l'autorisation de vendre qu'il avait donnée à son mandataire Bergeron, et contenaient des conditions étrangères à l'entente orginaire. Le 9 décembre 1943, l'honorable Juge Côté de la Cour Supérieure, siégeant à Chicoutimi, maintint l'action, déclara les offres bonnes et va-

(1) Q.R. (1922) 32 K.B. 178. (2) Q.R. (1927) 43 K.B. 295.

lables, et après avoir modifié le projet d'acte de vente offert à Zusman, enjoint au demandeur de signer les modifications qu'il avait ordonnées, et condamna le défendeur à apposer sa signature à l'acte offert avec les corrections qu'il avait faites. La Cour d'Appel maintint également l'action de l'intimé, déclara bonnes, valables et suffisantes les offres faites par lui, et ordonna à son tour de nouvelles corrections à l'acte de vente projeté. Zusman signa définitivement le projet d'acte, tel que déterminé finalement par la Cour d'Appel, le 26 octobre 1944, soit au delà de deux ans après que Tremblay l'eut lui-même signé. Il est bon de noter que l'acte, tel que finalement reçu par M. le Notaire Brown, comportait toujours la clause à l'effet que "la prise de possession des susdits lieux par l'acquéreur aura lieu 90 jours après la signature des présentes".

Subséquemment, soit le 26 janvier 1945, l'appelant Zusman, par l'intermédiaire de son avocat, Mtre Edouard Masson, C.R., écrivit à l'intimé une lettre pour lui réclamer la somme de $5,504.00. Dans ce montant étaient compris 30 versements mensuels de $100.00 chacun dont le premier était échu le 6 septembre 1942, représentant un total de $3,000.00, et $1,380.00 d'intérêt dû sur la balance de $11,500.00 depuis le 6 septembre 1942, au taux de 6 p. 100 l'an. L'intimé Tremblay s'est rendu à cette demande, a payé les 30 versements réclamés, plus l'intérêt sur la balance du capital, mais le 10 août 1945, par l'intermédiaire de ses procureurs d'alors, MM. St-Laurent, Gagné et Taschereau, il réclama de Zusman tous les fruits civils de l'immeuble depuis le 6 août 1942, soit la somme de $7,410.00 moins les taxes municipales et scolaires payées par Zusman au montant de $560.11, laissant une balance de $6,849.89. Comme Zusman avait donné effet à la vente depuis le 6 août 1942 en réclamant les paiements mensuels et les intérêts sur la balance du capital, c'était la prétention de Tremblay que les fruits civils de l'immeuble, soit la valeur locative du magasin occupé par Zusman, et les loyers des quatre autres locataires, devaient lui appartenir.

Sur le refus de Zusman de payer cette somme, une action a été instituée pour la réclamer, et c'est cette action qui fait le sujet du présent appel. Le défendeur-appelant contesta cette action, plaidant que les seules conventions inter-

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venues entre les parties et les conséquences juridiques qui en résultent, ont été réglées et définitivement établies par le contrat signé le 26 octobre 1944, suivant les directives de la Cour d'Appel, et que, la prise de possession de l'immeuble ne devait s'effectuer que 90 jours après la signature de ce contrat, soit le 26 janvier 1945. Il ajouta que l'appelant était un possesseur de bonne foi au sens de l'article 411 du *Code Civil* pendant tout le temps que l'action en passation de titre était pendante, puisque le projet de contrat que l'intimé a d'abord signé a été modifié à deux reprises par la Cour Supérieure et la Cour d'Appel, et qu'à tout événement, le recours de Tremblay était par action en reddition de compte. L'honorable Juge Boulanger qui a entendu la cause à Chicoutimi en première instance a maintenu l'action du demandeur, a condamné le défendeur Zusman à payer la somme de $6,714.37 avec intérêts et dépens. Ce jugement a été confirmé par la Cour du Banc du Roi à Québec (1), le 13 décembre 1949, M. le Juge Aimé Marchand était dissident.

Afin de bien situer le litige et de pouvoir déterminer qui a véritablement droit aux fruits civils de cet immeuble, il importe en premier lieu de se demander quelle était la situation juridique des parties au 6 août 1942, date où Zusman a été mis en demeure de consentir un acte de vente en faveur de Tremblay. L'autorisation de vendre donnée par Zusman constituait clairement Bergeron son mandataire pour une période de 30 jours, ce dernier étant autorisé à disposer de la propriété pour la somme de $16,500.00, aux conditions stipulées à l'acte. C'est en cette qualité de mandataire que Bergeron a trouvé un acheteur en la personne de Tremblay, qui a aussitôt signifié à Zusman qu'il acceptait de se porter acquéreur aux prix, charges et conditions stipulés à l'acte sous seing privé intervenu entre Zusman et Bergeron. On se souvient que le protêt signifié par Mtre Brown, N.P., comporte une clause à l'effet que si le projet de vente, dûment signé par Tremblay et annexé au protêt, n'est pas en tout conforme aux conditions de l'option, Tremblay est consentant à le modifier, *"mais toujours de façon à ce que les termes du susdit écrit sous seing privé soient suivis à la lettre"*. Il me semble évident

(1) Q.R. [1950] K.B. 79.

qu'à cette date du 6 août 1942, Tremblay a accepté la pollicitation de Zusman, que le premier est en conséquence devenu l'acheteur, et le second le vendeur de l'immeuble. Il est presqu'inutile de rappeler que par les termes mêmes de l'article 1472 C.C., la vente est parfaite par le consentement des parties, et cette règle s'applique non seulement aux meubles, mais également aux biens immobiliers.

Par ce consentement donné, une vente s'est opérée qui a justifié Tremblay d'instituer une action en passation de titre afin de confirmer dans un acte notarié la convention intervenue. En maintenant cette action, la Cour Supérieure et la Cour d'Appel ont reconnu le droit de propriété de Tremblay, comme ayant existé depuis le 6 août 1942, et c'est parce qu'il est ainsi propriétaire depuis cette date que les tribunaux ont reconnu par jugement, qui a maintenant l'autorité de la chose jugée, son droit d'obtenir un titre afin de donner effet à la vente antérieurement consentie. Il est vrai que la tradition de l'immeuble n'avait pas encore été opérée, mais dans le contrat d'aliénation d'une chose certaine et déterminée, l'acquéreur en devient propriétaire par le seul consentement des parties, quoique la tradition n'en ait pas lieu. (C.C. 1025.)

On objecte qu'il est impossible que la propriété de l'immeuble ait passé à Tremblay le 6 août 1942, parce qu'on ne s'était pas encore entendu quant aux conditions de la vente, et qu'il a fallu et le jugement du Juge Côté en Cour Supérieure, et celui de la Cour d'Appel pour les déterminer définitivement. L'appelant prétend que ce n'est que lorsqu'il a signé le contrat le 26 octobre 1944 en exécution du jugement de la Cour d'Appel que les droits des parties ont été fixés et que Tremblay est devenu propriétaire. Avec déférence, je ne puis accepter cette proposition.

En principe, un jugement est déclaratif de droits préexistants. Il est vrai que certains jugements, comme ceux prononçant la séparation de biens ou de corps, ou ordonnant l'interdiction, sont créateurs ou attributifs de droits, parce qu'ils donnent naissance à une situation nouvelle, et ont en conséquence un effet constitutif. Mais quand un jugement se borne à dégager le droit du doute et de l'imprécision qui l'entourent, quand il détermine les contours incertains d'une situation juridique, alors, il ne fait que

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constater un état de chose qui lui est antérieur, et qui lui est par conséquent distinct. C'est la préexistence du droit ou sa création par le jugement qui est le critère de la distinction. (Mazeaud, Rev. Trim. D.C. 1929, p. 17); (Dalloz, Nouveau Répertoire, Vol. 2, p. 859, N° 115.)

Or, dans le cas qui nous occupe, je n'ai pas de doute que le jugement de la Cour d'Appel rendu le 17 juin 1944, est simplement déclaratif des droits préexistants des parties, et leur résultant respectivement de l'entente du 6 août 1942. Il fixe pour toujours les droits de chacun, il signale les obligations qui découlent de leurs conventions, et oblige les parties à signer un document pour les constater. Il ne fait pas naître de situation nouvelle; aucun droit jusque là inexistant n'est créé. Comme le dit le jugement formel de la Cour d'Appel, la condamnation contre Zusman est de *"signer l'acte offert tel que modifié pour le rendre conforme aux conventions intervenues"*. Les obligations et les droits respectifs des parties ne datent donc pas du jour du jugement de la Cour d'Appel, mais bien du jour de la convention qui les a fait naître, date à laquelle doit rétroagir le jugement. (Mazeaud, Rev. Trim. D.C. 1929, p. 17); (Dalloz, Nouveau Répertoire, Vol. 2, p. 859, N° 115.) Je suis donc d'opinion que Tremblay est devenu propriétaire de l'immeuble en question le 6 août 1942, et non pas le jour de la date du jugement de la Cour d'Appel, ou le jour où la convention a été signée, en obéissance à ce jugement déclaratif.

Voyons maintenant les conséquences juridiques qui découlent du fait que Tremblay est propriétaire depuis le 6 août 1942. A-t-il droit aux fruits civils, comme la valeur locative du magasin occupé par Zusman, et les loyers des autres logements perçus par l'appelant? La réponse à cette question me paraît se trouver dans le texte de l'article 1498, para. 2, du *Code Civil,* qui se lit ainsi:

A compter du moment de la vente tous les fruits de la chose appartiennent à l'acheteur.

Cet article n'est que la répétition de l'article 409 qui dit:

Les fruits naturels ou industriels de la terre, *les fruits civils,* le croît des animaux appartiennent au propriétaire par droit d'accession.

Si on lit ces deux articles avec les articles 1025 et 1472 du *Code Civil*, il faut de toute nécessité conclure que le propriétaire a bien droit aux fruits civils d'un immeuble du moment qu'il s'en est porté acquéreur, même s'il n'y a pas eu de tradition actuelle de la chose et même si le vendeur en est resté en possession. C'est la règle que le propriétaire a la primauté. Il peut arriver évidemment que dans certains cas, le possesseur de bonne foi, (celui qui ignore les vices de son titre) puisse faire les fruits siens (C.C. 411), mais si sa possession et entachée de mauvaise foi, (ce mot est employé ici dans le sens juridique) il doit remettre tous les fruits au propriétaire qui les revendique.

L'appelant est bien obligé, pour invoquer cet argument, d'admettre que le titre de Tremblay à l'immeuble remonte au 6 août 1942, car évidemment l'article 411 C.C. ne peut trouver son application que lorsqu'il s'agit de la possession de la propriété d'autrui.

Les faits dans la présente cause ne justifient pas à mon sens l'application de cette règle. En principe, quand le possesseur de bonne foi fait les fruits siens, c'est quand il possède, en vertu d'un titre translatif de propriété dont il ignore les vices. Ici, c'est l'inverse qui se produit. Zusman ne possède pas en effet en vertu d'un titre translatif de propriété qui lui vient de Tremblay, mais c'est lui qui a vendu la propriété le 6 août 1942 et qui s'est obstiné à ne pas livrer avant le 26 août 1944. Même si la règle s'appliquait à son cas, et si l'on pouvait dire que celui qui refuse de livrer après avoir consenti un titre translatif de propriété peut encore jouir des fruits civils, s'il est de bonne foi, je ne crois pas qu'avec les faits tels que révélés dans cette cause, Zusman puisse invoquer cette bonne foi, et qu'il lui soit possible de dire qu'il ne savait pas qu'il avait consenti un titre. Comme le dit Mignault, Vol. 2, à la page 484, quand le Code parle du "titre translatif de propriété", il ne s'agit pas de l'acte ou de l'écrit qui constate le fait en vertu ou à la suite duquel le possesseur a reçu la chose qu'il détient: "c'est ce fait lui-même, c'est-à-dire la cause de la possession". Ainsi, le titre de la possession, c'est, pour un acheteur, non pas l'écrit qui constate le contrat de vente, mais la vente elle-même.

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Taschereau, J.

L'appelant prétend enfin qu'indépendamment de ce qui vient d'être dit, il a droit aux fruits civils parce qu'il a eu possession en vertu des termes mêmes du contrat 90 jours après la "signature des présentes". Je crois, avec M. le Juge St-Jacques de la Cour d'Appel, que cette clause ne veut pas dire autre chose que ce qu'elle disait à l'origine, lorsque le contrat a été préparé par le Notaire Brown et dûment signé par M. Tremblay le 6 août 1942. Il était convenu en effet à l'option que si l'acquéreur n'achetait pas les marchandises qui se trouvaient dans le magasin, il ne pourrait avoir possession des lieux que 90 jours après la signature de l'acte de vente. Quand le protêt a été signifié à Zusman, il était essentiel d'y insérer cette clause concernant la prise de possession, parce que Tremblay n'achetait pas la marchandise, et il pouvait s'attendre à ce que Zusman remplisse ses obligations et signe le contrat. De plus, comme je l'ai signalé déjà, ce n'est pas la possession qui confère les fruits civils mais bien le titre à la propriété. Il n'est pas incompatible que quelqu'un bénéficie des fruits civils d'un immeuble, et que la possession physique demeure entre les mains d'une autre personne.

Il importe enfin de signaler l'interprétation donnée au contrat par Zusman lui-même. En effet, le 26 janvier 1945, soit trois mois après qu'il eut signé le contrat, Zusman a fait écrire à Tremblay par l'intermédiaire de son procureur, pour lui réclamer 30 versements mensuels de $100.00 chacun, depuis le 6 septembre 1942 au 6 février 1945, plus $1,380.00 d'intérêt depuis la même date du 6 septembre 1942 au 6 septembre 1944, sur la balance de $11,500.00 au taux de 6 p. 100 l'an. Si le contrat devait prendre effet seulement au mois d'octobre 1944, tel que le prétend Zusman, pourquoi a-t-il exigé les versements dus depuis septembre 1942 et l'intérêt sur la balance depuis cette date? Il me semble clair qu'il a voulu interpréter le contrat, non pas comme ayant pris naissance le 26 octobre 1944, mais bien le 6 août 1942. Il serait extraordinaire qu'il y eut une date à laquelle Zusman pourrait exercer ses droits, et une autre, au delà de deux années plus tard, pour rencontrer les obligations qu'il a assumées en vertu du contrat.

Je ne crois pas qu'il y ait lieu d'intervenir et de modifier les décisions du juge au procès et de la Cour du Banc du Roi, quant à la nature de l'action qui devait être instituée par Tremblay.

Pour toutes ces raisons, je suis d'avis que le juge de première instance a justement maintenu l'action de l'intimé et que le présent appel doit être rejeté avec dépens.

RAND J. (*dissenting*):—This controversy arises out of a sale of land at Jonquière, Québec. The appellant, Zusman, authorized an agent in writing to sell for the sum of $16,500, payable $5,000 in cash and the balance at the rate of $100 a month with interest at 6 per cent on the amount from time to time unpaid. The owner engaged himself "à donner un titre régulier" and it was stipulated that if the purchaser should not buy the stock of merchandise then on the premises, the vendor reserved to himself "trois mois après la vente pour quitter les lieux". The mandate provided for a commission to the agent to be "payée comptant à la signature de contrat": its authority was to continue for one month, but the vendor retained liberty to "sell or promise to sell", "si je vendais ou promettais de vendre", subject to the payment of the commission.

The agent met the respondent a few days afterwards, and on or about the 15th of July the latter had intimated both to the agent and to the owner that he accepted the offer made him in accordance with the terms of the mandate. There was difficulty in bringing the vendor to the point of concluding the matter—attributable, it may be, to a desire on his part to evade the bargain—and on August 6 the respondent, accompanied by a notary, attended at his place of business with a deed of sale dated that day, signed by the respondent and containing a number of provisions, some of them of the usual kind, in addition to those mentioned in the mandate; and in the owner's absence formally protested him en demeure. As is seen, no particular day had been specified for completion, and the date of August 6, as well as fixing the monthly payments from that time, was an arbitrary adoption by the respondent.

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After the failure of other efforts to communicate with Zusman, the purchaser brought an action en passation de titre. The owner defended on a number of grounds including the impropriety of several of the stipulations of the deed. In the Superior Court, one of these was stricken out but subject to that, judgment went as prayed. On appeal, further modifications were made of the same nature and the deed finally formulated; and it was ordered that in default of execution by the vendor within a specified period, the deed was to take effect through the efficacy of the judgment. The owner was given his costs in the Court of King's Bench, but no costs were allowed in the Superior Court. Conformably to the judgment, the original document so amended, initialled by the purchaser and signed by the owner, and dated October 26, 1944, was formally completed by a notary in whose certificate the precise dates of signing by both parties were set out.

By an express provision the purchaser was to be entitled to possession ninety days "après la signature des présentes". This was, of course, the language of the document when it had been presented on and dated August 6, 1942. The clause dealing with price provided for the monthly payments and interest, the latter "à compter de ce jour". That language, likewise, was in its original form.

The evidence shows beyond doubt that both parties took the reservation of ninety days' possession by the owner to run from October 26, 1944, and to terminate on January 26, 1945. On the latter day, the owner submitted a statement of what he considered to be then due and to be paid on the delivery of possession. It included instalments assumed to be payable monthly on and after September 6, 1942, to January, 1945, as well as interest on the total sum less the $5,000 for the same period. This the purchaser paid and took possession.

Later, in 1945, the latter raised the question of the occupation by the owner from 1942 until 1945, and submitted a claim based on the ground that as of August 6, 1942 the purchaser, having accepted the offer of sale and become under art. 1472 of the *Code* the owner, and being under art. 410 of the *Code* entitled to the fruits of his

property, could recover them from the former owner as a possessor not in good faith under art. 411; and on the rejection of that claim, these proceedings were instituted. In the Superior Court the claim was upheld and judgment given for the rents received and the value of the premises occupied by the owner for 26 months less the taxes that had been paid. This judgment was affirmed in the Court of King's Bench, Marchand J. dissenting (1). The ground in both courts was substantially that as formulated by the appellant, that is, that the purchaser as owner was entitled to the fruits during the period of the litigation. There is injected into the reasons the fact also that the owner not only demanded but received interest for that period, and had thereby acknowledged that the judgment in the first action as well as the document as finally executed on October 26, 1944, were retroactive to August 6, 1942.

It is not necessary, in the view I take of the case, to consider whether title passed to the purchaser at the moment of mutual consent to buy and to sell or when that took place, whether on the first communication of acceptance or on August 6 or at any other time, although I must observe that the particular date has not been given the consideration which, on the theory in the courts below, it would seem to me to deserve. Nor do I think the significance of the three months' retained possession, as the parties properly, in my view, construed the judgment to intend, has been fully appreciated. But as I say, these features may for my purpose be disregarded.

What is being dealt with is the possession of land, land which as between the parties has been brought under the regime, one might say, of a contract. All matters here in issue, relating as they do to that possession, during the currency of the contract and in fact until its fulfilment, were and are bound by and subject to the effects flowing from its provisions. The basic right of ownership claimed by the respondent arises from it and the obligation to deliver possession and the right to or the deprivation of the fruits, likewise are wrapped up within its structure.

(1) Q.R. [1950] K.B. 79.

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Once made the subject-matter of the contract, the possession remains exclusively under the latter's dominion while it lasts.

That being the situation, arts. 1472, 410 and 411 have no relevancy whatever. What they deal with is land owned by one person in the possession of another; and the provisions of the Code draw to the ownership the right to the fruits in the circumstances which it declares. But between such parties there are no contractual relations controlling or binding that possession; what is contemplated is merely a clash of rights of ownership and of possession. Such a state of things could arise here only after the contract has been discharged from its effect on the possession and that could not be before the actual delivery of it in January, 1945.

If the original owner here was guilty of a breach of contract in failing to give possession before that time, then on ordinary principles of contract the purchaser would have a claim in damages and the issue would be decided in accordance with the law dealing with a default of that nature. It might be established that the purchaser, by insisting upon stipulations in the deed of sale which were ultimately struck out by the judgment, himself was the cause of that failure. Such a claim could have been made in the action for specific performance or in that action it could have been reserved, or indeed it may be open to the purchaser today to assert it. But the issues and the considerations on which it would be determined are not those in these proceedings.

Nor does the fact that the owner asked for and was paid interest from 1942 affect the matter. That claim purported to be made under the express language of the deed, where it declares the interest is to be computed "de ce jour", and I have little doubt that that day was October 26, 1944. But the propriety of that payment is not before us. On the face of the instrument to which both parties gave their consent, and as they interpreted it, the possession was to be given ninety days from October 26, 1944: that presents the initial obstacle to the respondent. I can see no way in which the judgment could have been made retroactive: all that was open to the Court to do was to order per-

formance, and at the most, to give a judgment in contractual damages. What it could not do was to treat the relations of the parties to the land as if the contract did not exist.

As I have already observed, no date was fixed for the formal conclusion of the bargain. It was implied, of course, that that would be done with proper diligence; but the date was uncertain and in appropriate circumstances could have been, say, two weeks subsequent; in the event, then, of a delay caused by the purchaser, that time could be deemed enlarged to October 26, 1944, with the same effects from then as if the proper document had been executed, say, on August 20, 1942.

I would, therefore, allow the appeal with costs and dismiss the action, but in the circumstances without costs in the Superior Court. The appellant will have his costs in the Court of King's Bench.

Appeal dismissed with costs.

Solicitor for the appellant: *E. Masson.*

Solicitor for the respondent: *R. Fradette.*

LEITH BOWHEY (*Defendant*) ..... APPELLANT;

AND

CHARLES THEAKSTON (*Plaintiff*) .. RESPONDENT.

Trials—Jury Trial—Disclosure to jury party insured—Procedure to be followed by trial judge—The Judicature Act, R.S.O. 1937, c. 100, ss. 27 (1), 55(3).

In an action for damages arising out of the collision between two motor cars, a witness for the defence in examination-in-chief disclosed information from which the jury might reasonably infer that the defendant was insured. Defence counsel thereupon moved that the case be traversed to the next jury sitting. Plaintiff's counsel objected but expressed willingness for the trial to proceed either before the same jury or before the trial judge alone. The trial judge ruled that he would not traverse the case but would, subject to consent of

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

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counsel, either try the case alone or proceed with the same jury. Defendant's counsel having declined to elect, the trial proceeded before the jury and judgment was given for the plaintiff.

Held: (Kellock and Estey JJ., dissenting) that although it was contrary to the established rule in Ontario for the trial judge against counsel's objection to have proceeded with the same jury, counsel having been afforded the choice of having the trial proceed before the jury or, another proper and permissible course, that of continuing without a jury, and having declined to elect, should not be heard to complain because the former course was adopted.

APPEAL by defendant from the judgment of the Court of Appeal for Ontario(1) affirming, Laidlaw JA. dissenting, the judgment of Kelly J. after a trial with a jury.

G. W. Mason K.C. for the appellant.

W. Judson K.C. for the respondent.

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

CARTWRIGHT J.:—This is an action for damages arising out of a collision between two motor vehicles owned and driven by the plaintiff and the defendant respectively. The defendant counterclaimed, each party asserting that the other was solely to blame. The solicitors for the defendant served a jury notice. The action was tried before Kelly J. with a jury at Owen Sound and judgment was given for the plaintiff for $13,352.33 and costs.

The defendant appealed and his appeal was dismissed, Laidlaw J.A. dissenting(1). The notice of appeal is not in the record before us but the sole ground of appeal is stated by Laidlaw JA. as follows:—

> The sole ground upon which counsel for the appellant rests the appeal is that the defendant did not have a fair trial because a witness called for the defendant referred to a visit made by her to "the insurance man" in Meaford, and, notwithstanding the objections made by counsel for the defendant, the learned trial judge thereafter proceeded to the conclusion of the trial with the same jury that heard the statement of the witness.

While the other learned Justices of Appeal differed from the result at which Laidlaw JA. arrived, they agreed with this statement as to the point in issue.

After the trial had proceeded for two days, counsel for the defendant called as a witness one Hilda French, the

(1) [1950] O.R. 524

fiancée of the defendant and the only passenger in his motor vehicle. In the course of her examination-in-chief she made an answer to a question put to her by counsel for the defendant as follows:—

Q. Now, I believe you were interviewed by some person representing Mr. Theakston?

A. Well, a lawyer came to our door at noon when I got home from work, and he wanted to know if I could tell him anything, and I did not know what to say because I did not know, and he said that he would meet me around eight o'clock, and I said, Well, I work, and I went back to work at eight o'clock, and so I did not know what to do so, I went to the insurance man in Meaford, and the man was not there, but a woman was there, and she told me to go to Bennett's office to find out if I had to answer any questions to this lawyer, and I went to Bennett's office, and it happened to be the very guy who came to our door at noon.

So as not to focus the attention of the jury on the matter, counsel for the defendant awaited the recess that followed not long after and then moved in the absence of the jury to have the jury discharged and the case traversed to the next jury sittings.

Counsel for the plaintiff objected to the case being traversed. He stressed the delay and expense which would result, and the fact that he was in no way to blame for what had occurred. He expressed his willingness to have the trial continue either with or without a jury. The learned trial judge held, and it was conceded by counsel before us, that counsel had no intention of bringing about the mention of insurance.

After hearing both counsel fully the learned trial judge made his ruling as follows:—

His Lordship: I want to have everything on the record. I have an unpleasant duty to perform in these matters, as I have to announce my decision. My decision on this motion is that I will not strike out the jury, nor will I postpone the trial to the next court. I will, however if counsel consent, let the trial proceed before me without a jury. I do this for a number of reasons. The first and main one is the fact that this whole question of insurance was brought out by a witness produced by the defendant and by counsel for the defendant. I put myself on record that I do not for a moment impute that it was done deliberately. I think it was unfortunate that the witness was asked about the interviews, and without first discussing the interviews with her. It is exactly what you might expect to be the answer you would get if she did go to some insurance man and was not warned against mentioning it. That one point alone is sufficient for my decision, the evidence having been brought out by a witness from the side that now wants the jury struck out; and, unless by consent of counsel for the other side, I am of opinion that I should not strike out the jury.

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Secondly, I do not think there is any miscarriage of justice here, in any event. She explained very well that she went to an insurance agent—it may have been to get advice for herself—and she did not see the party who interviewed her, and she then went to a solicitor's office, and saw who she thought was a solicitor. She there discussed the matter with the solicitor, and the evidence coming out as it did, it might appear to the jury that it was likely that both sides were insured; I have grave doubts that the jury would think that only one of those cars was insured unless told otherwise, and I have already warned them not to discuss the matter with any of the parties, and that they must rely on the evidence.

As to mentioning about the solicitor being from Toronto, I always dislike that, and I must be frank about it, but I hear it so often. At the sittings of a court not far from this one, a certain prominent counsel never fails to bring out that fact, if it exists, no doubt hoping that the jury in that jurisdiction will give more weight to the contention of counsel who live within the jurisdiction. So, if this goes on, I will be glad to see the air cleared, but I think it is not a matter of deliberateness in bringing out the question of a party being insured. It is a matter of who brought it out and as a result of what questioning or what line of questioning, of a particular witness. Had this information been brought out by counsel for the plaintiff, I would have had a much more serious matter to deal with, but as I understand the law, and I have dealt with similar motions before, I feel that it is pretty well settled that it is a matter of which party's witness brings out the information about insurance, and as a result of questioning by counsel representing which party. So, I must refuse the motion. I do, however, give counsel the option as to whether he wants to proceed with this jury or proceed without. Perhaps he wishes to talk it over, or think it over for a minute or two. I will give him that right.

Counsel for the plaintiff then said:—

I think I have already gone on record that I will be content with a trial in either manner—either by your Lordship without a jury or with a jury.

All relevant portions of the arguments of counsel and the observations of the learned trial judge are set out in the reasons for judgment of Laidlaw J.A. and it is not necessary to reproduce them here.

The majority in the Court of Appeal were of the view that the learned trial judge had concluded that the jury would not reasonably infer that the defendant was insured and that his finding in this regard and his ruling that the trial should proceed with a jury ought not to be interfered with. With the greatest respect, I do not attach the same meaning to what was said by the learned trial judge as do the majority of the Court of Appeal. It appears to me that it was his view that the jury might well infer that both parties were insured. If it were necessary to decide the

probable effect upon the jury of Miss French's evidence I would incline to agree with the view expressed by Laidlaw J.A. as follows:—

> It is my opinion in the present case that the jury would probably infer that the defendant was insured. They would have in mind that Miss French who made the statement about insurance was a passenger—the only passenger—in the motor vehicle owned and driven by the defendant, and that she was the fiancée of the defendant. They would reasonably and probably feel that she would not willingly do anything, or say, anything, to hurt or prejudice the defendant's position in the matter of a claim against him, but on the contrary, would want to do anything she properly could to protect his interest. Therefore, the jury would conclude that when she did not know what to do after she was interviewed by a lawyer whom she did not know, and went to "the"—not "an" insurance man for advice, it was the insurance man who represented or was connected with the insurance company that insured the defendant. That is the conclusion which, in my opinion, should have been reached by the learned trial judge . . .

I do not understand there to be disagreement between the learned Justices of Appeal as to the principles to be deduced from the cases discussed in their reasons. They appear to me to agree (i) that where something occurs during the course of the trial from which the jury may reasonably infer that the defendant is insured the services of that particular jury should be dispensed with; (ii) that the trial judge should afford counsel a full opportunity of making submission before deciding what course should then be followed; and (iii) that having done so it is for the trial judge to decide whether to continue the trial himself without a jury or to direct that the case shall proceed before another jury. I respectfully agree with Laidlaw J.A. that the application of these principles is not dependent on the answer to the question as to which counsel inadvertently brought about the mention of insurance.

I do not think it necessary to review the line of cases discussed in argument which establish the rule, in Ontario, that the discretion of the trial judge as to whether the trial shall proceed with or without a jury will not be interfered with by an appellate court except in extreme cases. The Court of Appeal has, however, interfered when the trial judge in reaching his decision has misdirected himself as to the rules by which he should be guided. An instance of this is to be found in *Logan et al v. Wilson et al* (1).

(1) [1943] 4 D.L.R. 512.

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It is said that in the case at bar the learned trial judge wrongly directed himself that the fact that the question of insurance was brought out by a witness called for the defendant in answer to a question put by counsel for the defendant was decisive against the defendant's motion, and accordingly did not exercise any discretion in arriving at his decision.

It appears to me that in substance what occurred was as follows. The learned trial judge refused to traverse the case for trial by another jury, and wrongly, in my respectful view, said that the trial should proceed to conclusion before the same jury. If the matter had ended there I would have found myself in respectful agreement with Laidlaw J.A. as to the proper disposition to be made of the appeal. But, having made this decision, the learned trial judge proceeded to make it plain that, while he would not traverse the case for trial with another jury, he could complete the trial himself without a jury if both counsel consented. Counsel for the plaintiff had already stated that he consented to such a course and he expressly repeated this. In the result while the motion of counsel for the defendant to have the case set over for trial by another jury was definitely refused he was permitted to choose whether the trial should be completed by the learned trial judge with or without a jury. Had the learned trial judge himself decided to continue the trial without a jury it is, I think, clear that the defendant could not have complained successfully. The record before us does not disclose any further statement by counsel for the defendant but it follows from the fact that the trial continued with a jury that he did not consent to the learned trial judge completing it without a jury.

Under the circumstances, although not without hesitation, I have reached the conclusion that the appeal fails. While it was, I think, contrary to the established rule in Ontario for the learned trial judge to proceed with the trial before the same jury against the objection of counsel, he, in effect, gave counsel the choice between following that course and following another proper and permissible course, that of continuing without a jury. It is true that the defendant wanted neither of such courses to be followed, but having declined to consent to the permissible alterna-

tive it does not appear to me that he should now be heard to complain because the other was adopted. To hold otherwise would bring about the undesirable result that the defendant could take his chance of obtaining a favourable verdict from the jury while remaining free to demand a new trial if the verdict should prove adverse.

I would dismiss the appeal with costs.

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

KELLOCK J.:—This is an appeal from an order of the Court of Appeal for Ontario dismissing an appeal from the judgment at trial in favour of the plaintiff, respondent, entered after the verdict of a jury in an action and counterclaim arising out of a collision between motor cars. The appeal is taken upon the ground that, during the course of the examination-in-chief of a witness for the defendant, information was disclosed from which the jury might reasonably infer that the defendant was insured. In the court below, the majority, Aylesworth and Mackay JJ.A., were of opinion that in the view of the trial judge it was not open to the jury to draw such inference. Laidlaw J.A., dissenting, being of a different opinion, would have allowed the appeal. The learned trial judge, in the course of his reasons, said:

> The evidence coming out as it did, it might appear to the jury that it was likely that both sides were insured.

I find myself in agreement with the view of Laidlaw J.A. as to the construction to be placed upon this finding and, with respect, on consideration of the evidence of the witness in question, I think that this view is well founded. We heard no argument founded on the possibility that the jury might, from what occurred, also draw the inference that the plaintiff was insured, so that the case is to be considered apart from such a question. It is to be observed that the learned trial judge absolved the appellant's counsel of anything other than inadvertence in connection with the disclosure in question.

The appellant contends in these circumstances, that the proper course which ought to have been pursued by the trial judge, was to have dismissed the jury and, after having obtained the views of counsel as to continuing with-

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out the jury or traversing the case to another jury sittings, should have exercised his discretion as to one or the other course, but that he ought not to have, as he in fact did, continued the trial with the same jury.

For the respondent it is argued that the appellant has not gone far enough and that it was uncumbent upon him to show that there had been an actual miscarriage in that, for example, the verdict was perverse or the damages were excessive. Reliance was placed upon the provisions of s. 27(1) of *the Judicature Act,* R.S.O. 1937, c. 100, which provides that

> A new trial shall not be granted on the ground of mis-direction or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to the jury, or by reason of any omission or irregularity in the course of the trial, unless some substantial wrong or miscarriage has been thereby occasioned.

In *Loughead* v. *Collingwood Ship Building Company,* (1) the defendant applied to a Divisional Court for a new trial upon the ground that during the cross-examination of one of its witnesses, counsel for the plaintiff, against the objection of counsel for the defendant, was permitted to prove that the defendant company was insured. The majority, Falconbridge C.J. and Riddell J., in directing a new trial, held that it was not a case of improper admission of evidence, with respect to which Consolidated Rule 785, the predecessor of s. 27 of *The Judicature Act,* would be an answer. In their view, the mere putting of such a question to a witness did the mischief and placed the defendant "in a position of manifest and incurable disadvantage."

They held that the proper course which the trial judge ought to have pursued in the circumstances was that above set out in the contention of the appellant.

On the other hand, Anglin J., as he then was, was of opinion that while prior to the rule a clear case for a new trial would have been made out, nevertheless, the rule forbade such a course unless a substantial wrong or miscarriage were shown. In his opinion, that had not been established. The view of the majority prevailed in the Court of Appeal, (2) the appeal being dismissed.

(1) (1908) 16 O.L.R. 64. (2) 12 O.W.R. 697.

We were referred on the argument to the decision of the Divisional Court in *Mitchell* v. *Heintzman,* (1) but if there is anything in that decision opposed to the decision of the Court of Appeal, it cannot, of course, stand. The court in *Mitchell's case* would appear to have thought that the facts did not bring the case before them within the principle of the earlier decision. I take the law, therefore, to be established as laid down in *Loughead's case,* with which I respectfully agree. While it may come about that as a result of compulsory insurance or other circumstances, the mention of insurance before a jury may lose the significance which, up to the present, it has been considered to have in cases of the character under discussion, I do not think that circumstances have sufficiently changed since that decision to render its principle no longer applicable.

In *Fillion* v. *O'Neill* (2), a witness for the plaintiff, in answer to a question put by the learned trial judge, gave information which, in the view of the learned judge, disclosed that the defendant was insured. Thereupon he discharged the jury without giving the plaintiff's counsel the right to "elect" whether to go on without the jury or to have the case stand over to another jury sittings. An appeal was allowed on the ground that the plaintiff had been deprived of "a substantial right" which the same court in the later case, *Craig* v. *Milligan* (3), defined as the right to place his position fully before the learned trial judge. Having done so, however, the court held that the learned trial judge in such case, after hearing both parties, is not bound by any election or preference of either of the parties. He is entitled to exercise his own discretion under s. 55(3) of *The Judicature Act,* but he must not continue the trial with the existing jury.

In the case at bar, at the close of the evidence given by the witness who had made the disclosure as to the insurance, counsel for the appellant applied to the learned trial judge in the absence of the jury, to traverse the case to another sittings. On the other hand, counsel for the respondent took the stand that the learned judge had "an extremely wide discretion as to whether you will carry on with the jury or not," and that he was content to have

(1) 4 O.W.N. 636. (2) [1934] O.R. 716.
(3) [1949] O.R. 806.

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the case proceed before the learned judge either without the jury or with the existing jury, but he opposed any traverse.

At the conclusion of the argument, the learned judge decided that he would not, of himself, strike out the jury or traverse the trial, but that he would, with the consent of counsel, strike out the jury. He founded his decision upon the fact that the disclosure had come about as a result of a question by counsel for the appellant and that "that one point alone" was sufficient for his decision. In the second place, he said he did not think there was any miscarriage of justice for the reason that, as set out above, it might appear to the jury that it was likely that both parties were insured. The learned judge, however, made it very clear that

> It is a matter of who brought it out and as a result of what questioning or what line of questioning of the particular witness. Had this information been brought out by counsel for the plaintiff, I would have had a much more serious matter to deal with, but as I understand the law and I have dealt with similar motions before, I feel that it is pretty well settled that it is a matter of which party's witness brings out the information about insurance, and as a result of questioning by counsel representing which party.

He concluded as follows:

> So I must refuse the motion. I do, however, give counsel the option as to whether he wants to proceed with this jury or proceed without.

During the course of the argument, counsel for the appellant had offered to refer his Lordship to the authorities, but the learned trial judge said that he was familiar with them. It is plain, however, that his decision was given upon a mistaken view as to what had been laid down in those authorities. It is irrelevant whether the information is disclosed in answer to a question by either counsel or by the learned trial judge, where, as here, the examining counsel is found by the trial judge to be innocent. The authorities are equally clear as to the course which the learned judge ought to have taken.

The foundation of the decision in *Loughead's* case is that it is to be assumed that a fair trial cannot be had if evidence is given in a case from which the jury may conclude that the party against whom liability is sought to be enforced, is insured. Accordingly, the proper course for an appellate court to follow would be to direct a new

trial unless there can be said to be anything in the particular circumstances of the case at bar by reason of which the appellant should be held to have lost that right. In my opinion, that situation does not exist.

In the first place, the course actually followed in completing the trial was one which was not open to the learned trial judge. That course was taken because the appellant refused a consent he was under no obligation to give. He had given a jury notice and was quite entitled to ask that the trial of the action and counterclaim take place before a jury. While it is quite true that, in the exercise of his discretion, the learned judge could have tried the case without a jury whether the appellant consented or not, and that, had he done so the appellant could not have complained, the decision of the learned judge was not reached in the exercise of any discretion vested in him, but in reality in abdication of the discretion he did have, the course taken being in no way induced or contributed to by the appellant. I therefore think that the "choice" offered the appellant is irrelevant with reference to the question now under consideration, and I do not think it ought to be held against the appellant that counsel did not persist, in the circumstances, in putting forward his view of the law after judgment.

I would therefore allow the appeal with costs here and in the court below. As the abortive trial was contributed to by the respondent, as I have already pointed out, I think the costs of that trial ought to be reserved to the discretion of the judge presiding at the new trial.

Appeal dismissed with costs.

Solicitors for the appellant: *Richardson & Shearer.*

Solicitors for the respondent: *MacKay & McAvoy.*

1951

*May 22
*June 20

GEORGE W. LUCEY and LYMAN J. LUCEY ..... } APPELLANTS;

AND

THE CATHOLIC ORPHANAGE OF PRINCE ALBERT, commonly known as ST. PATRICK'S ORPHANAGE.. } RESPONDENT,

AND

FRANCIS CHARLES NEATE, ADMINISTRATOR of Estates of the Mentally Incompetent, as ADMINISTRATOR OF THE ESTATE OF NELLIE A. LUCEY ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

*Wills—Interpretation—Gift to "Reverend William Bruck o.m.i. St. Patrick's Orphanage of the City of Prince Albert * * *"—Whether intended donee the individual or the Orphanage of which he was Director.*

By a will in her own handwriting, a testatrix left all her estate to "Reverend William Bruck o.m.i. St. Patricks Orphanage of the City of Prince Albert in the Province of Saskatchewan, absolutely" and appointed him her sole executor. Father Bruck, who had been continuously director of the orphanage from 1906 to the date of his death in 1947, predeceased the testatrix, who died in 1949. On an application to determine whether because of Father Bruck's death an intestacy existed, or whether the words of the will amounted to a bequest to him as "Director of" said orphanage.

Held: that the words of the will must be interpreted in their grammatical and ordinary sense and so interpreted the words "unto Reverend William Bruck o.m.i. St. Patricks Orphanage of the City of Prince Albert * * *" meant that the donee of the estate was the Reverend William Bruck and not the Orphanage.

Held: also, that on a true construction of the will the Reverend William Bruck, had he survived the testatrix, would have been beneficially entitled to the whole of her estate but, as he predeceased her, the gift to him lapsed, and the estate passed to those entitled on an intestacy.

In re Delany, Conoley v. *Quick* [1902] 2. Ch. 642 at 646, approving *Thornber* v. *Wilson,* (1858) 4 Drew. 350 at 351; *Re Flinn, Public Trustee* v. *Griffin* [1948] 1 All E.R. 541, applied.

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

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment of Brown C.J. K.B. (2).

C. L. B. Estey for the appellants.

J. M. Cuelenaere K.C. and *J. G. Diefenbaker K.C.* for The Catholic Orphanage of Prince Albert, respondent.

The judgment of the Court was delivered by:

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of Appeal for Saskatchewan (1) affirming the judgment of the learned Chief Justice of the King's Bench (2) by which it was decided that the estate of the late Nellie A. Lucey passed under her will to the respondent, The Catholic Orphanage of Prince Albert, commonly known as St. Patrick's Orphanage.

The question raised is whether on a proper construction of the will the estate was given beneficially to the Reverend William Bruck, in which case, he having predeceased the testatrix, it would pass to those entitled on an intestacy, or whether it was given either directly to St. Patrick's Orphanage or to the Reverend William Bruck as trustee for the Orphanage.

The will is a short one. It reads as follows:

This is the Last Will and Testament of me, Nellie A. Lucey of the City of Prince Albert, in the Province of Saskatchewan.

I devise and bequeath all the real and personal estate to which I will be entitled at the time of my decease, unto Reverend William Bruck o.m.i. St. Patricks Orphanage of the City of Prince Albert in the Province of Saskatchewan, absolutely, and I appoint the said Reverend William Bruck sole Executor of this my Will; hereby revoking all former Testamentary writing. In Wittness (sic) whereof I the said Nellie A. Lucey the Testatrix, have to this, my Last Will and Testament, set my hand and seal this 2nd (second) day of December 1929.

SIGNED by the said Testatrix as and for her last Will and Testament, in the Presence of us, present at the same time who at her request, in her presence and in the presence of each other, have subscribed our names as wittnesses. (sic)

(Signed) NELLIE A. LUCEY.

(Signed) ELIZABETH SEREDA.

(Signed) FRED SCHWALK.

(1) [1950] 2 W.W.R. 1167. (2) [1950] 1 W.W.R. 1057.

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The Reverend Father Bruck died on January 9, 1947. The testatrix died on April 6, 1949.

The respondent was incorporated by Special Act (1915, Statutes of Saskatchewan, c. 46) with power *inter alia* to acquire by gift, devise or bequest any real or personal estate.

For the appellants it is contended that the wording of the will in plain and unambiguous terms gives the whole of the estate to the Reverend William Bruck beneficially, and that the courts below have erred in admitting extrinsic evidence and in the construction which they have placed upon the will.

Counsel for the respondent contends that the words "unto Reverend William Bruck o.m.i. St. Patrick's Orphanage of the City of Prince Albert in the Province of Saskatchewan," describe as donee the Orphanage rather than the Reverend Father Bruck, that all of the words quoted which precede the word "Orphanage" are descriptive of the Orphanage and that, while the words "St. Patrick's Orphanage" might well have been a sufficient description, the words "Reverend William Bruck o.m.i." were inserted as a further description out of an abundance of caution. Counsel argues that if the words "St. Patrick's Orphanage" had been intended merely as the address of the Reverend William Bruck the word "of" would have been inserted before the words "St. Patrick's Orphanage" or a comma would have been inserted after the initials "o.m.i." Alternatively the respondent submits that the words describing the donee are equally apt to describe either the Orphanage or the Reverend Father Bruck and that extrinsic evidence of the intention of the testatrix was admissible and shows that such intention was to make the Orphanage the donee.

In the further alternative the respondent contends that if the words are held to describe the Reverend Father Bruck as donee then, on the proper construction of the will, read in the light of the surrounding circumstances, he takes as director, or as the member of the O.M.I. in charge, of the Orphanage and as trustee for it.

It is, I think, clear that the Court, unless it may take judicial notice of the meaning of the letters "o.m.i.", is entitled to be informed by evidence of their proper meaning.

The affidavit of the Reverend Charles Charron makes it clear that these letters following the name of the Reverend William Bruck indicate that he was a member of an Order of priests in the Roman Catholic Church known as "Oblates of Mary Immaculate" and that as such member he had taken perpetual vows of obedience, chastity and poverty.

Our first task is to interpret the words, in which the testatrix has expressed herself, in their grammatical and ordinary sense. I cannot bring myself to doubt that, so interpreted, the words "unto Reverend William Bruck o.m.i. St. Patrick's Orphanage of the City of Prince Albert in the Province of Saskatchewan" mean that the gift of the testatrix' estate is to the individual whose name is Reverend William Bruck and who is further described by the initials and words which follow his name, the letters "o.m.i." denoting the Order to which he belonged and the words "St. Patrick's Orphanage" the place where he lived, the institution of which he was director and in which he carried on his life work. The words do not appear to me to be susceptible of the interpretation that the estate is given "unto St. Patrick's Orphanage" and that the preceding words "Reverend William Bruck o.m.i." are simply descripive of the Orphanage. It would, I think, involve a violent and unnatural construction to regard the words "Reverend William Bruck" or "Reverend William Bruck o.m.i." as an adjectival phrase descriptive of St. Patrick's Orphanage, and I do not think the testatrix so employed them. This view is, in my opinion, somewhat strengthened by the use of the words "the said" in the sentence which follows "—and I appoint the said Reverend William Bruck sole executor of this my will".—The testatrix first gives her estate to Reverend William Bruck and then appoints "the said Reverend William Bruck" her executor. I have concluded that the words of the will mean that the donee of the estate is the Reverend William Bruck and not the Orphanage.

It is next necessary to consider the argument of the respondent that if it should be held that the gift is to the Reverend William Bruck it is made to him not beneficially but *virtute officii* impressed with a trust for the benefit of the Orphanage.

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In none of the cases to which counsel referred was a gift to a named individual held to be other than a beneficial gift merely because such individual was described as the holder of an office.

In *re Delany, Conoley* v. *Quick* (1), Farwell J. quotes with approval from the judgment of Kindersley V.C. in *Thornber* v. *Wilson* (2). (A case in which there was a devise—subject to a term of seven years—of real estate on trust to sell and pay the net residue of the proceeds of the sale "to the then Minister of the Roman Catholic chapel at Kendal") as follows:

> The question whether there is a charitable gift does not depend on the fact that there is a gift to an individual describing him as minister; but on this, whether the testator designates the individual as such, or as being the person who happens to fill the office. A gift to a minister as such, is a charitable bequest. I think here the intention was clearly to benefit the minister and chapel; it was not a personal bequest, with a description of the person to be benefited. A gift to the person *now* minister would have been different; the testator might be unacquainted with his name, and so only be capable of describing him by his office. And here the surplus is only to be realized at the end of seven years after the testator's death, which makes it stronger to shew that the testator meant to benefit the chapel, not the particular person.

Farwell J. continues "The mere description of the legatee as the holder of an office is not, of course, sufficient to raise any such inference." (i.e. an inference that it was not a personal bequest.)

The sentence last quoted was not strictly necessary to the decision of the case with which Farwell J. was dealing but, after such search as I have been able to make, I have not found any reported case which appears to be at variance with it, and in my respectful opinion it correctly states the law.

In *Halsbury's Laws of England,* Vol. 34, page 320, section 370, the matter is put as follows:

> The mere description of a donee as the holder of an office is not of itself sufficient to raise the inference that the gift is for the benefit of the office and not of the holder personally, unless the context and circumstances show that the holder for the time being was intended. A gift, however, to a person either described as, or known to the testator as, the holder of an office, "or his successors," or a gift to the holder of an office for the time being, is for the benefit of the office or of the association or body in which the office is held.

(1) [1902] 2 Ch. 642. (2) (1858) 4 Drew. 350 at 351.

This appears to me to be an accurate statement of the law, supported by the authorities cited and by the reasoning of Jenkins J. in *Re Flinn, Public Trustee* v. *Griffin,* (1) where a number of cases are collected and analysed.

It is argued for the respondent that, even if the statement of the law quoted above from Halsbury be accepted, in the case at bar the context and circumstances should lead the court to decide that the intention of the testatrix was that the Reverend Father Bruck should take not beneficially but as director of and trustee for the Orphanage; and that extrinsic evidence of these circumstances was properly admitted. Reliance is placed on placitum 96 in Sir James Wigram's treatise on *Extrinsic Evidence in Aid of the Interpretation of Wills,* 5th Edition, page 83, reading as follows:

> Every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare.

Accepting this, it appears to me that the following facts set out in the affidavit of the Reverend Charles Charron were properly admitted in evidence.

> (i) That Reverend Father William Bruck was director of St. Patrick's Orphanage from the year 1906 until his death in 1947.
>
> (ii) That he was a member of the Order known as the "Oblates of Mary Immaculate" and had made a perpetual vow of poverty and that the fact that he had made such vow was known to the testatrix.
>
> (iii) That the Orphanage had no Board of Directors and that Reverend Father Bruck was in full charge of its administration and devoted all his time, energy and attention to the furtherance of its objects.
>
> (iv) That the testatrix was a Roman Catholic, had come to Prince Albert in 1929 and in her lifetime had made contributions and paid money to Reverend Father Bruck for the benefit of the Orphanage.
>
> (v) That she was a spinster and apparently had not kept in close touch with her brothers, the appellants.
>
> (vi) That she was admitted to the Saskatchewan Hospital on November 7, 1947, having become mentally senile and unable to attend to herself and her affairs.

With such added light as this information affords I am unable to construe the words of the will as making the Reverend Father Bruck a trustee for the Orphanage. Even if the words are read, as counsel for the respondent contends they should be, "unto Reverend William Bruck,

(1) [1948] 1 All E.R. 541.

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member of the Oblates of Mary Immaculate in charge of St. Patrick's Orphanage" they still appear to me to be words of gift to the Reverend Father who is further described as the holder of an office. To indicate that he was to take as trustee it would have been necessary for the testatrix to add some such words as "or his successor" or "or the member of the Oblates of Mary Immaculate for the time being in charge of St. Patrick's Orphanage."

I have found no case which decides, and I do not think that it should be held, that the fact that a beneficiary is described in a will as a member of an order, vowed to poverty, is of itself sufficient to prevent his taking beneficially.

In *In Re Barclay* (1), a testatrix by her will dated September 7, 1903, gave the residue of all her property, after the death of G., to whom she had given a life interest, in the following terms: "To the Superior of the Jesuit Church of the Immaculate Conception, Farm Street, London, to the Superior of that Church at the moment of the legacy falling due, and failing him to any other representative Father of the Order of the Society of Jesus * * *" The testatrix died in 1910, and G. died in 1928. The Superior of the Church of the Immaculate Conception, Farm Street, London, was not the same person at the death of the testatrix as at the death of G. Tomlin J. held that this was a valid gift to the Superior at the death of G. absolutely. At page 182, Tomlin J. says:

> In my opinion the gift to a person described as the Superior does not per se make him a trustee, even though he may not be personally known to the testatrix, nor do I think he can be fixed with a trust, because by vow or otherwise, he is under some obligation of conscience carrying no legal sanction to deal with what he receives in a particular way.

The Court of Appeal varied the order of Tomlin J. holding that the Superior took the gift "upon trust to apply the same for the benefit of the Church of the Immaculate Conception, Farm Street, London, as he may in his discretion think fit"; but I can find nothing in the judgments delivered in the Court of Appeal at variance with the statement of Tomlin J. that a person cannot be fixed with a trust, because by vow or otherwise, he is under some obligation of conscience carrying no legal sanction to deal with

(1) [1929] 2 Ch. 173.

what he receives in a particular way. The Court of Appeal proceeded on the grounds (i) that the gift was not to a named individual but to a person who might and in all probability would be quite unknown to the testatrix, a person designated by his office, and that office one held in connection with the Farm Street church, (ii) that there was an alternative gift, should the office of Superior be vacant, to "any other representative Father of the Order of the Society," (iii) that the will directed that in certain events two legacies should be paid by the Society of Jesus, (iv) that the testatrix in her will explained the reason of the gift —namely, gratitude to the Society of Jesus for her receipt of the grace of the true faith.

I have not overlooked the use of the word "absolutely". It can not assist the contention of the respondent but is not, of itself, necessarily decisive against the view that the gift was in trust. Had the will contained words sufficient to indicate that the testatrix intended the Reverend Father Bruck to take qua trustee, it might then have appeared that the word "absolutely" was inserted by the testatrix for some such reason as that suggesed by Clauson J. in *Ray's Will Trusts* (1) where the learned judge held that the use of the word "absolutely" following a gift to an abbess for the purposes, as he held, of the convent over which she presided, was merely to show that she was to be free from any fetter or trust which would bind her to keep the fund intact as an endowment for the purposes of the community and that the legacy was to go into the funds of the society and to be used without fetter for any purpose for which the funds of the society could be used.

In my opinion those portions of the affidavit of the Reverend Charles Charron which state that the testatrix had in her lifetime told him that it was her intention to leave all her estate to and for the benefit of St. Patrick's Orphanage and that she had made out her will in favour of St. Patrick's Orphanage were inadmissible.

It is, I think, sufficient to refer to the statement of Lord Cairns in *Charter* v. *Charter* (2).

* * * My Lords, upon one part of the case I have never entertained any doubt. I hold it to be clear, as I think all your Lordships do, that this is not a case in which any parol evidence of statements of the testator,

(1) [1936] 1 Ch. 520 at 526. (2) (1874) L.R. 7 H.L. 364 at 376.

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Cartwright J.

as to whom he intended to benefit, or supposed he had benefited, by his will, can be received * * * I am of opinion that it ought to have been excluded. The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or to two things. That clearly cannot be said of the present case.

I have already expressed my opinion that the words of this will are apt to describe the Reverend William Bruck as donee of the estate and are not apt to so describe the respondent. I do not read the reasons of the learned Chief Justice of the King's Bench or those of the Court of Appeal as indicating that they regarded such evidence of intention as admissible.

There is, I think, no doubt that if the Reverend Father Bruck had survived the testatrix he would have used all of her estate either for the Orphanage or for other equally worthy objects and would have retained nothing whatever for himself; but, in my opinion, no obligation to so deal with the estate was imposed upon him by the words which the testatrix has used in her will.

For the above reasons I have reached the conclusion that, on a true construction of this will, the Reverend William Bruck, had he survived the testatrix, would have been beneficially entitled to the whole of her estate. It follows from this that as he predeceased her the gift to him lapses.

The appeal should be allowed accordingly and judgment should be entered declaring that the administrator with the will annexed holds the estate of the late Nellie A. Lucey in trust for those persons who, under the laws of Saskatchewan, would have been entitled thereto had she died intestate. The orders as to costs made by the Chief Justice of the King's Bench and by the Court of Appeal should stand and the costs of all parties of the appeal to this court should be paid out of the estate, those of the administrator with the will annexed on a solicitor and client basis.

Appeal allowed.

Solicitors for the appellants: *Moxon, Schmitt & Estey.*

Solicitors for the respondent, The Catholic Orphanage of Prince Albert: *Diefenbaker, Cuelenaere & Hall.*

PAUL BÉGIN (*Plaintiff*).....APPELLANT;

1951

*May 7, 8
*Jun. 20

AND

DAME ÉMERILDA BILODEAU (*Defendant*).....RESPONDENT.

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

Wills—Whether second will revoked former—Intention of testator—Foreign trust company executing will in Quebec—Arts. 365, 892, 894, 896 C.C.

In 1937, by a will made in authentic form in the Province of Quebec, the testator left to his nephew, the deceased husband of the respondent, all the property which he might possess in Canada at the time of his death and which consisted of a house and lot in the Province of Quebec. The contents of the will were communicated to the nephew who took possession of the property forthwith, paid the taxes and insurance. Subsequently, in 1939, the testator made in the U.S.A. a will in the English form in which, after disposing of his residence there and making several pecuniary bequests, he left the "residue" of his property to certain relatives of his deceased wife in the U.S.A. and named an American trust company his executor. The opening paragraph of that will contained the customary clause "hereby revoking any and all former wills made by me". The nephew survived the testator and at his death the property passed to his wife, the respondent. The trust company sold the property to the appellant who sued respondent for possession and for rental. The action was allowed in the Superior Court but dismissed in the Court of Appeal.

Held: The appeal should be dismissed as the later will did not revoke the former expressly or by the nature of its dispositions. A formal clause such as here is not sufficient if the terms of both wills can be read so as to have effect. The intention of the testator was clearly that the second will should only dispose of the property other than that disposed of by the former will.

Per Rand and Kellock JJ.: The foreign trust company was not empowered to carry on business in the Province of Quebec and to make the sale in question as it was not registered under the Quebec Trust Companies Act.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1) dismissing an action for possession and for rental.

L. P. Pigeon, K.C., for the appellant.

L. A. Pouliot, K.C., for the respondent.

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

(1) Q.R. [1950] K.B. 818.

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BEGIN v. BILODEAU

The CHIEF JUSTICE:—Il s'agit ici d'un conflit apparent entre deux testaments d'un monsieur Arthur-B. Gay, dont l'un fut fait dans la ville de Lauzon, province de Québec, le 27 août 1937, et l'autre, le 6 décembre 1939, à Dormont, comté d'Alleghany, dans l'état de la Pennsylvanie, où le testateur avait son domicile.

Par le premier, Arthur Gay donnait et léguait tous les biens meubles et immeubles, sans aucune exception, qu'il délaisserait en Canada au jour de son décès à son neveu, Wilfrid Guay.

Il est admis que les biens meubles et immeubles ainsi légués comprenaient la propriété située à Lauzon, portant le numéro civique 31 de la rue Sainte-Sophie, que l'appelant revendique présentement, dont il veut faire déguerpir l'intimée (qui est la veuve de Wilfrid Gay) et contre laquelle il a pratiqué une saisie-gagerie.

Par le testament postérieur, Arthur Gay léguait à des personnes demeurant aux États-Unis "all the rest, residue and remainder of my estate, real, personal and mixed", et il nommait comme exécutrice testamentaire la "Monongahela Trust Company", de Homestead, Pennsylvanie.

La question qui se pose est de savoir quel effet peut avoir eu sur le premier testament la clause suivante par laquelle le second commence:

> I, ARTHUR GAY, of the Borough of Dormont, County of Alleghany and State of Pennsylvania, being of sound mind and memory, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any and all former wills made by me.

Le litige résulte du fait que l'exécutrice testamentaire nommée dans le second testament a vendu à l'appelant, le 13 décembre 1948, la propriété de Lauzon léguée au mari de l'intimée par le premier testament et que l'appelant demande maintenant d'être mis en possession de cette propriété.

La Cour Supérieure a maintenu l'action et la saisie-gagerie, a déclaré que l'intimée n'avait aucun droit d'occuper cette propriété et lui a enjoint de quitter les lieux.

La Cour du Banc du Roi (en Appel) (1) a unanimement infirmé ce jugement. Trois des juges ont considéré

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que les circonstances qui ont entouré la remise de la propriété à Wilfrid Guay, en 1937, l'avait rendu définitivement propriétaire, et les deux autres que, lors de la vente faite par l'exécutrice testamentaire à l'appelant, ses fonctions et ses pouvoirs étaient épuisés et qu'il s'ensuit que l'appelant n'a pas prouvé ce qu'il a allégué: qu'il était propriétaire de l'immeuble occupé par l'intimée.

Une autre raison acceptée par deux des juges de la Cour du Banc du Roi (en Appel) (1) est que, comme la "Monongahela Trust Company" est une corporation incapable, d'après la loi de la province de Québec, d'agir comme exécutrice testamentaire, et que la loi étrangère qui la régit n'a pas été prouvée comme étant différente de celle du Québec, il doit être décidé que sa nomination comme exécutrice testamentaire n'est pas valide et que conséquemment elle n'avait pas le pouvoir nécessaire pour consentir l'acte de vente à l'appelant.

Deux remarques s'imposent dès l'abord: 1° La "Monongahela Trust Company" n'a pas été appelée dans la cause, quoique l'intimée, par les conclusions de sa défense, ait demandé que la vente à l'appelant, ainsi que son enregistrement, soient déclarés nuls, illégaux et inexistants et soient annulés; 2° Que le testament lui-même, du 6 décembre 1939, soit déclaré illégal et nul comme fait par une personne incapable de décider et comme non accompagné des formes et des formalités prescrites.

Dans ces conditions, la question qui s'est posée immédiatement était de savoir si les conclusions de l'intimée pouvaient être accordées par les tribunaux en l'absence de l'exécutrice testamentaire et hors de sa présence.

La Cour du Banc du Roi (en Appel) (1) ne semble pas avoir été arrêtée par cette objection et elle s'est contentée, dans le jugement qu'elle a rendu, de déclarer qu'elle pouvait accueillir les conclusions de l'intimée "aux fins de la maintenir dans ses défenses de simple rejet de l'action, et sans adjuger sur ses conclusions, irrégulièrement formées d'ailleurs, de la nature de demandes aux pétitoires". Il a été établi, d'ailleurs, au cours de l'argumentation devant cette Cour qu'une action pétitoire est actuellement pendante entre les parties. Demande a même été faite, au

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Rinfret C.J.

cours du procès, de suspendre l'adjudication dans la présente instance jusqu'à ce que le pétitoire ait été décidé, mais cette demande n'a pas été accordée.

Les parties à cet appel doivent se rendre compte que tout jugement de la part de cette Cour qui aurait pour effet d'annuler le second testament, ainsi que l'acte de vente à l'appelant par l'exécutrice testamentaire nommée dans ce testament, ne peut jamais valoir qu'entre les parties à l'appel et que le remède de la tierce opposition reste ouvert à la "Monongahela Trust Company". Dans les circonstances, il eut peut-être été préférable que, avant d'adjuger sur la cause qui nous est soumise, on eut attendu le résultat de l'action pétitoire à laquelle il eut pour le moins été recommandable que l'on mit en cause la "Monongahela Trust Company". Nous devons, sur ce point, rappeler les décisions de cette Cour dans les causes de *Burland* v. *Moffatt* (1); *Montreal Agencies Limited* v. *Kimpton* (2); *Corporation de la Paroisse de St-Gervais* v. *Goulet* (3); *Christin* v. *Piette et Pelletier* (4).

Nous croyons, cependant, pouvoir trancher le litige qui nous est soumis, au moins dans sa partie essentielle, en le traitant comme l'a fait la Cour du Banc du Roi (en Appel) (5) et sans adjuger sur les conclusions "irrégulièrement formées d'ailleurs" (pour employer l'expression de la Cour d'Appel), mais, comme on le comprendra, le présent jugement est strictement limité aux droits des parties en cause.

J'en suis arrivé à la conclusion qu'une stricte interprétation des deux testaments permet de les considérer comme compatibles et que, par conséquent, le second n'a pas eu pour effet de mettre le premier de côté.

Nous devons rester ici dans le domaine de la loi de la province de Québec, car la loi du domicile n'a pas été prouvée et il s'ensuit qu'elle doit être tenue pour semblable à celle de la province de Québec (*voir* le jugement de Sir Lyman Duff J.C. dans *Trottier* v. *Rajotte* (6).

(1) (1886) 11 Can. S.C.R. 76 at 88, 89.
(2) [1927] S.C.R. 589 at 602.
(3) [1931] S.C.R. 437.
(4) [1944] S.C.R. 308.
(5) Q.R. [1950] K.B. 818.
(6) [1940] S.C.R. 212.

Il est à remarquer tout d'abord que le second testament ne révoque pas expressément le premier. Les mots: "hereby revoking any and all former wills made by me" sont exprimés en termes généraux. Il n'y est pas référé au premier testament en termes exprès. Or, l'article 892 du *Code Civil* édicte que "un testament ne peut être révoqué par le testateur que 1°—par un testament postérieur qui le révoque expressément ou par la nature de ses dispositions; 2°—par un acte devant notaire ou autre acte par écrit, par lequel le changement de volonté est expressément constaté".

L'emploi dans chacun de ces sous-paragraphes de l'article 892 du mot "expressément" est significatif.

En plus, il faut en rapprocher l'article 896 qui, sans doute, parle de l'effet d'une révocation sur un testament antérieur mais qui, tout de même, s'exprime comme suit:

> A défaut de disposition expresse, c'est par les circonstances et les indices de l'intention du testateur qu'il est décidé si la révocation du testament qui en révoque un autre, est destinée à faire revivre le testament antérieur.

Là, encore, le *Code* emploie le mot "expresse".

Enfin, l'article 894 édicte que:

> Les testaments postérieurs qui ne révoquent pas les précédents d'une manière expresse, n'y annulent que les dispositions incompatibles avec les nouvelles ou qui y sont contraires.

Et, de nouveau, l'on trouve ici et toujours la condition que la révocation soit faite d'une "manière expresse".

Or, il est évident que l'on ne peut prétendre que le testament de 1939 révoque expressément le testament de 1937 et que le changement de volonté n'est pas expressément constaté. Dans ce cas, l'on me paraît justifié, à défaut de disposition expresse, de chercher dans les circonstances et les indices de l'intention du testateur si réellement la nature des dispositions de l'un et l'autre des testaments fait qu'ils se contredisent.

Comme l'a fait remarquer la Cour du Banc du Roi (en Appel) (1), les deux testaments peuvent parfaitement être interprétés l'un avec l'autre, le premier disposant, suivant ses termes, de "tous les biens meubles et immeubles, sans

(1) Q.R. [1950] K.B. 818.

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aucune exception, que je délaisserai en Canada", et l'autre disposant des biens meubles et immeubles que Gay a laissés au jour de son décès aux États-Unis.

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Toutes les circonstances et les indices relevés par la Cour du Banc du Roi (en Appel) (1) et soulignés dans son jugement conduisent à cette interprétation. Les faits prouvés dans la cause indiquent que le testateur Arthur Gay, à la suite de la mise en possession qu'il a faite à Lauzon en faveur de son neveu, Wilfrid Guay, et toutes les circonstances qui ont entouré cette mise en possession, avait l'intention de faire une transmission définitive de cette propriété. Il la considérait, dès lors, comme étant sortie de son domaine et comme étant devenue le bien de Wilfrid Guay à tel point que, lorsqu'il disposa de ses biens aux États-Unis, par le testament de 1939, il n'avait aucunement l'intention d'y inclure la propriété située à Lauzon. Cette intention ne peut être déduite des termes généraux employés en tête de son testament de 1939, rédigé par un homme de l'art, et qui, à tous égards, peuvent être considérés comme une clause de style.

On lit dans le Traité élémentaire de Droit civil de Planiol 8e éd. (1921) tome 3, p. 709, nº 2842:

> Malgré leurs formules absolues, par lesquelles les testateurs déclarent révoquer toutes les dispositions antérieures, les révocations expresses sont susceptibles d'être interprétées, et certaines dispositions de date plus ancienne peuvent parfois être maintenues. Voyez-en des exemples dans Cass., 5 juillet 1858, D. 58, 1. 385 S. 58. 1. 557; Cass., 10 juillet 1860, D. 60, 1, 454, S. 60. 1. 708; Cass., 17 novembre 1880, D. 81, 1. 180, S. 81. 1. 249.

La Cour de Cassation en France, re: affaire DeJenteville & Rivet, a décidé (*voir* Dalloz, 81.1.80):

> ATTENDU que l'ensemble de l'écrit litigieux autorisait un doute à cet égard; —que dès lors il appartenait aux juges du fait de décider la question d'après l'interprétation que leur paraîtraient commander les termes de l'écrit et les circonstances extrinsèques de la cause.

L'intimée nous a référés à l'arrêt re: *Dempsey* v. *Lawson* (2):

> *Even if the second instrument contains a general revocatory clause, that is not conclusive,* and the Court will, notwithstanding, consider whether it was the intention of the testator to revoke a bequest contained in a previous will: Denny *v.* Barton. On the other hand, though there be no express revocatory clause, the question is whether the

(1) Q.R. [1950] K.B. 818. (2) (1876-77) L.R. 2 P.D. 107.

intention of the testator, to be collected from the instrument, was that the dispositions of the earlier will should remain in whole or in part operative. Dr. Lushington, in giving the judgment of the Privy Council in Henfrey *v.* Henfrey, says: "the question is total revocation or partial revocation". And on this question Sir J. Nicoll says, in Methuen *v.* Methuen, "In the Court of Probate the whole question is one of intention; the *animus testandi* and the *animus revocandi* are completely open to investigation in this Court.'

De même, re Erskine (1):

A subsequent testamentary paper does not necessarily revoke one prior in date, *even though the second instrument contains a general revocatory clause.* The intention of the testator is the sole guide in the matter, and the intention to be discovered is that relating to the disposition of the *testator's property,* and not to *the form of the will.* A will is not necessarily confined to one document, but may be contained in several documents. When executed by a soldier after it had been prepared by his solicitor is not revoked by a will made three days later, on a form supplied by *the military authorities,* which contained a *clause revoking generally all former wills.* The dispositon of the property was the same in both wills and both documents were admitted to probate.

Dans la cause de *Girouard & Durocher* (2), il a été décidé que:

...le moyen le plus sûr de déterminer l'intention d'un testateur et de fixer le sens qu'il a entendu donner à ses dispositions testamentaires, est de s'attacher à l'interprétation que les parties intéressées ont faite de l'acte, et par la manière dont elles l'ont exécuté.

Or, ici, les intéressés, en vertu du second testament, ont démontré par leur long silence et leur inaction durant plusieurs années qu'ils ne comprenaient pas que le testament de 1939 n'entendait pas inclure la propriété occupée par l'intimée. Ils n'y ont jamais émis la moindre prétention jusqu'à l'acte de vente qu'ils ont consenti à l'appelant et, par conséquent, plus de neuf ans après le testament de 1939. L'un des points les plus significatifs de l'interprétation qu'ils ont donnée au testament est que c'est seulement le 2 juin 1945, soit six ans après le testament, que pour la première fois ils ont fait enregistrer une déclaration de transmission de biens mentionnant la propriété de Lauzon.

Un autre fait, peut-être encore plus significatif, pour déterminer l'intention du testateur est le suivant: Lorsque Arthur Guay fit son premier testament, il le fit lire solennellement en présence de Wilfrid Guay et de sa famille. Or, en premier lieu, un testament n'a jamais d'existence

(1) [1918] 1 W.W.R. 249. (2) 20 R.L. (N.S.) 404.

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légale avant la mort du testateur; mais, en second lieu, pour quiconque est au courant des coutumes et des habitudes de la province de Québec, l'on sait que, jusqu'à la mort du testateur, le testament est censé demeurer secret et il est tout à fait inusité de procéder à en faire la lecture en présence des bénéficiaires aussitôt après qu'il a été rédigé et signé. Il m'est impossible de voir, dans la façon dont on a procédé ici, autre chose qu'une indication bien arrêtée de la part de Arthur Guay que son intention était, dès ce moment-là, de transmettre la propriété à Wilfrid Guay, et que, dès lors, il s'en considérait comme dépossédé à toutes fins que de droit. La conséquence serait donc que, lorsqu'il a fait le testament de 1939, il était bien convaincu que la propriété de Lauzon ne faisait plus partie de son domaine et que, par ce testament de 1939, il n'avait aucunement l'intention, en employant des termes généraux, d'y comprendre cette propriété.

Mais il me paraît inutile d'entrer ici dans tous les détails des circonstances qui démontrent bien que le testateur considérait avoir accompli tout ce qui était nécessaire pour transférer cette propriété à Wilfrid Guay et que, lors de son testament de 1939, il n'envisageait nullement l'obligation d'en faire mention ou la possibilité que son second testament put être interprété comme incluant cette propriété.

Sur ce point, je suis complètement d'accord avec les raisons données par la majorité de la Cour du Banc du Roi (en Appel) à l'appui du jugement qui a été rendu. Et cela me paraît suffisant pour maintenir ce jugement et pour rejeter l'appel.

Je ne veux pas dire par là que les autres moyens auxquels se sont rattachés quatre des juges de cette Cour ne constituent pas non plus des moyens sérieux à l'encontre du succès de l'appelant, mais je ne crois pas nécessaire de les élaborer ici, étant donné la conclusion à laquelle j'en arrive sur ce premier moyen que je considère décisif.

Je suis donc d'avis de maintenir le jugement dont est appel et que cet appel doit être rejeté, avec dépens.

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

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TASCHEREAU J.:—Le demandeur-appelant a institué contre la défenderesse-intimée des procédures en saisie-gagerie.

Il allègue en substance que depuis le 13 décembre 1948, il est propriétaire d'un immeuble situé à Lauzon (P.Q.), qu'il a acheté du Monongahela Trust Company de Homestead, Pennsylvanie, pour le prix de $2,000.00 payé comptant. Au moment de cet achat, la défenderesse habitait cette maison, et le demandeur l'a immédiatement avisée d'avoir à payer le prix et la valeur de son occupation, que la Commission des prix et du commerce en temps de guerre a fixé à $50.00 par mois.

A cette action, la défenderesse a plaidé, après avoir nié le pouvoir du Monongahela Trust de vendre cet immeuble à l'appelant, qu'elle est avec ses enfants, l'héritière de son mari Wilfrid Guay, décédé *ab intestat,* et que la maison qu'elle habite faisait partie de son patrimoine. Elle invoque un testament fait à Lauzon par Arthur Bonaparte Guay, oncle de son mari, devant Lagueux, N.P., le 27 août 1937, dans lequel il léguait à son neveu tous les biens qu'il possédait au Canada. La Cour Supérieure a maintenu l'action, mais la Cour d'Appel (1) l'a rejetée avec dépens.

La preuve révèle qu'Arthur Bonaparte Guay, oncle du mari de l'intimée, vivait aux États-Unis, mais qu'il est revenu à Lauzon chez son neveu, qui était son seul parent, en 1934, et qu'il est revenu de nouveau en 1937. Le 27 août 1937, devant Joseph Lagueux, notaire, Arthur Bonaparte Guay a acheté l'immeuble en question pour le prix de $3,042.00, et à la même date, devant le même notaire, il a fait un testament notarié dans lequel il dit:

> Je donne et lègue tous les biens meubles et immeubles sans aucune exception que je *délaisserai en Canada* au jour de mon décès à mon neveu, Wilfrid Guay lequel je nomme mon légataire universel et mon exécuteur testamentaire, voulant et ordonnant que tous les biens que je lègue ainsi au dit Wilfrid Guay lui soient propres et insaisissables quant à toutes les dettes qu'il pourra devoir au jour de mon décès.
>
> Ce legs est fait à la charge par le dit Wilfrid Guay de pourvoir à mes obsèques et funérailles *si je décède en Canada,* et de me faire chanter deux services dont l'un au jour de l'inhumation de mon corps et l'autre à l'anniversaire de mon décès.

(1) Q.R. [1950] K.B. 818.

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L'immeuble légué était le seul bien que le testateur laissait *au Canada,* et dont la défenderesse prétend avoir hérité avec ses enfants, au décès de son mari.

A la date où il a ainsi fait son testament, Arthur Bonaparte Guay a remis à son neveu une copie de son testament, l'a fait lire à la famille qui était réunie dans la maison, lui remit également une copie d'acte d'achat de la maison ainsi que les certificats d'enregistrement. Il est revenu au pays en 1938 et en 1939 comme invité de son neveu. Les taxes étaient payées par le neveu, et à l'échéance de la première police d'assurance, celle-ci a été renouvelée avec perte payable au neveu. La preuve révèle que depuis l'achat de la maison, ce dernier en a eu la jouissance la plus complète, et a agi toujours avec le consentement de son oncle, comme s'il en était véritablement le propriétaire.

En décembre 1939, Arthur Bonaparte Guay a demandé à un officier du Monongahela Trust Company de lui préparer un testament. Ce dernier s'est adressé à un avocat américain qui a rédigé, hors la présence de Guay, un testament que ce dernier a signé le 6 décembre 1939. Dans ce testament, fait suivant la forme dérivée de la loi d'Angleterre, Guay déclare *révoquer* tous testaments antérieurs qu'il aurait pu faire, et après avoir consenti quelques legs particuliers, il donne le résidu de ses biens à certains parents de sa femme, antérieurement décédée. Il nomme le Monongahela Trust Company de Homestead, Pennsylvanie, exécuteur testamentaire, et l'autorise à vendre ses biens mobiliers et immobiliers aux prix et conditions qu'il pourrait déterminer.

La première question qui se pose est de savoir si le testament fait aux États-Unis en 1939, *révoque* le testament fait à Lauzon en 1937, et par lequel la propriété occupée par la défenderesse-intimée était donnée au neveu du testateur. S'il faut en arriver à la conclusion qu'il n'y a pas de semblable *révocation,* alors le mari de l'intimée, malgré le testament américain, se trouve à avoir hérité de l'immeuble en question, et le présent appel doit être rejeté, sans qu'il soit nécessaire d'examiner si le Monongahela Trust pouvait consentir une vente valide à l'appelant.

Un testament peut être révoqué de diverses façons, entre autres, par un testament postérieur qui le révoque expressément, ou qui le révoque par la nature de ses dispositions (892 C.C.). La révocation par un testateur est expresse, par exemple, quand elle résulte de la confection d'un nouveau testament où il est dit que le précédent testament ou telle disposition du précédent testament sera révoqué, mais il arrive qu'une révocation en des termes généraux, comme dans le cas qui nous occupe, ne signifie pas nécessairement que le premier testament soit révoqué. Il se peut que ce soit l'intention du testateur de maintenir les deux testaments s'il n'y a pas d'incompatibilité. Comme le dit Planiol (Traité Élémentaire de Droit Civil, 8e éd., Vol. 3, page 709:

> Malgré leurs formules absolues, par lesquelles les testateurs déclarent révoquer toutes les dispositions antérieures, les révocations expresses sont susceptibles d'être interprétées, et certaines dispositions de *date plus ancienne peuvent parfois être maintenues.*

Dans *Dempsey* v. *Lawson* (1), il a été décidé:

> *Even if the second instrument contains a general revocatory clause, that is not conclusive,* and the Court will, notwithstanding, consider whether *it was the intention* of the testator to revoke a bequest contained in a previous will: Denny *v.* Barton. On the other hand, though there be no express revocatory clause, the question is whether the intention of the testator, to be collected from the instrument, was that the dispositions of the earlier will should remain in whole or in part operative.

Dans *Re Erskine* (2):

> A subsequent testamentary paper does not necessarily revoke one prior in date, *even though the second instrument contains a general revocatory clause.* The intention of the testator is the sole guide in the matter, and the intention to be discovered is that relating to the disposition of the *testator's property,* and not to *the form of the will.* A will is not necessarily confined to one document, but may be contained in several documents.

In the *Estate of O'Connor, Deceased* (3), on lit ce qui suit:

> In order to ascertain the intention of the deceased as to what shall operate and compose his or her will, it is permissible to examine all the circumstances of the case. They must, however, be circumstances existing at the time when the will was made.

Certes, c'est dans le testament lui-même que doit être recherchée l'intention du testateur, mais comme il l'a été dit dans *Re Hammond* (4), il y a des cas où l'on peut s'ins-

(1) (1876-77) L.R. 2 P.D. 107.
(2) [1918] 1 W.W.R. 249.
(3) [1942] 1 All. E.R. 545.
(4) [1934] S.C.R. 409.

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pirer aussi des circonstances particulières pour trouver ce que le testateur a véritablement voulu. Pour employer l'expression classique, il est alors permis de se placer dans "l'arm chair" du testateur, et de considérer les circonstances qui l'entouraient quand il a fait son testament.

Il s'agit bien de l'un de ces cas dans la présente cause, et il importe donc de se demander si le *de cujus*, quand il a fait son testament américain, avait bien l'*animus revocandi*, c'est-à-dire l'intention de révoquer le testament canadien de 1937.

Il est clair que deux testaments peuvent exister simultanément lorsqu'ils affectent des biens différents, et qu'il appert qu'une clause de révocation générale dans le second ne porte pas sur les biens légués dans le premier. Dans le cas qui nous occupe, il me semble bien évident que quand le testateur a signé son premier testament devant Lagueux, N.P., en 1937, il avait l'intention clairement exprimée, de ne léguer à son neveu que les biens qu'il possédait au Canada, et dont il était devenu propriétaire le jour même par acte de vente que lui avaient consenti Antonio Beaudoin Labrecque *et al.* Voulant établir son neveu non fortuné, qui était le dernier parent qu'il avait au Canada, il lui remit tous les titres ainsi que la possession de l'immeuble, et je n'ai aucun doute, comme le dit M. le Juge en chef Galipeault, que quand l'oncle, peu versé dans le dédale des lois, est parti pour les États-Unis en 1939, pour ne plus jamais revenir, pour lui, "tout était fini, tout était réglé, bien définitivement", en ce qui concerne cette propriété de Lauzon. Il en avait bien disposé en faveur de son neveu. Il ne se préoccupera plus de son entretien, du paiement des taxes, ou du maintien en force des assurances. C'est le neveu qui s'occupera de tout cela, car c'est lui qui effectivement est devenu le propriétaire pour toutes fins pratiques.

Quant à Homestead en 1939, Bonaparte Guay décide de faire un autre testament et qu'il s'adresse au gérant du Monongahela Trust, il ne fait pas de doute qu'il avait présents à l'esprit les faits qui venaient de se passer à Lauzon, et qu'il n'a jamais eu l'intention de déshériter son neveu. La clause de révocation générale, qui est très souvent "une clause de style", ne me paraît pas affecter le testament canadien.

Par ce second testament américain, Bonaparte Guay nomme le Monongahela Trust, compagnie étrangère, non enregistrée dans la province de Québec, et par conséquent incapable d'agir légalement, administrateur de ses biens et tuteur aux enfants mineurs nommés dans le testament. Il lègue un immeuble situé à Dormont, Pennsylvanie, à mademoiselle Bessie Graner, fait quelques legs particuliers en argent, et donne le résidu de ses biens à des parents de sa femme décédée, sans cependant spécifier ceux situés en pays étranger. Il n'est nullement question de l'immeuble de Lauzon, et même l'aviseur financier du *de cujus* depuis de nombreuses années, le gérant du Monongahela Trust, M. McClure, qui a demandé pour ce dernier la vérification du testament et les lettres d'administration, déclare quelques mois après la mort de Bonaparte Guay, que tous les biens sont situés à West Homestead, Pennsylvanie.

Bonaparte Guay est mort le 12 juin 1941, et Wilfrid Guay, le neveu, le 23 octobre de la même année. Ce n'est que plus tard que l'on a appris à Lauzon le décès de l'oncle, et ce n'est qu'en 1945 que le Monongahela Trust a réclamé la propriété de l'immeuble. Je ne vois entre le testament canadien et le testament américain aucune incompatibilité. Dans le premier, c'est un legs fait à Wilfrid Guay des biens canadiens; dans le second, c'est un legs aux parents de sa femme, de certains biens qui ne peuvent être autres que les biens situés aux États-Unis. Il faut, je crois, donner effet aux deux testaments, et c'est comme cela qu'il faut fixer, je pense, le sens que le testateur a entendu lui-même donner à ses dispositions.

Il résulte que Wilfrid Guay a hérité de l'immeuble de Lauzon lors de la mort de son oncle Bonaparte Guay, et que l'intimée dans la présente cause, ayant hérité de son mari conjointement avec ses enfants, est propriétaire définitive de cet immeuble, et qu'en conséquence, l'appel doit être rejeté avec dépens de toutes les cours.

The judgment of Rand and of Kellock JJ. was delivered by

RAND J.:—This action was brought by the appellant as owner of land in Quebec claiming rent. Two questions are raised: one, whether a will devising the land, made in

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that province, was revoked by a later will made in Pennsylvania; and the other, whether an instrument purporting to convey the land to the appellant executed in Quebec by a trust company incorporated in Pennsylvania as executor under a power of sale conferred by the second will, is valid.

The first will, made in 1937 in notarial form, devised to the deceased husband of the respondent all of the moveables and immoveables without exception which the testator might possess in Canada at the time of his death. The testator had been born in Quebec but had long since made his home in the United States. Two years later, in 1939, the Pennsylvania testament was made in which, after disposing of his residence there and making several pecuniary bequests, he left the "rest, residue and remainder" of his property to certain relatives of his deceased wife in that state. The opening paragraph, after declaring the instrument to be his last will and testament, proceeds, "hereby revoking any and all former wills made by me." The important question of law can at once be seen to be whether that general revocation is, in the circumstances, to be taken to have included the will of 1937.

The second question arises from the fact that by art. 365 of the *Civil Code* of Quebec a corporation is declared incompetent to be entrusted with the execution of testaments. This has been qualified by chap. 284 of the Revised Statutes of Quebec, 1941, which deals with trust companies, provincial, dominion and foreign, and which provides for the authorization of a foreign company of that character to carry on business in the province, provided it obtain a certificate of registration. That certificate can issue only on terms and conditions fixed by the Lieutenant-Governor in Council. The doing of business would include acting as testamentary executor. Mr. Pigeon suggests we should treat art. 365 as impliedly repealed by the statute but that, obviously, could not be done. Keeping in mind the article and the object of the statute, the incapacity applies to any juristic act done in the province as executor. The trust company was disabled, therefore, from selling or joining in the deed of sale in this case unless it was then the holder of a certificate; registration is a condition precedent to such

an act, and as no certificate has been granted, the result is that the title upon which the plaintiff in the action relies is fatally defective.

That being so, it is unnecessary to deal with the first question, which is one of importance and of difficulty. In such a matter the Court should have before it the fullest detail of material that might connect the testator's mind with the clause, but that unfortunately is not the situation here; and where, in any event, the action must be dismissed, we should not go beyond the necessities of the case. That issue then is to be taken as unaffected by the judgment and as free for such determination in other proceedings as the parties may see fit to seek.

The appeal must therefore be dismissed on the ground mentioned, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Germain, Pigeon and Thibodeau.*

Solicitor for the respondent: *J. E. Gregoire.*

WALTER GEORGE ROWE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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*Apr. 24, 25, 26
*May 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Murder—Use of revolver subsequent to commission of robbery—Whether accused in flight—No pursuit—Interpretation of s. 260(d) of the Criminal Code as enacted by S. of C. 1947, c. 55, s. 7.

Appellant, with an accomplice, committed an armed robbery at Windsor, and then engaged a taxi driver to drive them to London. The latter became suspicious and went into a service station in Chatham to phone the police, but appellant accompanied him and he was unable to do so. He made another attempt at a service station in London and succeeded in lifting the telephone receiver and asking for the police. Appellant, who had accompanied him, produced a Colt revolver and ordered everyone into the grease-pit at the rear of the station.

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The taxi driver escaped through a doorway slamming a wooden door behind him. A bullet discharged from appellant's gun passed through the doorway killing a person whose presence was unknown to appellant. It was contended by appellant that the gun was discharged accidentally when he slipped on the floor, and that the trial judge was wrong when he charged that appellant was, after leaving Windsor, fleeing from lawful apprehension since there being no pursuer, it could not be said that he was pursued and, therefore, in flight.

Held (Cartwright J. dissenting), that the appeal should be dismissed as the trial judge was justified in leaving it to the jury to find whether the accused was in flight "upon" (meaning after) the Windsor robbery, even though there was as yet no pursuit. It is sufficient that the pursuit be apprehended and, therefore, the matter of the flight may be subjective so far as the offender is concerned.

APPEAL from the judgment of the Court of Appeal for Ontario affirming appellant's conviction for murder.

W. R. Poole for the appellant.

W. B. Common K.C. and *C. C. Savage K.C.* for the respondent.

The judgment of the Chief Justice and of Kerwin, Taschereau, Estey and Fauteux JJ. was delivered by

KERWIN J.:—The appellant and one Bechard were jointly indicted and tried on a charge that on November 20, 1950, at London, Ontario, they murdered Clare Galbraith. Bechard was acquitted but Rowe was convicted and his conviction was affirmed unanimously by the Court of Appeal for Ontario. He was given leave to appeal to this Court from that affirmance on two points of law, the first of which is:—

> Did the learned trial judge err in his charge to the jury when he stated that the appellant after leaving Windsor was fleeing from lawful apprehension, thus bringing into operation Section 260(*d*) of the *Criminal Code*?

Rowe testified that a Colt revolver (Exhibit 13) had been taken by him from his boarding house in Detroit, Michigan, with the permission of the landlady's son. On November 20, 1950, Rowe and Bechard, who had boarded at the same place, came to Windsor, Ontario. About 2 p.m. Rowe telephoned a Mrs. Brown in Windsor, the wife of a friend, inquiring if her husband was at home. He was advised that the husband was at work and would not be home until 6 p.m. Rowe knew that Brown had in his possession three automatics and a Colt pistol, and there

was some discussion between Rowe and Bechard as to securing these in order to procure funds. About 2.45 p.m. Bechard, armed with Exhibit 13, forced Mrs. Brown into the basement where he tied and gagged her. She heard another man moving around on the floor above, and in fact Rowe admitted that he and Bechard stole the automatics and pistol with the intention of selling them. After Mrs. Brown had freed herself, she found that the telephone wires to her house had been cut.

About 3.30 p.m., John Jolly, an independent taxi owner stationed at the Prince Edward Hotel in Windsor, about two miles distant from the Brown home, was approached by Bechard and requested to drive Rowe and himself to London. Jolly was told that neither man had funds but he was promised payment upon completion of the trip.

While en route from Windsor to London, Jolly became suspicious because of the conversation between Rowe and Bechard and stopped at a service station at Chatham with the intention of telephoning police. However, Rowe accompanied him and he was unable to carry out his intention. Upon reaching London, on his own initiative, Jolly stopped at a service station and was again accompanied by Rowe. The latter instructed Jolly to proceed to a certain address, which, however, could not be located. By this time Jolly had become even more alarmed and suspicious and drove into another gasoline station. Rowe and Jolly proceeded into the office where Rowe consulted a telephone directory and stated he had discovered the London address he wanted. Jolly noticed that the telephone directory was opened at "Zurich", a municipality some distance outside of London. Jolly's suspicion that the trip was "not legitimate" was then confirmed and he lifted the telephone receiver and asked the operator to get the police. Upon hearing Jolly's request, Rowe immediately pulled out Exhibit 13, which had been returned to him by Bechard after the Brown robbery, and calling to those present "This is a stick up" or "Everybody in the back", he ordered them into the rear of the service station. Jolly and others were herded into the grease pit room. Rowe ordered Jolly to stop and not go on with the others. Jolly hesitated a moment and then ran through a doorway, through a small connecting room, and through an open doorway into the wash rack room, slamming a

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wooden door behind him. While Rowe was in the grease pit room with Exhibit 13 in his hand, a bullet was discharged from it, passing through the wooden door that Jolly had closed and killing Galbraith, whose presence was unknown to Rowe. Rowe's evidence was that he slipped on the floor, thus causing the bullet to be discharged, but that he had no intention of pulling the trigger. While there is other evidence that Rowe was seen to pull back the hammer of the gun and that two distinct clicks accompanying the movement were heard, the point is unimportant in view of the only problem before us under the first question, which concerns section 260 of the *Criminal Code*, and particularly the opening clause and 260(*d*) as enacted by sections 6 and 7 of chapter 55 of the 1947 Statutes.

Before referring to section 260, it should be added that Rowe's evidence was that he intended to proceed to Toronto to seek a reconciliation with his wife and that Bechard also intended to go to Toronto to commence divorce proceedings against his wife; that he (Rowe) intended to sell the five weapons and from the proceeds give Bechard $75 and pay Jolly $50 for his trip from Windsor to London and return, using any balance to proceed by bus to Toronto; that he spent fifteen minutes in an unsuccessful endeavour to locate a purchaser of the weapons in Windsor; that he proposed to make a sale at any available pool room in London; that he hired a cab, rather than take other means of transportation, in order to arrive in London before the closing of the pool rooms in that city,—although he did not know at what time the pool rooms closed; that he had passed through London previously but had never tarried there.

Section 260 as amended in 1947 reads as follows:—

260. In case of treason and the other offences against the King's authority and person mentioned in Part II, piracy and offences deemed to be piracy. escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, indecent assault, forcible abduction, robbery, burglary or arson, culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue.

(*a*) if he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or

(*b*) if he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or

(*c*) if he, by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.

(*d*) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use.

One of the offences mentioned in the opening paragraph, "robbery", had been committed by Rowe at the Brown house in Windsor. The contention that he did not use Exhibit 13 at the London service station and that Galbraith's death did not ensue as a consequence of its use cannot be sustained. Section 260(*d*) was enacted as a result of the decision in *Hughes* v. *The King* (1), and its provisions are met in this case by the facts that Rowe not only had the Colt upon his person but pulled it out and held it in his hand. That was a use, under any definition of that very ordinary word, and the death of Galbraith ensued as a consequence.

Part of the Crown's case was that Rowe committed, or attempted to commit, robbery at London, and the jury were charged accordingly, but it was also put to the jury, in accordance with another submission of the Crown, that Rowe was in flight upon the commission of the Windsor robbery and the most serious attack was made upon those portions of the charge to the jury dealing with that matter. In argument before us, circumstances were imagined where it was said that there could be no flight but it is sufficient for this appeal to decide that there was evidence upon which the jury, to whom it was left as a matter of fact, could decide that Rowe was in flight upon (which means after) the Windsor robbery. The time element is of importance. About 2.45 p.m. the robbery took place; fifteen minutes, according to Rowe, were spent in an endeavour to locate a purchaser of the weapons; about 3.30 Jolly was engaged for the trip to London, and he was never left alone by Rowe. Rowe had only passed through London and was not familiar with the city, although

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according to his story he intended to dispose of the weapons at a pool room. It was contended that there was no evidence that the police had ever been notified of the Windsor robbery and that, there being no pursuer, it could not be said that Rowe was pursued and, therefore, in flight. That contention is unsound. The whole matter was subjective so far as Rowe was concerned. He knew that he had committed a robbery at Brown's house; he was anxious to dispose of the weapons taken from that house; he spent only fifteen minutes endeavouring to find a purchaser in Windsor; it was Bechard who made the arrangements with the taxi driver but it was Rowe, who had not been seen by Mrs. Brown, who identified himself to Jolly when the latter was raising a question as to being paid for the trip to London. Rowe never let Jolly out of his sight, and coupled with this are the circumstances under which he pulled out Exhibit 13. The trial judge was correct in leaving it to the jury to find whether Rowe was in flight.

The second point upon which leave to appeal was given is this:—

> Did the learned trial judge err in allowing the admission of Exhibit 23 as evidence in the case, and in allowing also all other evidence in connection with the crime committed in Windsor?

At the trial, a very short extract from a statement previously made by Bechard was put in evidence as against him by the Crown in order to show his connection with Exhibit 13. Later, at the instigation of Bechard's counsel, the whole of the statement was admitted as Exhibit 23 but it was made clear to the jury that the extract and the entire statement were evidence only against Bechard and not as against Rowe. The trial judge having ruled that Bechard's statement was voluntary and having permitted Crown counsel to put in as evidence the short extract referred to, it was quite proper that the judge should later permit the whole of the statement to be admitted at the request of counsel for Bechard. The latter was one of the accused and was entitled to have the whole of the statement go in so that the jury might have before it everything that had been said by him. This is not a case where an accused seeks to put in evidence in chief a statement made

by him on some previous occasion, whether to a police officer or not, and the decisions cited in connection with that class of case are inapplicable.

The appeal must be dismissed.

KELLOCK J.:—Put shortly, the question with respect to which leave to appeal was granted and which remains undisposed of, is whether or not there was any evidence of flight with respect to the robbery in Windsor so as to render applicable s. 260(*d*) of the *Code*.

The section provides that, in the case of certain offences including robbery, culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue,

> (*d*) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use.

On behalf of the Crown it was argued that the length of time between the commission of the crime in respect of which the flight occurs, and the death, is immaterial if the offender in the interim is evading arrest. On the other hand, the appellant contended that before there can be any flight within the meaning of the paragraph, there must, at the least, be an attempt to apprehend. In other words, it is said that flight involves pursuit, and if there be no pursuit in fact, there can be no flight within the meaning of this legislation.

In my opinion, neither of these contentions ought to be accepted. As to the Crown's contention, I think it is too wide. On the other hand, it has been often pointed out that "the wicked flee when no man pursueth." One of the ordinary meanings of the word "flight" is the "action of running away from danger," and I think the danger (in such a case as the present, danger of loss of liberty) may be apprehended as well as present and actual. In other words, the subjective element in any case may be sufficient.

In *The Queen* v. *Humphery* (1), Tindal C.J. said, with relation to the use of the word "upon" in statutes, at p. 370, that it

(1) (1839) 10 Ad. & E. 335.

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may undoubtedly either mean before the act done to which it relates, or simultaneous with the act done, or after the act done, according as reason and good sense require the interpretation, with reference to the context, and subject matter of the enactment.

The Oxford Dictionary gives as one of the meanings of the word, "following upon" as well as "immediately after." The French text of the statute here in question reads

. . . ou au cours ou au moment de la fuite du délinquant après la perpétration . . .

In the present instance, "upon" cannot be given the meaning of either before or simultaneously with the commission of the offence, and as the word "immediately" is not used in the statute, I think "upon" should be interpreted in the sense of "following." The question as to whether or not in a given case flight exists is, of course, a question of fact.

In the case at bar, I think the circumstances, which I do not repeat, are sufficient to have enabled the jury, if they saw fit, to find that the appellant, at the time the fatal shot was fired, was in flight upon the commission of the Windsor robbery within the meaning of the statute. The fact that the jury might also have concluded that he and his companion had a new venture in mind involving the sale of the guns or their use in another way to obtain money, did not preclude the jury from taking such a view.

In these circumstances, I would dismiss the appeal. I should like to add that, in my view, we are indebted to Mr. Poole for his argument in this case, and the way in which all difficulties were frankly faced.

CARTWRIGHT J. (dissenting):—This is an appeal, pursuant to leave granted by my brother Taschereau, from a unanimous judgment of the Court of Appeal for Ontario pronounced on February 22, 1951, affirming the conviction of the appellant on a charge of murdering one Clare Galbraith.

The relevant facts are stated, and section 260 of the *Criminal Code* is set out, in the judgment of my brother Kerwin and it is not necessary to repeat them.

I find it necessary to consider only the first point upon which leave to appeal was granted which was as follows:—

First, did the learned trial judge err in his charge to the jury when he stated that the appellant after leaving Windsor was fleeing from lawful apprehension, thus bringing into operation section 260(*d*) of the *Criminal Code*?

On the evidence it was open to the jury to find (i) that the discharge of the revolver which killed Galbraith was accidental, in the sense that it was not discharged by any act of Rowe's done with the intention of discharging it but resulted from his slipping on the floor of the grease-pit room, and (ii) that in the service station at London, where Galbraith was shot, Rowe was neither committing nor attempting to commit any of the offences mentioned in section 260 of the Criminal Code. If the jury did find the facts to be as set out in (i) and (ii) then what moved them to convict Rowe of murder instead of manslaughter must, I think, have been a finding that he was using the revolver during or at the time of his flight upon the commission of the robbery in which he had taken part in Windsor.

On a careful reading of the whole charge I think it clear that the learned trial judge instructed the jury that it was open to them to find that at the moment of the discharge of the revolver the appellant was in flight from the commission of the robbery in Windsor and that if they did so find then as a matter of law, even if they concluded that the discharge of the revolver was accidental in the sense above mentioned, it was their duty to convict the appellant of murder rather than manslaughter. I refer particularly to the following passages in the charge of the learned trial judge:

Now, does that indicate to you that these men were still in flight from Windsor, that they were getting away from the police following that robbery in Windsor? It is for you to say, gentlemen of the jury, whether they were in flight or not, because if they were in flight from the robbery, if their flight had not been discontinued, if there had not been a termination of it, then they come right within that amendment of the Code which I gave to you a few minutes ago.

* * *

You have to look at it this way, that in the case of manslaughter the unlawful act must not be such as the offender knew or ought to have known was likely to cause death. It must not be any of the acts I have described as murder. Therefore, if you find that Rowe did not mean to cause death, or if you have a reasonable doubt about it, or if you

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find he did not mean to cause to the person killed bodily injury which he knew was likely to cause death and that he was reckless as to whether death ensued or not, and if you find he did not mean to cause death or bodily injury to Jolly or knew that he was likely to cause death to Jolly, and *in addition to that, if you find there was no flight,* and if you find there was no attempted robbery, or if you have a reasonable doubt about these things, and you merely find he was pointing that gun and while he was pointing the gun it went off by accident, you would be justified in bringing in a verdict against Rowe of manslaughter, but you have to eliminate all these things that are murder. If you merely find he was not robbing or fleeing from lawful apprehension, that he was merely pointing a gun and the gun went off by accident, as he says, then he would be only guilty of manslaughter. If he has even raised a reasonable doubt in your mind about these items of murder, you would be entitled to make such a finding.

* * *

I say, as I told you this afternoon, *if you say that they were not, when they got to London, escaping from lawful apprehension,* if you can say they were not attempting a robbery, if you can say that he shot at Jolly without intending to cause any fatal harm, then you get down to where he was committing an offence, and did not intend to cause death, then you are in the realm of manslaughter. *But before you are in the realm of manslaughter you must be able to get rid of the crime of flight* and of robbery in London, and the attempt to cause bodily injury to Jolly, which was likely to cause death.

* * *

All I want to emphasize to you, gentlemen of the jury, is that before you get to manslaughter at all in this case you have to eliminate all those items which would be murder.

There is no evidence in the record that at the time of the discharge of the revolver the police in Windsor or anywhere else, or indeed anyone other than Rowe and his accomplice Bechard, knew that the appellant had taken part in the robbery in Windsor. Mrs. Brown, the victim of the robbery, had not seen Rowe and there is no evidence that she had any idea of the identity of Bechard. She had seen Bechard during the robbery and was able to identify him some days later in a police line-up but prior to the robbery he was a stranger to her. There is no evidence that any pursuit of Rowe and Bechard as a result of the robbery at Windsor ever commenced.

It seems to me that the question which we have to decide is whether, in this state of the evidence, as a matter of law on a proper construction of section 260 of the *Criminal Code* it was open to the jury to find that the discharge of the revolver occurred during or at the time of the flight

of Rowe upon the commission of the robbery in Windsor, within the meaning of those words as used in clause (*d*) of the section.

It is, I think, of assistance to consider the state of the law immediately prior to the amendment. The common law is, I think, correctly stated in the following passage in Archbold's Criminal Pleading, 32nd Edition (1949) page 910:—

> If a person, while in the act of committing a felony involving violence, e.g., rape, kills another without having the intention of so doing, the killing is murder. A person who uses violent measures in the commission of a felony involving personal violence does so at his own risk and is guilty of murder if those measures result, even inadvertently, in the death of the victim. For this purpose, the use of a loaded firearm in order to frighten the victim into submission is a violent measure. If the act is unlawful but does not amount to felony, the killing, generally speaking, is manslaughter.

The common law in this regard was carried in a somewhat modified form into section 260 of the *Criminal Code* as it read prior to the 1947 amendment. For felonies involving violence Parliament substituted the offences enumerated in the opening words of the section and, where the offender neither meant death to ensue nor knew that it was likely to ensue as a result of his conduct, required as a condition of his conviction of murder proof either of the intention to inflict grievous bodily harm or of the administration of a stupefying or overpowering thing or of the stopping of the breath of a person, for the purpose, in each case, of facilitating the commission of one of the specified offences or the flight of the offender upon the commission or attempted commission thereof.

In this state of the law *The King* v. *Hughes* (1) was decided, the unanimous judgment of this court being delivered by Sir Lyman Duff, C.J.C. We are, of course, bound by that judgment except in so far as its effect may have been abrogated or modified by the amendment referred to. It appears to me to have decided that when an accused, who is in the course of committing a robbery accompanied by violence, is using a pistol and such pistol is discharged during a struggle and the death of another person is caused thereby and there is some evidence that such discharge was accidental, the trial judge must instruct the jury that

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if they reach the conclusion that the pistol went off by accident—in the sense that it was not discharged by any act of the accused done with the intention of discharging it—(or are not satisfied that it did not go off in that manner) they should find a verdict of manslaughter unless they are satisfied that the conduct of the accused was such that he knew or ought to have known it to be likely to induce such a struggle as occurred and that somebody's death was likely to be caused thereby and that such was the actual effect of his conduct and of the struggle.

By the 1947 amendment the following further alternative condition was added to section 260:—

> (*d*) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use.

I find myself in respectful agreement with the argument of Mr. Common that the amendment does make a change in the law as laid down in *The King* v. *Hughes,* with the result that now if an offender during or at the time of the commission of one of the offences mentioned or during or at the time of his flight upon the commission or attempted commission thereof is using a revolver and death ensues as a consequence of its use this will be murder even although the actual discharge of such revolver was accidental in the sense above mentioned. It remains to consider the meaning of the words "flight upon the commission of the offence." Counsel were not able to refer us to any reported case dealing with the interpretation of these words.

Mr. Common, while submitting that in the case at bar he does not need to press his argument so far, contends that the flight of the offender, within the meaning of the section continues so long as he is apprehensive of and seeking to evade arrest. The difficulty in accepting this is that to do so would bring about the result that once a person had committeed one of the offences mentioned in section 260 he would, within the meaning of clause (*d*) of that section continue to be in flight until he was apprehended and would therefore be guilty of murder if anyone was killed by the accidental discharge of a pistol which he was using for any purpose.

Mr. Poole contends that the word "flight", as used in the section, pre-supposes the existence not only of a person who is fleeing but also of a pursuer and that a "flight upon the commission of an offence" cannot still be in progress hours after such commission when there has been no pursuit at all.

The effect of the amendment is, in circumstances to which it is applicable, to render a person guilty of murder who would not otherwise have been guilty of that crime and any doubt as to its meaning which remains after the application of the rules of construction must be resolved *in favorem vitae.*

In construing the section, I think it should be borne in mind that a person who has committed a crime is usually apprehended, if apprehended at all, in one of two ways; either (*a*) at or near the scene of the crime or as the result of a pursuit, long or short, commencing as he leaves the scene of the crime or (*b*) having escaped from the scene of the crime, being neither interrupted during its commission nor freshly pursued after its commission, he is later apprehended as the result of police investigation and detective work. It seems to me that the words "the flight of the offender upon the commission" as used in clause (*d*) are apt to describe the situation suggested in (*a*) above, to the exclusion of that suggested in (*b*). I can find no logical stopping place between so holding and accepting the argument of counsel for the Crown which is put in the following way in his factum:—

> It is further submitted that in the circumstances of this case having regard to the nature of the armed robbery at Windsor that "flight of the offender" continued during the freedom of the offender while evading arrest and terminated upon his apprehension. The length of time between the crime and apprehension is immaterial if the offender is evading arrest thus escaping from lawful apprehension. To this extent evading arrest, and escaping lawful apprehension are synonymous.

I do not think that the words—"during or at the time of . . . the flight of the offender upon the commission of an offence"—are synonymous with the words—"so long as an offender is a fugitive from justice"; nor do I think that flight within the meaning of the section continues so long as fear of apprehension lingers in the mind of the offender.

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I do not think it necessary to decide whether the existence of a pursuit is in all cases a necessary condition of the existence of a flight; but for an offender's conduct to fall within the meaning of that word as used in clause (*d*) after he has got well away from the scene of the crime I think it necessary that there be in progress a pursuit continuing from such scene. A flight from a pursuit commenced later as a result of the offender being traced or identified by detective work would not, in my opinion, be a flight upon the commission of the offence but rather a flight from such fresh pursuit or the danger thereof. Among the meanings given to the word "upon" in the Oxford Dictionary are "following upon", "immediately after." It is in this sense that I think the word is used in section 260(*d*).

I have reached the conclusion that there was no evidence in the case at bar on which it could be held that at the time of the fatal discharge of the revolver the appellant was in flight upon the commission of the robbery in which he had taken part in Windsor. No pursuit of the appellant was in progress. None had commenced. He was separated by more than 100 miles in distance and by some hours in time from the scene and moment of the Windsor robbery. He and his accomplice had made good their escape from the vicinity of the scene of the crime. Thereafter they had spent a short time in Windsor endeavouring to dispose of the proceeds of the robbery and, failing in this, they had negotiated with the taxi driver, Jolly, to drive them as far as London where they hoped to dispose of such proceeds for enough money to enable them to pay the taxi fare and to continue their journey to Toronto where for varying reasons each of them wished to visit his wife. If my opinion as to the proper construction of the section, set out above, is correct, it is clear that under these circumstances the appellant in the service station at London was not in flight upon the commission of the robbery at Windsor. Indeed if I understand the theory of the Crown, in so far as it relates to flight from Windsor rather than to attempted robbery at London, it is that the appellant drew his revolver in the London service station not because he had any thought that a pursuit from Windsor was in progress but rather because he feared that if the police came in answer to Jolly's summons they would find him in possession of

stolen goods. Had the appellant turned to flee at the moment of Jolly's call to the police he could not in my opinion be said to be fleeing upon the commission of the robbery in Windsor but only from the London police because he feared that they would find evidence which would ultimately lead to his apprehension for that crime.

If it is suggested that the construction, which I have indicated above to be, in my opinion, the correct one, brings about too lenient a result, it must be remembered that we are concerned with arriving at the intention of Parliament in a case where *ex hypothesi* the appellant not only had no intention of harming anyone but had no intention of discharging the revolver at all and that the question is not whether he ought on such hypothesis to be acquitted but whether he must as a matter of law be convicted of murder to the exclusion of manslaughter.

For the above reasons it is my respectful opinion that the learned trial judge erred in law in directing the jury that there was evidence on which they could find that the revolver was discharged during the appellant's flight upon the commission of the robbery in Windsor, within the meaning of section 260(*d*) of the *Criminal Code* and that if they so found they must convict him of murder. I think it impossible to say that but for this direction the jury must necessarily have found the same verdict.

I would allow the appeal, quash the conviction and direct a new trial.

Appeal dismissed.

Solicitors for the appellant: *Wright and Poole.*

Solicitor for the respondent: *A.G. for Ontario.*

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*June 5, 6, 7, 8.

*June 20

DOUGLAS G. H. WRIGHT.....APPELLANT;

AND

LAURA MAY WRIGHT and GUARANTY TRUST COMPANY OF CANADA ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mental Incompetency, jurisdiction to dispense with notice to alleged incompetent—Evidence required to establish incompetency and to support order for maintenance of dependents—The Mental Incompetency Act, R.S.O. 1937, c. 110, s. 5.

The respondent Laura May Wright, wife of the appellant, made an application under *The Mental Incompetency Act* to Barlow J. in chambers for an order declaring the appellant a mentally incompetent person, appointing a committee of his person and estate, and dispensing with service upon the appellant of the Notice of Motion and supporting affidavits. Barlow J. having found that personal service would be harmful to the appellant, dispensed with service upon him, declared him mentally incompetent, and referred the matter to the Master to appoint a committee, and to propound a scheme for the care and maintenance of the appellant and the management of his person and estate. The Master made a report whereby the respondent wife was appointed committee of the person, and the respondent trust company and herself committee of the estate and whereby he directed payment out of the estate of annual payments of $10,000 and $4,500 for the support and maintenance of the respondent wife and her invalid mother respectively. This report was confirmed by Barlow J.

Appeals taken from each of the Orders of Barlow J. were dismissed by the Court of Appeal.

Held: (Cartwright J. dissenting), that there was jurisdiction in Barlow J. to dispense with service upon the appellant of the Notice of Motion and supporting affidavits and, sufficient evidence to warrant the finding of mental incompetency.

Re Brathwaite 47 E.R. 1104; *Re Newman* 2 Ch. Ch. 390; *Re Webb* 12 O.L.R. 194.

Held: (Kerwin J. dissenting), that on the basis of the only evidence which the Master had before him the allowances granted to the appellant's wife and mother-in-law were excessive and the matter should be remitted to him for reconsideration.

Per: Cartwright J., dissenting,—Since the enactment of *The Lunacy Act*, 9 Ed. VII c. 37, power to dispense with service, if it exists, must be found in *The Mental Incompetency Act, The Judicature Act,* or in the rules made under one of such Acts, and since no express provision can be found in either Act, nor in any of the rules to which reference

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

was made by counsel, it must be concluded that service of notice in such a case is imperatively required. If the Court had jurisdiction to dispense with service, the matter before it was insufficient to warrant the making of either an Order dispensing therewith or an Order of mental incompetency.

APPEAL by special leave from the judgment of the Court of Appeal for Ontario dismissing appeals from the orders of Barlow J. of December 8 and 22, 1950.

Lewis Duncan K.C. for the appellant.

J. L. McLennan K.C. and *R. D. Poupore* for Laura May Wright, respondent.

T. M. Mungovan K.C. for Guaranty Trust Co. of Canada, respondent.

KERWIN J. (dissenting in part):—Leave was granted by this Court to Douglas G. H. Wright to appeal from the judgment of the Court of Appeal for Ontario dismissing his appeal from the orders of Barlow J. of December 8 and 22, 1950. The first order intituled "In the Matter of *The Mental Incompetency Act*, being Chapter 110 of The Revised Statutes of Ontario, 1937, and In The Matter of Douglas Guy Hobson Wright, a supposed mentally incompetent person", was made upon the application of his wife and was based upon an affidavit made by her, one by Dr. Spence, and another by Dr. Boyer. After reciting, "it appearing that personal service of the notice of motion herein upon the said Douglas Guy Hobson Wright would be harmful to him", service upon him was dispensed with and it was declared that he, presently an inmate of Homewood Sanitarium, Guelph, Ontario, was a mentally incompetent person. It was referred to the Master to appoint a committee or committees of his person and estate, the Master was directed to propound and report a scheme for his maintenance and the management of his estate, and the order contained the other usual provisions. The order of December 22, 1950, confirmed the report of the Master dated December 14, by which Mrs. Wright had been appointed the committee of her husband's person, and Guaranty Trust Company of Canada and she had been appointed committee of the estate, the Trust Company being the

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accounting member of the committee and having the custody of the securities and cash. This order and report will be adverted to later.

The order of December 8 dispensing with service of the notice of motion and the accompanying affidavits and declaring the appellant a mentally incompetent person, is challenged on several grounds. We understand that substantially the same objections were raised in the Court of Appeal, although, since counsel for the appellant changed his position before us from time to time as to the meaning and effect of some of the rules of practice of the Supreme Court of Ontario under the Judicature Acts, it may be that the argument before the Court of Appeal did not take the same course as that followed here. There is nothing to prevent counsel changing his submissions on questions of law if no prejudice be caused, and the matter is mentioned merely in order to stress the fact that the appellant was unable to convince the Court of Appeal by anything that was there said. Laidlaw J.A., speaking for the Court, put it thus:—

> Counsel for the appellant has failed to satisfy us in respect of any grounds upon which he brings these proceedings before the Court. There was ample evidence before the learned Judge to support the order in appeal. The proceedings before the learned Judge were regular, and he properly exercised the powers given to him by section 5 of *The Mental Incompetency Act*. We can find no error in the proceedings nor in the order. The appeal should be dismissed.

Reliance was placed upon that provision of Magna Carta appearing in section 2 of An Act respecting Certain Rights and Liberties of the People, R.S.O. 1897, chapter 322, and which Act is now inserted in Appendix A to R.S.O. 1950, at page 1 of Vol. 5, and specifically upon the words:—

> No man shall be taken or imprisoned nor prejudged of life or limb, nor be disseized or put out of his freehold, franchises, or liberties, or free customs, nor be outlawed, or exiled, or any otherwise destroyed, unless he be brought in to answer.

This must mean in accordance with the law as is indicated by the succeeding words:—"and prejudged of the same by due course of law". The position of lunatics was dealt with at common law in an entirely different manner from any other subject and since the former law and practice of

inquest of office has been entirely superseded in Ontario, it is sufficient to refer to the history of the matter without detailing it.

The Legislature of Upper Canada in 1792 enacted that in all matters of controversy relating to property and civil rights, resort should be had to the laws of England. By section 5 of chapter 61 of the 1857 Statutes of Canada, it was provided that the Court might on sufficient evidence declare a person a lunatic without the delay or expense of issuing a commission, except in case of reasonable doubt. Chapter 65 of R.S.O. 1897, provided for an inquiry by commission, and an inquiry without commission, with, or without, the aid of a jury, and for the right of the alleged lunatic to demand that such latter inquiry be submitted to a jury. Rule 334 of the 1897 Rules of Practice of the Supreme Court of Ontario under *The Judicature Act* provided:—

> 334. Where it appears, upon the hearing of any matter, that by reason of absence, or for any other sufficient cause, the service of notice of the application, or of the appointment, cannot be made, *or ought to be dispensed with, such service may be dispensed with,* or any substituted service, or notice, by advertisement or otherwise may be ordered.

Down to 1909, the practice in Upper Canada and Ontario was uniform to dispense with service of notice of motion for a commission or a declaration where such service would be dangerous or harmful to the alleged lunatic: In *Re Patton* (1); In *Re Newman* (2); In *Re Mein* (3); In *Re Webb* (4). *The Lunacy Act,* chapter 37 of the Statutes of 1909, repealed prior Acts dealing with the same subject, and subsection 1 of section 36 enacted:—

> 36(1) The Supreme Court may make rules for carrying this Act into effect and for regulating the costs in relation thereto and except where inconsistent with the provisions of this Act, or such rules, *The Judicature Act* and Rules made thereunder shall apply to proceedings under this Act.

The rules were next revised in 1913 and Rule 334 was omitted. In the same revision, Rule 213 provided:—

> 213. Any application in an action or proceeding shall be made by motion, and notice of the motion shall be given to all parties affected by the order sought.

(1) (1868) 1 Ch. Ch. 192.
(2) (1869) 2 Ch. Ch. 390.
(3) (1869) 2 Ch. Ch. 429.
(4) (1906) 12 O.L.R. 194.

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In the 1928 revision of the rules, No. 213 was amended so as to read as follows:—

213. Any application in an action or proceeding shall be made by motion, *and unless the nature of the application or the circumstances of the case render it impracticable* notice of the motion shall be given to all parties affected by the order sought.

The decision of Mr. Justice Britton in *Re Morrison* (1) while made after the Lunacy Act of 1909, was given before the new Consolidation of the Rules, 1928. Furthermore, the application there made was refused on several grounds and it is the only reported case where any intimation is given that even at that time there was no power to order that service upon the individual of the notice of motion to declare him incompetent should be dispensed with. Counsel for the appellant did not deny that such a power has been exercised for many years at Osgoode Hall.

The actual decision in *In re McLaughlin* (2), does not assist in the disposition of the present appeal but it is important to note what is said by Lord Davey, speaking for the Judicial Committe, at page 347:—

It must be remembered that this particular jurisdiction is one of some peculiarity and difficulty. It exists for the benefit of the lunatic, and the guiding principle of the whole jurisdiction is what is most for the benefit of the unhappy subject of the application.

This shows that the question of lunacy or mental incompetency has always occupied a separate position and, viewing the present rules of practice in the light of that underlying proposition, Rule 213, as it now reads, is on its proper construction applicable to such an application as was made here and is not confined to applications in an action or a proceeding already commenced. In any event the notice of motion dated December 7, 1950, was filed in the Registrar's office the same date in accordance with Rule 234 so that the application for an order dispensing with service may be said to have been made in a pending proceeding.

In view of this special jurisdiction, section 35 of *The Mental Incompetency Act*, R.S.O. 1937, chapter 110, as

(1) (1919) 15 O.W.N. 338. (2) [1905] A.C. 343.

amended by section 20 of chapter 55 of the 1941 statutes (replacing subsection 1 of section 36 of the Lunacy Act of 1909) and enacting:—

35. Subject to the approval of the Lieutenant-Governor in Council, the Rules Committee may make rules for carrying this Act into effect and for regulating the costs in relation thereto, and except where inconsistent with the provisions of this Act or such rules, *The Judicature Act* and rules made thereunder shall apply to proceedings under this Act.

does not prohibit that part of the first order of Mr. Justice Barlow, which dispensed with service of the notice of motion upon the appellant. On the contrary, the rules made under *The Judicature Act* justify it. The rules as thus interpreted are not inconsistent with any of the other provisions of *The Mental Incompetency Act*. Particular stress was placed upon sections 5 and 6. Subsection 3 of the former gives the alleged mentally incompetent person the right to appeal from any order made by the Court declaring him such. Section 6 deals with the directing of an issue. Subsection 1 thereof provides:—

(1) Where in the opinion of the Court the evidence does not establish beyond reasonable doubt the alleged mental incompetency, or where for any other reason the Court deems it expedient so to do, instead of making an order under subsection 1 of section 5, the Court may direct an issue to try the alleged mental incompetency.

Other subsections give directions as to the method and place of trial and give the alleged mentally incompetent person the like right to move against a verdict or to appeal from an order made upon or after the trial as may be exercised by a party to an action including the right of appeal. Section 7 gives the alleged incompetent the right to demand that any issue directed to determine the question of his mental incompetency be tried with a jury. The mere fact that provision is thus made for an appeal by the alleged incompetent and, if the trial of an issue is directed, for his right to demand a jury, indicates that there is no lack of jurisdiction in the Court hearing a notice of motion for a declaration of incapacity to direct that notice of motion shall not be given to the alleged incompetent, where the judge before whom the application comes is of opinion, as was the case here, that personal service would be harmful to the party involved. It was suggested that "impracticable" was confined to something that could not be put to use or practically dealt with but one definition of "practicable" in

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the Oxford English Dictionary and Funk and Wagnall's Standard Dictionary is "feasible". This means not only feasible in a physical sense since a thing or a proceeding may be said to be practicable from other points of view and, therefore, the opinions of the doctors as to the effect upon the appellant of the service upon him of the notice of motion and copies of the affidavits may be said to make such service impracticable.

On the second point raised by the appellant, without referring to any parts of the affidavits which under any argument presented by counsel for the appellant might be said to be hearsay, I find myself in agreement with Barlow J. and the members of the Court of Appeal, all of whom considered that the evidence submitted to the former was sufficient to "establish beyond reasonable doubt", as prescribed by section 6(1) of *The Mental Incompetency Act,* that the appellant was a mentally incompetent person. He was admitted to Homewood Sanitarium at Guelph on October 25, 1950; his wife's affidavit was sworn to December 1; that of Dr. Spence on December 2; and the affidavit of Dr. Boyer on December 6. Dr. Spence had seen the appellant on October 18 and he was one of the medical men upon whose certificate the appellant was admitted to the sanitarium. His opinion, based on the facts recited by him and his observations, was that on December 2 the appellant was unable to transact ordinary business matters or give proper consideration to the protection and conservation of his estate. Dr. Boyer examined the appellant on October 24. He pledged his oath that the appellant had at that time a manic reaction and in his opinion the appellant needed hospital and custodial care. He also gave his opinion from the facts set out by him and his observations that the appellant by reason of his mental condition was unable to transact ordinary business matters or to give proper consideration to the protection and conservation of his estate. In view of the opinions expressed by the doctors on December 2nd and 6th, respectively, and of the contents of Mrs. Wright's affidavit, sworn to December 1, the lapse of time between the last occasions upon which the doctors saw the appellant and the making of the order is not so great or so significant as to raise any doubt as to the soundness of the order.

The third main submission on behalf of the appellant was that there was no evidence, or insufficient evidence, to justify paragraphs 5, 6(*a*), (*b*), (*d*), of the report of the Master of December 14, 1950. The Master found the value of the appellant's estate to be approximately $310,000 of which the annual income was about $10,000. According to an affidavit of Mrs. Wright, she owned the house and property in which she and the appellant had resided in Forest Hill Village, and personal estate to the value of about $160,000, which produced an annual income of $6,000. The cost of maintaining herself and the property was put by her at $9,600 per annum. While there is no record of any testimony having been given at the time, it is not disputed that Mrs. Wright and her solicitor and an officer of the Trust Company attended the Master who questioned Mrs. Wright in order to satisfy himself as to the nature of the scheme which he should propound.

In paragraph 5 of the report, which is the first to be objected to, the Master states:—

> 5. I further find that in addition to his wife, the said Laura May Wright, the said Douglas Guy Hobson Wright had dependent upon him Mrs. Mima Hughes, the mother of the said Laura May Wright now in her 84th year and a chronic invalid. I further find that the outlay by the said Douglas Guy Hobson Wright in respect of the maintenance of the said Mrs. Mima Hughes and for medical and nursing attendance during the past two years has been approximately $4,500 per year.

We were informed that Mrs. Mima Hughes died shortly after the making of the report and, while there is no evidence that she was dependent upon the appellant, there is no contradiction of the statement to the effect in the Master's report. I am not prepared to disagree with the Courts below and set aside paragraph 5 although under other circumstances a serious view should be taken of the fact that no sworn testimony was given relating to the matter.

Paragraph 8(*a*) directed that there be paid to the appellant's wife for her own support and maintenance the annual sum of $10,000. In the opinion of Barlow J. and of the Court of Appeal, this was justified by Mrs. Wright's affidavit. Paragraph 8(*b*) is the one providing for payment of the annual sum of $4,500 for the support, nursing and medical attendance of Mrs. Hughes. After reporting in

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paragraph (*c*) that the present arrangement for the appellant's care appeared to be satisfactory, the Master recommended that the committee of the estate be authorized to provide for the appellant's continued maintenance at the Homewood Sanitarium at the rate of $70 per week, together with any medical or nursing expenses that might be necessary, and to supply any clothes or comforts that the appellant might properly require. Provision was made that if the rate of maintenance be increased, the committee be authorized to pay the same with the approval of the Master. Then came paragraph 8(*d*) in which, after stating that the income from the estate would not be sufficient to cover the cost of the appellant's maintenance and the other allowances, it was recommended that the committee be authorized to encroach upon the corpus of the estate and for this purpose, with the Master's approval, to sell any of the assets.

The appellant and his wife have no children and the wife apparently considered it not improvident that part of the corpus should be used for the purposes mentioned. There is no rule that this may not be done and in fact in many cases it is impossible to provide for the proper maintenance of a mentally incompetent person without doing so. If it is found that that is not going to be satisfactory, the matter may always be brought before the Master again.

The appeal should be dismissed. No order should be made as to costs except that the costs of the wife and the Trust Company be paid by the committee forthwith after taxation thereof out of the assets of the appellant's estate which may be in the hands of the committee.

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

KELLOCK J.:—This is an appeal by special leave of this court from an order of the Court of Appeal for Ontario, dismissing an appeal from an order of Barlow J. of December 8, 1950, declaring the appellant a mentally incompetent person and directing a reference to the Master to appoint a committee of his person and estate, and propound a scheme for his maintenance and the management

of his estate. The appeal is also from the subsequent order of Barlow J. of December 22, 1950, which affirmed the Master's report.

In his original order, the learned judge had directed that service upon the appellant of the notice of the motion should be dispensed with. This order was made upon the basis of affidavits of two medical witnesses to the effect that personal service upon the appellant would be harmful to him in view of his condition of health. With respect to the order of December 8, the appeal is based upon the contention that the learned judge had no jurisdiction to dispense with service, and in any event, that the evidence did not justify any declaration of mental incompetency.

With respect to the first ground, it is contended that whatever may have been the situation prior to 1909, when the statute 9 Ed. VII c. 37 was passed, that statute, in providing by s. 36(1) that *The Judicature Act* and rules made thereunder should apply to proceedings under the Act except where inconsistent with the statute itself, had the effect thereafter of requiring either personal or substituted service of such notices of motion. In my opinion, this contention is not well founded.

Jurisdiction with respect to declarations of lunacy was, in England, until a comparatively late date, exercised by the Lord Chancellor as delegate of the Sovereign, and not by the Court of Chancery. When, however, the Court of Chancery was set up in Upper Canada in 1837 by 7 Wm. IV c. 2, the court was given "like power and authority as by the laws of England are possessed by the Court of Chancery in England" in all matters relating to idiots and lunatics and their estates, except where special provision had been or might be made with respect thereto by any law of the province.

Doubts subsequently arose as to the jurisdiction thus conferred, and in 1846 the statute, 9 Vict. c. 10, was enacted to remove these doubts and to extend the law. The statute recites that "by the laws of England, the custody, care and management of lunatics, idiots and persons of unsound mind and their property and estates does not of right belong to or form part of the jurisdiction of Chancery, but the same

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is conferred upon the Lord Chancellor or some other person or persons under and by the commission of the Crown, under the sign manual." It is therefore enacted

> that it was intended that the said Court of Chancery should have the like jurisdiction as given to the Lord Chancellor in England.

and that from and after the passing of the Act, the said court shall

> with a like power and authority as exercised by the Lord Chancellor in England, or such other person or persons which may be entrusted as aforesaid, have the care and custody of all lunatics, idiots and persons of unsound mind in that part of the province, formerly Upper Canada, and of their real and personal estates so that the same shall not be wasted or destroyed; and shall provide for their safe keeping and maintenance and for the maintenance of their families and education of their children out of their personal estates and real estates respectively.

This jurisdiction of the Lord Chancellor thus bestowed upon the court was "in its nature" an *ex parte* jurisdiction; *Re Braithwaite* (1), and was exercised under a commission granted by the Lord Chancellor and directed to certain persons to inquire, with the aid of a jury, into the alleged unsoundness of mind, the inquisition thereupon being returned into the Court of Chancery with the appropriate finding. Notice of the execution of the commission was not given to the alleged lunatic unless a caveat had been entered by him or unless an order were obtained on application to the court directing that reasonable notice be given to the alleged lunatic; *Shelford* p. 101; *K.* v. *Daly* (2). If lunacy were found, the person so declared had the right by petition to traverse the inquisition, and thereupon the court might direct a new trial which, in Upper Canada, took place before a judge of the Court of Chancery with the aid of a jury "according to the circumstances of the case and the situation of the parties."

In 1857 and again in 1865, alternative modes of proceeding to that by way of inquisition under a commission, were provided. In 1857, by 20 Vict. c. 56, it was provided by s. 5 that the court might, on sufficient evidence, declare a person lunatic without the delay or expense of issuing a commission, "except in cases of reasonable doubt," and any person who, before the Act, had the right to traverse an inquisition might move against such order or appeal therefrom, as the case might require, subject to the same

(1) 47 E.R. 1104. (2) (1749) 1 Ves. 268.

rules as to time to which the right to traverse was subject. The statute of 1865, 28 Vict. c. 17, provided that where a commission of lunacy would have theretofore been necessary or proper, the court in lieu thereof, with or without a jury, might hear evidence and inquire into and determine the alleged lunacy. In such case the alleged lunatic had the right to demand that the inquiry be submitted to a jury, or the court might order that the inquiry be had before any court of record. Section 6 provided that in any such case, no traverse should be allowed, but the court, if dissatisfied with the finding of a jury, might, at the instance of any party who would be entitled to traverse an inquisition under a commission, direct a new trial upon application therefor made to the court within three months of the verdict. These alternative proceedings were continued side by side down to the passing of the statute of 1909 when the procedure by inquisition under a commission was dropped.

While this was the jurisdiction of the Court of Chancery and its successor, the Supreme Court of Ontario, nevertheless, at a comparatively early date, the court in ordinary cases would direct notice of the application to be given to the alleged lunatic, but the jurisdiction to dispense with notice in appropriate cases remained and was, from time to time, exercised as occasion required.

In *Re Patton* (1), Spragge V. C., in giving directions on an application pending before him, said that

> I should incline also to require that the alleged lunatic be notified.

When it subsequently appeared that the officials at the asylum where the alleged lunatic was confined would not allow him to be served with the petition, as he was suicidal and to permit it might prove dangerous to him, Vankoughnet C. made the declaration without service. An example of the normal practice of requiring notice to be given to the alleged lunatic is to be found in the decision of Spragge V. C. in *In Re Miller* (2). Britton J. in *Re Morrison* (3), was not laying down any new practice in what he there said. Illustrations also of the exercise of the jurisdiction to dispense with service are to be found

(1) (1868) 1 Ch. Ch. 192. (2) (1868) 1 Ch. Ch. 215.
(3) (1919) 15 O.W.N. 338.

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in *In Re Main* (1); In *Re Newman* (2), and *Re Webb* (3), the last mentioned case being a decision of Mabee J. in 1906.

The jurisdiction conferred by 9 Vict. c. 10 was continued down through the various revisions of the statutes and no change in this jurisdiction was made or intended by the statute of 1909, which in s. 3 reads as follows:

> Subject to the provisions of *The Act respecting Lunatic Asylums and the custody of Insane Persons*, the Court shall have all the powers, jurisdiction and authority of His Majesty over and in relation to the persons and estates of lunatics, including the care and the commitment of the custody of lunatics and of their persons and estate.

While by s. 36, the rules under *The Judicature Act* are to apply in lunacy proceedings, they are to apply "except where inconsistent with the provisions of this Act." The jurisdiction conferred upon the Court by s. 3 to make *ex parte* orders, renders application of the ordinary rules requiring service quite inconsistent therewith.

In my opinion, the provision made by s. 36 with respect to the rules did not change the situation previously existing, as the Consolidated Rules of 1897 were already applicable to all proceedings in the Court by reason of s. 122 of *The Judicature Act*, R.S.O. 1897 c. 51. The same had also been true of the earlier rules. It is the fact that Rule 334 of the 1897 rules contained a provision enabling service to be dispensed with in cases to which it applied, and this rule goes back to Order 34, s. 5, of the Chancery Orders of 1853. However, both *In Re Patton* and *Re Newman* appear to have been proceedings under the amendment of 1857 (*Re Newman* is expressly so) and not proceedings by way of inquisition upon commission, and in neither does it appear that the jurisdiction to dispense with service was based upon the rule. On the contrary, the order in *Newman's* case was expressly placed upon the basis of the jurisdiction of the Lord Chancellor as set forth in Shelford on Lunacy.

Rule 334 was not continued in the revision of the rules in 1913, and until 1921 the rules did not contain any provision authorizing service of any notice of motion to be dispensed with. In *Re McNab* (4), a decision of Masten J.,

(1) (1869) 2 Ch. Ch. 429.
(2) 2 Ch. Ch. 390.
(3) (1906) 12 O.L.R. 194.
(4) (1921) 20 O.W.N. 398.

as he then was, there were affidavits of two medical men to the effect that it would be dangerous to serve notice of the application upon the alleged incompetent, one of the affidavits stating that service upon a Mrs. Austin, who was in charge of the private sanatarium where the alleged incompetent was being cared for, would accomplish more than could be effected by personal service. Examination of the file does not disclose any evidence of service, and there appears to have been no order for substituted service. The formal order recites only the affidavits already referred to and the affidavit of the medical superintendent of the sanitarium, which the report shows the learned judge required before his order was to go, and while it contains no express provision dispensing with service, it appears to have been made without notice to the incompetent, in the same way as that made in *Patton's* case. The declaration made by the order was under s. 36 of the Act of 1914, and was not a declaration of lunacy. An order in such a case without notice could only have been properly made by analogy to the jurisdiction with respect to the making of a declaration of lunacy. Masten J. was a very eminent and a very careful judge, and in my opinion, would not have made such an order except on the basis of the jurisdiction which I have discussed.

When the statute of 1909 was passed, a number of the provisions of the British Lunacy Act of 1890, 53 Vict. c. 5, were incorporated into the Ontario statute. The significant thing, however, is that while the English statute, by sub-s. 2 of s. 90, requires notice of the application to be given to the alleged lunatic if within the jurisdiction, this provision was not incorporated in the Ontario statute, although s. 3 sub-s. 2 of the latter, which authorizes the making of declarations, is taken from s. 108 sub-s. 2 of the English Act. At the same time, sub-s. 1 of s. 3 of the Ontario statute continues the former jurisdiction. In my opinion, had it been the intention of the provincial legislature in 1909, with the English statute before it, to affect the existing jurisdiction to make declarations of lunacy without notice, such an important change would have been effected by some express provision, such as had been enacted in Eng-

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land, rather than by leaving the matter to implication, if such an inference could be found in the general frame of the statute as, in my respectful opinion, it cannot be.

There is a further consideration. The Judicial Committee in *Re McLaughlin* (1), per Lord Davey, said:

> "It" (i.e. the jurisdiction in lunacy) "exists for the benefit of the lunatic, and the guiding principle of the whole jurisdiction is what is most for the benefit of the unhappy subject of the application."

Although the legislation in question in that case was not the same as in the case at bar, the above was said in connection with the very subject matter here under discussion, namely, the question as to service of notice upon the alleged lunatic of an application for a declaration of lunacy.

The guiding principle being as stated, it would surely require very clear statutory direction to take from the court the discretion conferred upon it in 1846 and to render obligatory in every case that notice be served upon an allegedly mentally incompetent person, notwithstanding that in the opinion of professional witnesses, to do so would be inimical to the interests of "the unhappy subject of the application." Yet this is the substance of the argument put forward on behalf of the appellant.

It is argued for the appellant that, in any event, the evidence upon which Barlow J. proceeded in dispensing with service was insufficient. It is, of course, beyond question that in making orders of this kind, the court ought to require very clear evidence that the normal course should not be followed. In the case at bar, however, the evidence was sufficient, both in the view of the learned judge of first instance and the Court of Appeal, and in these circumstances I do not think a case has been made out for interfering with the order on that ground.

It is next contended on behalf of the appellant that the evidence was not sufficient to establish the mental incompetency of the appellant beyond a reasonable doubt at the date of the order in question, or at any date subsequent to the month of October 1950. It is clear, however, upon the material, that the appellant was suffering from a mania of a nature which had not developed over-night nor would

(1) [1905] A.C. 343 at 347.

pass over-night. His condition toward the end of October had become such that he required custodial care for himself, and he was confined in a private sanitarium upon the certificates of two medical men pursuant to the *Private Sanitaria Act,* R.S.O. 1950 c. 290. He was also quite incapable of caring for his property, having in fact physically destroyed part of it in quite a violent way. Such a condition is not one of a mere passing nature. There can, I think, be taken from the affidavit of the wife, the fact, at least, that the condition had been of some standing or had been developing for some time. In fact, the appellant remained in the institution until March 10, 1951, when we were advised by his counsel he was then released, which release, as appears from the order of the Master of the 13th of March, 1951, was made pursuant to the provisions of s. 54 of the *Private Sanitaria Act,* which provides that if the superintendent of the sanitarium considers it conducive to the recovery of a patient that he should be entrusted for a time to the care of friends, that official may allow such patient to return on trial to his friends upon receiving an undertaking in writing by one or more of them that an oversight will be kept over him. The appellant was in this instance released into the care of a brother. Counsel for the committee applied, under the provisions of the second paragraph of s. 68 of the Supreme Court Act, to place the order of the Master in evidence, and in my opinion, it should be admitted. In the circumstances thus disclosed, in view of the concurrent findings below, I think that any lacuna, if there be one, in the material is sufficiently filled in. In my opinion, therefore, the appeal fails with respect to the order of December 8, 1950.

It is further contended on behalf of the appellant that there was no evidence, or, in any event, insufficient evidence to justify the findings of the Master that the mother-in-law of the appellant, since deceased, was a dependent of his, or to justify the annual payments for her maintenance and for that of the wife of the appellant of $4,500 and $10,000 respectively, in addition to the outlay for the care and maintenance of the appellant himself, resulting in substantial encroachment upon the corpus of the estate. The only evidence before the Master upon which these directions were based showed that the appellant's estate was worth

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some $310,000 producing an annual income of approximately $10,000, while the wife herself has a personal estate of some $160,000 from which she derives an annual income of $6,000. The latter's affidavit states that the annual cost of maintaining herself and the city residence of the appellant and herself will be approximately $9,600. We were told that additional oral statements of fact were made to the Master in connection with the matters before him, but that the witnesses were unsworn. These statements were not in a form to which the Master was entitled to have regard, and on the basis of the only evidence which the Master had before him, I think that these allowances were excessive, and that the matter should be remitted to him for reconsideration.

I would therefore allow the appeal with respect to paragraphs 5 and 8 (*a*), (*b*) and (*d*) of the order of the Master of the 14th of December, 1950, and so much of the order of Barlow J. of the 22nd of December 1950 and the order of the Court of Appeal as relates to the said paragraphs, and direct that the matters covered by the said paragraphs be remitted to the Master for further consideration. The costs of all parties here and below should be taxed and be paid out of the estate in the hands of the committee.

CARTWRIGHT J. (dissenting in part):—This is an appeal, pursuant to leave granted by this court on the 10th of May, 1951, from an order of the Court of Appeal for Ontario pronounced on the 6th of April, 1951, dismissing the appeal of Douglas Guy Hobson Wright from two orders of Barlow J. made on the 8th and 22nd days of December, 1950, respectively, the first declaring the appellant a mentally incompetent person and directing the usual reference to the Master and the second confirming the Master's report.

Both orders are attacked on several grounds. In the view which I take of the matter it is necessary to consider only the first order as I have reached the conclusion that it cannot stand and the second order falls with it.

The first objection advanced against this order is that it was made without service upon the appellant of notice of the application, and that consequently the proceedings were *coram non judice* and void.

We were assisted by counsel by a full and able argument in which the history of proceedings in lunacy in England and in this country was explored but I do not find it necessary to go at length into the historical aspect of the matter. The reasons of my brother Kellock, which I have had the advantage of reading, satisfy me that following the enactment of Chapter 10 of the Statutes of Canada, 1846, 9 Victoria, the Court of Chancery exercised the like jurisdiction in regard to persons of unsound mind as was conferred upon the Lord Chancellor in England by a Commission from the Crown under the Sign Manual which at that time included a jurisdiction to proceed *ex parte*.

That such jurisdiction was exercised with great caution appears from many reported cases. In Shelford on Lunacy (1833) the matter is dealt with as follows at page 60:—

> The English constitution has with much care provided protection for persons who are represented to be of unsound mind; and has been extremely cautious to prevent the power of the Crown, or of individuals, to interfere with such persons, from being assumed in any case where it is not required for the safety of the public and of individuals; because it is difficult to exert such power without depriving the subject of that liberty, and power of dealing with his property, which ought to be unrestricted, unless the necessity for restraint be clearly proved.
>
> It has, in the first place, made it necessary, before a commission of lunacy is issued, that a petition should be presented to the person who is delegated to exercise this authority of the Crown, and imposed on such person the duty of considering whether there is ground for an inquiry or not. It does not allow that individual to declare, that the person is of unsound mind; it calls on him to look through the case which is brought before him, to decide whether or not there is ground for further inquiry; if he finds that there is, the matter then goes to a jury of the country. Lord Chancellor Eldon laid it down as unquestionable, that the Crown has not, in England, the power of taking upon itself the care of any individuals, either as to their persons or their property, on the ground that they are of unsound mind, without the verdict of a jury.

It appears that the supposed lunatic had a right to be present at the execution of the commission. The law is so stated in Shelford at page 100 and, in *ex parte* Cranmer (1), The Lord Chancellor, Lord Erskine, in directing the issue of a commission said:—

> The party certainly must be present at the execution of the Commission. It is his privilege.

(1) (1806) 12 Ves. Jr. 446 at 455.

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Notwithstanding the existence of the safeguards mentioned above and of the right of traverse, Shelford, in a foot note at page 101, expressed himself as follows:—

> It is a subject of surprise, that such a rule as this should still prevail in matters of lunacy, and that a commission should be granted without requiring any notice to be given either to the party to be affected by it, or to some of his relations which are not concerned in the application; and that it is practicable for a comparatively secret tribunal to sit in judgment upon the actions and state of mind of a party, without his having an opportunity of preparing for his own vindication, and defending himself against the imputation of insanity. Notwithstanding the right to traverse, it is submitted, with great deference, that it would be proper to make a general order of Court, requiring reasonable notice in all cases to be given to the party, or to some of his relations or friends who are not concerned in the application, of the intention to apply for a commission of lunacy against him. Such notice, if the party possessed any reason, would enable him to oppose the application in the first instance, and would be no obstacle against the issuing of a commission in cases of absolute necessity.

In 1853 by Chapter 70 of the Statutes of the United Kingdom, 16 and 17 Victoria, section 40, it was provided, in part:—"Where the alleged lunatic is within the jurisdiction he shall have notice of the presentation of the petition for Inquiry." In such case the alleged lunatic had the right to demand an inquiry before a jury. Section 45 of the same Act provided:—

> Where the alleged Lunatic is not within the Jurisdiction the Inquiry shall be before a Jury, and no further or other Notice shall be necessary to be given to him than he would have been entitled to receive if this Act had not been passed.

It was conceded by counsel that in England since 1853 the alleged lunatic has been entitled to notice if within the jurisdiction.

There appear to be comparatively few reported cases in Ontario in which the power of the court to dispense with service on the alleged lunatic and the circumstances under which such power should be exercised are discussed. Counsel referred us to the following:—*Re Miller* (1), *Re Patton* (2), *Re Newman* (3), *Re Mein* (4), *Re Webb* (5), *Re Morrison* (6).

(1) (1868) 1 Ch. Ch. 214.
(2) 1 Ch. Ch. 192.
(3) 2 Ch. Ch. 390.
(4) (1869) 2 Ch. Ch. 429.
(5) (1906) 12 O.L.R. 194.
(6) (1919) 15 O.W.N. 338.

Re Miller was a decision of Spragge V. C. on an application to declare a person a lunatic. The judgment reads as follows:—

> The affidavits are very strong, and leave no reasonable doubt as to the alleged lunatic being of unsound mind; but he ought to have notice, and any persons, counsel or others, whom he may desire to see in reference to this application must have free access to him.

Re Patton was a motion to declare a person a lunatic made before Spragge V. C. who declined to make an order without personal service and adjourned the application taking the view that the material before him was insufficient. The application was renewed before Vankoughnet C. supported by an additional affidavit of another medical man and by evidence that the officers at the asylum would not allow service as the lunatic was suicidal and it might be dangerous to serve him. The Chancellor made the order without service on the alleged lunatic.

Re Newman and *Re Mein* were decisions of the Secretary following *Re Patton*. The respective headnotes accurately summarize the decisions and are as follows:—

> *Re Newman*—On an application to declare a person a lunatic without commission, an affidavit by an officer of a lunatic asylum that the alleged lunatic is in such a state of mind as that service on him would be dangerous and prejudicial to him, will not be held sufficient to dispense with personal service on him.
>
> Where, however, such affidavit was corroborated by others, and it was evident the party was a dangerous lunatic, personal service on him was dispensed with.
>
> In *re Mein*—Notice of a motion to declare a person a lunatic and to apply the estate of an alleged lunatic to his maintenance, &c., in a lunatic asylum, should be served on the lunatic personally, if it is practicable to do so, without danger to his health or state of mind. Where, therefore, a notice of such a motion had not been served on the ground that doing so would be useless in consequence of the state of the alleged lunatic; the Secretary directed that some medical man, other than the physician of the asylum, should visit the asylum and give evidence as to the state of the lunatic, and whether service could be effected on him.

In *Re Webb,* Mabee J. followed *Re Newman* and *Re Mein* and made an order dispensing with personal service on the alleged lunatic, but confirming an order for service on the Superintendent of the Asylum, on evidence that service "might dangerously excite the patient."

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It will be observed that all these cases were decided prior to 1909. Counsel for the appellant argues that since the enactment, in that year, of Chapter 37 of the Statutes of Ontario, 9 Edward VII, the power to dispense with service, if it existed theretofore, has ceased to exist. It is pointed out that with the passing of this Act the practice of Inquisition by Commission (which had continued up to that time, appearing last in R.S.O. 1897, Cap. 65) disappeared and that thereafter with immaterial verbal changes the practice by which a person may be declared a lunatic has been that now prescribed in *The Mental Incompetency Act*, R.S.O. 1950, c. 230 and particularly sections 5, 6, 7, 8 and 35 thereof.

Section 5 is as follows:—

5(1) The court upon application supported by evidence may by order declare a person a mentally incompetent person if the court is satisfied that the evidence establishes beyond reasonable doubt that he is a mentally incompetent person.

(2) The application may be made by the Attorney-General, by any one or more of the next of kin of the alleged mentally incompetent person, by his or her wife or husband, by a creditor, or by any other person.

(3) The alleged mentally incompetent person and any person aggrieved or affected by the order shall have the right to appeal therefrom.

(4) The practices and procedure on the appeal shall be the same as on an appeal from an order made by a judge of the court.

Section 6 provides that "where in the opinion of the Court the evidence does not establish beyond reasonable doubt the alleged mental incompetency" the Court may direct an issue and deals with the method of trial.

Section 7 reads as follows:—

7. An alleged mentally incompetent person shall be entitled to demand, by notice in writing to be given to the person applying for the declaration of his mental incompetency and also to be filed in the office of the Registrar of the Supreme Court, Toronto, at least ten days before the first day of the sittings at which the issue is directed to be tried, that any issue directed to determine the question of his mental incompetency shall be tried with a jury, and, unless he withdraws the demand before the trial, or the court is satisfied by personal examination of the mentally incompetent person that he is not mentally competent to form and express a wish for a trial by jury and so declares by order, the issue shall be tried by a jury.

Section 35 reads as follows:—

35. Subject to the approval of the Lieutenant-Governor in Council, the Rules Committee may make rules for carrying this Act into effect and for regulating the costs in relation thereto, and except where inconsistent with this Act or such rules, *The Judicature Act* and rules made thereunder shall apply to proceedings under this Act.

In my view, since the enactment of 9 Edward VII, c. 37, power to dispense with service, if it exists, must be found in *The Mental Incompetency Act,* in *The Judicature Act,* or in the rules made under one of such Acts. I can find no express provision in either Act which, in my opinion, permits an order of mental incompetency to be made without service of notice on the person whose status and property are to be affected. An examination of all the rules to which reference was made by counsel brings me to the conclusion that service of notice in such a case is imperatively required.

Reference may first be made to Rule 2(*m*) and Rule 11(1):—

2(*m*) In Rules 12 to 31 the words "Writ of Summons" and "Writ" shall include any document by which proceedings are commenced, and shall also include all proceedings by which a person not a party is added as a party either before or after judgment, e.g., proceedings in the Master's office and garnishee and third party proceedings.

11(1) When by any statute a summary application without the institution of any action may be made to the Court or a Judge in a manner therein provided, such application may also be made by originating notice but any security required by such statute shall be given.

There can be no doubt that the notice of motion to declare a person mentally incompetent is "a document by which proceedings are commenced" and, therefore, is included in the words "Writ of Summons" or "Writ" wherever such words appear in Rules 12 to 31.

Rule 16 is imperative in its terms. It requires the notice to be served personally in the absence of an acceptance of service by a solicitor who undertakes to appear. It permits substituted service in a proper case, but in the case at bar no order for substituted service was asked for or made, and I do not pursue the question whether such an order could properly have been made. It is necessary to consider the effect of the opening words of Rule 16 "Save as hereinafter provided." I can find no provision in any following rule which is apt to authorize the court to dispense with

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service on a person whom it is sought to have declared mentally incompetent, although a number of rules in certain circumstances vary the provisions of Rule 16. Examples are Rules 18, 21, 23, 24 and 101.

Rules 21 and 22 require consideration. They read as follows:—

> 21. Where a mentally incompetent person or person of unsound mind not so found by inquisition or judicial declaration, is a defendant, service on the committee of the mentally incompetent person or on the person with whom the defendant of unsound mind resides, or under whose care he is, shall, unless otherwise ordered, be deemed good service.
>
> 22. After service of the writ no further proceedings shall be taken against a defendant who is a mentally incompetent person and has no committee, or no committee except the Public Trustee, or against a defendant of unsound mind not so found, until a guardian *ad litem* is appointed.

It is argued for the appellant that the definition section of *The Judicature Act* should be resorted to in interpreting the word "defendant" in these rules. "Defendant" is defined by section 1(*g*) of *The Judicature Act* as follows—

> 1. In this Act * * *
>
> (*g*) "defendant" includes a person served with a writ of summons or process, or served with notice of, or entitled to attend a proceeding;

The Interpretation Act, R.S.O. 1950, c. 185, provides by section 32 that "the interpretation section of the Judicature Act shall extend to all acts relating to legal matters," and by section 31(*a*) provides that "Act" shall include enactment. It may be suggested that a rule duly passed is an enactment but I am not prepared to differ from the view expressed by Orde J. A. in *Bendjy* v. *Munton* (1), at 137 that the interpretation section of *The Judicature Act* is not by implication to be extended to the Rules of Practice. But even if it be held that Rules 21 and 22 are applicable only to actions brought against a person mentally incompetent whether so found or not, I think that by virtue of the concluding words of Rule 1:—"As to all matters not provided for in these Rules, the practice shall be regulated by analogy thereto" they furnish a strong indication that the rules do not contemplate that a person alleged to be of unsound mind shall be judicially so found, without notice

(1) [1932] O.R. 123.

to anyone on his behalf and without the Court having the assistance of someone in a position to oppose the application.

It was urged on behalf of the respondent that Rule 213 gives the court jurisdiction to dispense with notice in such a case as the one at bar. This rule reads as follows:—

213. Any application in an action or proceeding shall be made by motion, and unless the nature of the application or the circumstances of the case render it impracticable notice of the motion shall be given to all parties affected by the order sought.

In my view the words "application in an action or proceeding" are more apt to describe interlocutory proceedings than the commencement of a proceeding. The service of originating notices is specially dealt with in Rules 16, 215 (2), 601 and 602. The history of the precursors of Rule 213 does not, in my opinion, support the view that such rule was intended to permit the Court to deal, on originating notice, with matters affecting the rights of a party in a position analogous to that of a defendant in a manner as sweeping as would be possible in any action, without any notice to such party. I have particularly in mind the fact that from 1913 to 1928 the words "unless the nature of the application or the circumstances of the case render it impracticable" did not appear in Rule 213 and that from 1897 to 1913 the provision corresponding to such words was Rule 357, reading as follows:—

357. If satisfied that the delay caused by proceeding by notice of motion might entail serious mischief, the Court or a Judge may make any order *ex parte,* upon such terms as may seem just.

This rule replaced Rule 527 of the Consolidated Rules of 1888 which was substantially the same.

If it can be said that the words of Rule 213 are sufficiently general to appear to include all motions, the fact remains that the service of originating notices is specifically dealt with by Rule 16, which, as I have indicated, imperatively requires service thereof, either personal or substituted, and the general words of Rule 213 would yield to this special provision. *Generalia specialibus non derogant.*

It remains to be considered whether there is anything in the *Mental Incompetency Act* which by necessary implication shews that it was contemplated that proceedings to

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declare a person mentally incompetent could be taken *ex parte*. The scheme of all the relevant sections of the *Mental Incompetency Act* seems to me to contemplate that the alleged mentally incompetent person shall have the right to resist the application brought to so declare him. Such a right is implicit in the express statutory right given to such person to demand trial by jury (section 7) and to appeal (section 5(3)). It appears to me to be unthinkable that the legislature would expressly give the alleged mentally incompetent such rights unless it contemplated that he, or some one on his behalf, should have notice of the proceedings. These rights are not given conditionally upon his hearing by chance that the proceedings are afoot. They would be illusory indeed if the whole proceedings could be carried on in secret so far as the alleged mentally incompetent was concerned. If the matter appeared to me to be doubtful I would resolve the doubt in favour of requiring that notice be given to a person of proceedings the result of which may be to alter his status, to deprive him of liberty of action and to remove all his property from his control. To establish an exception to the elementary rule *"audi alteram partem"*, clear and unambiguous authority is required and I can find none. As is said in Broom's Legal Maxims, 10th Edition, at page 67:—

> "The laws of God and man," said Fortescue J., in *Dr. Bentley's Case*, "both gave the party an opportunity to make his defence, if he has any." And immemorial custom cannot avail in contravention of this principle.

In the only reported case since 1909 to which we were referred by counsel, *Re Morrison* (1), the note reads, in part, as follows:—

> Britton J. in a written judgment, said that an application to have a man declared a lunatic or incompetent to manage his business should at least be upon notice to the supposed incompetent of intention to make the application. Service of this notice should be proved.

To permit a person's rights to be dealt with in a judicial proceeding unless he has had an opportunity of being heard is contrary to the fundamental principles of the law, and appears to me particularly undesirable in a case such as this in which, if the order in appeal is upheld, the appellant who has been deprived, unheard, of his status and property is left without remedy except such as is afforded

(1) (1919) 15 O.W.N. 338.

by section 9 of *The Mental Incompetency Act*. Except by leave of the Court he can not even be heard until a year has expired from the date of the order declaring him incompetent and, when he does obtain a hearing, instead of it lying upon those who question his competency to prove their case beyond a reasonable doubt he must assume the burden of satisfying the court that he has become mentally competent and capable of managing his own affairs. I find this prospect particularly disquieting in the case at bar where the appellant has no control over any of his own property and, for reasons which do not appear in its oral judgment, the Court of Appeal has not permitted recourse to be had to such property for the purpose of paying the appellant's costs of taking the appeal which the Statute expressly authorized. The way of a suitor is not easy when all his assets are in the hands of those who oppose his suit.

I have reached the conclusion that Barlow J. had no jurisdiction to entertain the motion without service of notice upon the appellant or properly authorized substituted service and that the order of December 8, 1950, must be set aside.

If I had found that the court had jurisdiction to dispense with service of notice of the proceedings I would, with the greatest respect, have been of opinion that the material before Barlow J. was insufficient to warrant the making of either an order dispensing with service or an order of mental incompetency. The learned Judge had before him three affidavits. The affidavit of the applicant was sworn on December 1, 1950. It does not deal with the question of service nor does it indicate that she had seen the appellant since the month of October when she describes the conduct on his part which is described in the affidavit of Dr. Spence. In considering the affidavits of Dr. Spence and Dr. Boyer it is necessary to bear in mind the provisions of Rule 293:—

> 293. Affidavits shall be confined to the statement of facts within the knowledge of the deponent, but on interlocutory motions statements as to his belief, with the grounds therefor, may be admitted.

The affidavit of Dr. Spence offends against this rule. In paragraph 2 he speaks of the appellant having "a history of having had one depression during my absence with the

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Canadian forces overseas." Even on an interlocutory application such a statement would be inadmissable unless the source of the deponent's information was given. Paragraph 4 of the affidavit is hearsay. In it Dr. Spence deposes to information given to him by one of the doctors at the Sanitarium where the appellant was a patient. When those parts of the affidavit which are inadmissible are disregarded what remains is a statement that the deponent examined the appellant on the 18th of October, 1950, and then found him disturbed mentally and under delusions as to the proximity of the North Koreans and "that everything about him was atomic sensitive and had to be de-ionized which was accomplished by hitting the objects with an old cavalry sword" and that he was acting in a violent manner and had done much damage to the contents of the dwelling house. There is nothing in the affidavit to indicate with any certainty that the deponent saw the appellant on any occasion subsequent to the 18th of October. His affidavit was sworn on the 2nd of December, 1950.

The affidavit of Dr. Boyer was sworn on the 6th of December, 1950. He tells of having examined the appellant on the 24th of October, 1950. He states that the appellant "was friendly but arbitrary and undoubtly psychotic," that he "was quite delusional but that there was no constancy in any delusion except the effect of electrical influences". He expresses the opinion that the appellant "has a manic reaction, the cause of which is not apparent" and "that he needs hospital and custodial care." There is nothing in the affidavit to indicate that the deponent saw the appellant on any date other than the 24th of October, 1950.

Both doctors state in their affidavits that in their respective opinions the appellant "is by reason of his mental condition unable to transact ordinary business matters or to give proper consideration to the protection and conservation of his estate" and that "it would be inadvisable to serve on the said Douglas Guy Hobson Wright the notice of motion for the appointment of Committees of his person and estate and supporting affidavit. To do so would in all probability exaggerate his disturbed mental condition and be harmful to him."

It is to be observed that neither doctor expresses the opinion that service of the papers would be attended with danger to the appellant or that he lacked the mental capacity to understand the nature of the proposed proceedings and to determine whether or not he wished to instruct counsel to oppose them. If one contrasts this material with that which was before the court in the cases of *Re Patton*, *Re Newman* and *Re Mein* (*supra*) it at once becomes apparent how far it falls short of what was required in those cases.

There are other matters as to which it was, I think, necessary for the court to have information which are not dealt with in the affidavits at all. The physical health of the appellant is not referred to. The cause of the alleged mental trouble is not given. Nothing is said in the way of prognosis. The court is left without information as to whether the recovery of the alleged incompetent is probable or otherwise and if probable, within what interval of time it is likely to occur. Nothing is said as to the ability or otherwise of the appellant to understand the nature of the proposed proceedings or to instruct counsel. The lack of any admissible evidence as to the condition of the appellant at any time subsequent to the 24th of October, 1950, was in itself, in my opinion, a sufficient reason for refusing to make any order.

It is scarcely necessary to say that if an application of this sort is to be allowed to be made *ex parte* it is the duty of the court to be extremely cautious to protect the person whose status and property are being dealt with without his knowledge and without his having any opportunity to make answer. Even if the statute did not, as it does, expressly require as a condition of making an order that the court be satisfied that the evidence established beyond a reasonable doubt the fact of mental incompetency, I would have regarded the evidence as falling far short of the minimum necessary to justify the making of an order.

In view of the conclusion which I have reached as to the order of December 8th it becomes unnecessary for me to deal with the order of December 22nd which would fall with the earlier order, but as I understand that I have the misfortune to differ from the other members of the court

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as to the order of December 8th, I desire to add that if I had been of opinion that such last-mentioned order should stand I would have agreed with my brother Kellock for the reasons given by him, that paragraphs 5 and 8 (*a*), (*b*) and (*d*) of the report of the Master of December 14, 1950, and so much of the order of Barlow J. of the 22nd of December, 1950, and of the order of the Court of Appeal, as relates to such paragraphs, should be set aside and that the matters covered by the said paragraphs should be remitted to the Master for further consideration and I would have agreed with the order as to costs proposed by my brother Kellock.

For all the above reasons I would allow the appeal and set aside the order of the Court of Appeal and the orders of Barlow J. of December 8, 1950 and December 22, 1950, *in toto*. As the other members of the Court are of a different opinion nothing would be gained by my discussing the question as to the order which should be made as to costs in the unusual circumstances of this case.

Appeal from the judgment of the Court of Appeal in so far as it dismissed the appeal from the order of Barlow J. of Dec. 8, 1950, dismissed; in so far as it dismissed the appeal from the order of Barlow J. of Dec. 22, 1950, allowed.

Solicitors for the appellant: *Duncan & Bicknell.*

Solicitors for the respondent, Laura May Wright: *MacDonald & MacIntosh.*

Solicitors for the respondent, Guaranty Trust Company of Canada: *Mungovan & Mungovan.*

PICBELL LIMITED .....APPELLANT;

AND

PICKFORD & BLACK, LIMITED.....RESPONDENT.

1951

*Feb. 28
*Mar. 1
*June 20

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO.

Contracts, prohibited—Charter-Party—Order-in-Council requiring Shipping Board's approval as condition precedent ignored—Whether expiry of Order validated contract.

Section 9 of Order-in-Council P.C. 6785 of July 31, 1942, provided that all parties proposing to charter any vessel exceeding 150 tons gross register, other than a fishing vessel, "shall submit in advance full particulars" for the approval of the Canadian Shipping Board and that "no such charter as aforesaid shall be made without such approval". The Order-in-Council was revoked at the end of 1946. On March 30, 1946 the appellant and respondent entered into a written agreement which purported the charter by the appellant to the respondent of a 4,700 ton vessel for a period of 84 months. The respondent took delivery of the ship on April 10, 1946 and operated and paid for it until April 15, 1950, when it notified the appellant that the agreement was a nullity, having been made in contravention of Order-in-Council 6785, and that it would no longer continue to operate or be responsible for the ship. The appellant thereupon brought an action for a declaration that the agreement was a valid and subsisting one, and for specific performance.

Before this Court it put its case on the single ground that the charter party was subject to a condition precedent that the approval of the Canadian Shipping Board under Order-in-Council 6785 should be obtained and, that Order having expired at the end of 1946, that condition dropped, leaving the charter party in full force *ab initio*.

Held: that, as Order-in-Council 6785 required that the terms of such a charter party be submitted "in advance" and approved by the Board and that "no such charter party as aforesaid shall be made without such approval"; there was no authority to give a retroactive approval. Assuming that a binding contract subject to such a condition could be made, the effect of the regulation was that no performance or execution of it could take place before that approval.

APPEAL from a decision of the Supreme Court of Nova Scotia *in banco*, (1), whereby it was held that the charter by the plaintiff to the defendant purporting to be evidenced by, and made pursuant to, the paper writing set out in the Statement of Claim (para. 4), was illegal.

C. F. H. Carson K.C. and *Allan Findlay* for the appellant.

F. D. Smith K.C. and *W. H. Jost* for the respondent.

*PRESENT: The Chief Justice and Rand, Estey, Cartwright and Fauteux JJ.

(1) [1951] 2 D.L.R. 119.

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THE CHIEF JUSTICE: For the reasons stated by my brother Rand, I would dismiss the appeal with costs.

The judgment of Rand, Estey, Cartwright and Fauteux JJ. was delivered by:

RAND J.:—Mr. Carson, abandoning all other points, puts his case on the single ground that the charter party was subject to the condition precedent that approval of the Canadian Shipping Board under Order-in-Council P.C. 6785, s. 9 should be obtained; and the Order-in-Council having expired at the end of December, 1946, that condition dropped, leaving the charter party in full force *ab initio*.

The Order-in-Council required that the terms of such a charter party be submitted "in advance" and approved by the Board and that "no such charter party as aforesaid shall be made without such approval." There was no authority to give a retroactive approval. Assuming that a binding contract or charter party subject to such a condition could be made, the effect of the regulation was that no performance or execution of it could take place before that approval. Here the actual terms stipulated for the charter party to go into effect at least when possession was taken, which was on the 10th of April, 1946; and from that time until the end of the year, the charter party was *de facto* being executed. To say, then, that when, not that the condition became fulfilled, in fact, as it never was, but that the reason for it had been removed in law, the contract as an entirety was rendered effective, is to validate retroactively that portion of the performance, which, as it was being done, was in the face of an express prohibition of law. The charter party so made and so performed could not have been so validated. The conception of a suspension by a condition in such circumstances assumes that the whole performance remains prospective; the facts here negative that and exclude its application.

The question of law as put does not permit the Court to consider the possibility of a finding of the formation of a truncated charter party originating on January 1, 1947, and terminating at the end of the seven-year period. Whether the relations between the parties could be taken to be of such a distributive nature as to warrant a finding to that effect I do not therefore consider; but it was the

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fact that they were there of that nature which was the governing circumstance in *Paoli* v. *Vulcan Iron Works Limited* (1).

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for appellant: *C. B. Smith.*

Solicitor for respondent: *F. D. Smith.*

COAST CONSTRUCTION COMPANY LIMITED ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

1951

*Sept. 11
*Sept. 13

MOTION FOR LEAVE TO APPEAL UNDER SECTION 82(1) (*b*) (NEW) OF THE EXCHEQUER COURT ACT.

Appeal to judge of the Supreme Court of Canada from an order of an Exchequer Court judge made in Chambers—Jurisdiction—The Exchequer Court Act, R.S.C. 1927 c. 34, s. 82(1) (b) as enacted by S. of C. 1949, c. 5, s. 2 (2nd Sess.).

The appellant moved under section 82(1) (*b*) of the *Exchequer Court Act* for leave to appeal to the Supreme Court of Canada from an order of the President of the Exchequer Court made in chambers dismissing its application made under Exchequer Court rule 130 to examine for discovery, as an officer of the Crown, the chief engineer of the International Pacific Salmon Fisheries Commission.

Held: that, assuming a judge of the Supreme Court of Canada had jurisdiction, although the order in the Exchequer Court was made in chambers, it was clear from the fact that leave of a judge of the Supreme Court was necessary, that it was never intended that decisions of the Exchequer Court on ordinary questions of practice and procedure should be subject to revision by the Supreme Court of Canada. There was no indication that anything out of the ordinary was decided on the motion in the Exchequer Court.

MOTION by appellant before Kerwin J. in Chambers for leave to appeal to this Court under s. 82(1) (*b*) of the *Exchequer Court Act* from an Order of Thorson J., President

*PRESENT: Kerwin J. in chambers.

(1) [1950] S.C.R. 114.

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of the Exchequer Court, made in Chambers, May 15, 1951, dismissing the application of the suppliant, Coast Construction Co. Ltd., in a petition of right against His Majesty, for an order that it be at liberty to examine the chief engineer of the International Pacific Salmon Fisheries Commission, as an officer of the Crown.

George Perley-Robertson for the motion.

W. R. Jackett K.C. contra.

KERWIN J.:—Leave is sought to appeal to this Court from an order of the President of the Exchequer Court made in chambers on May 15, 1951, dismissing the application of the suppliant, Coast Construction Company Limited, in a petition of right against His Majesty for an order that it be at liberty to examine Milo Bell, Chief Engineer of the International Pacific Salmon Fisheries Commission as an officer of the Crown for the purposes of discovery. That application had been made pursuant to Rule 130 of the General Rules and Orders of the Exchequer Court which, as it stood at the time of the application, provides:—

"Any departmental or other officer of the Crown may, by order of the Court or a Judge, be examined at the instance of the party adverse to the Crown in any action for the same purpose and before the same officers or before the Court or a Judge, if so ordered."

The present application is made under subsection 1 of section 82 of the *Exchequer Court Act* which, as enacted by section 2 of chapter 5 of the Statutes of 1949 (2nd Sess.), reads as follows:—

"82(1) An appeal to the Supreme Court of Canada lies

* * *

(*b*) with leave of a judge of the Supreme Court of Canada, from an interlocutory judgment, pronounced by the Exchequer Court in an action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars."

For the Crown it was argued that there was no jurisdiction to grant leave to appeal as it was contended that the order of May 15, 1951, was not "an interlocutory judgment pronounced by the Exchequer Court" since it was made in chambers. I do not deal with this objection as I am of opinion that in any event leave should not be given.

In the petition of right it is alleged that a contract was entered into bearing date August 24, 1944, between the suppliant as party of the first part, and, as party of the second part, His Majesty the King in right of Canada, acting and represented by the International Pacific Salmon Fisheries Commission, constituted pursuant to the Fraser River Sockeye Convention, ratified by chapter 10 of the Statutes of Canada, 1930, whereby the suppliant contracted and agreed to provide all and every kind of labour, superintendence, services, tools, implements, machinery, plant, materials, articles and things necessary for the due execution and completion of works known as the Fishway to be constructed on the Fraser River in the Province of British Columbia at Hell's Gate.

It is further alleged that the engineer of the Commission (admittedly Milo Bell) who was given certain powers by the contract, failed to act impartially, that he was not qualified, and that the Commission required the work to be carried on in a manner different to that contemplated in the contract so that the provisions thereof became inapplicable. The claim is then made that the fishway was fully constructed to the satisfaction of the Commission and that the suppliant should be paid on a *quantum meruit* basis. Alternatively, it is claimed that the provisions of the contract vesting various powers in the engineer became invalid by reason of his alleged disqualification, and that he ceased to be as between the suppliant and the Commission other than the Commission's agent, and that, as such, and in breach of the contract, he unreasonably interfered with the work in various ways for which damages are claimed, and a further claim for extras is advanced. Finally, in addition, there is a claim for damages represented by bank interest, which the suppliant alleges it was obliged to pay because of the failure of the Crown to pay certain progress certificates.

It was contended on behalf of the Crown that Mr. Bell was not a departmental or other officer of the Crown within the meaning of General Exchequer Court Rule 130 since, pursuant to the Convention, the Commission is composed of three members on the part of Canada and three on the part of the United States of America, and Mr. Bell was appointed by the Commission. On behalf of the suppliant,

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it is pointed out that in the contract "Commission" is defined as meaning "His Majesty the King in right of Canada and shall include the reigning Sovereign, or the successors or assigns of the Sovereign." No opinion is expressed upon these contentions. No reasons were given upon the dismissal of the Suppliant's application in the Exchequer Court, and it is not to be assumed that anything was decided that would interfere with any inquiry at the trial as to whether Mr. Bell was an officer of the Crown, if such inquiry be found necessary. All that appears is that the suppliant was unsuccessful in obtaining an order for Mr. Bell's examination for discovery,—without which order the suppliant could not, of course, conduct such examination. Assuming that I have jurisdiction, it is quite clear from the fact that leave of a judge of this Court is necessary, that it was never intended that decisions in the Exchequer Court on ordinary questions of practice or procedure should be subject to revision by this Court. There being nothing to indicate that anything out of the ordinary was decided on the motion in the Exchequer Court, the application is dismissed with costs.

Leave to appeal dismissed.

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*Feb. 13, 14, 15

*Jun. 27.

ROBERT WILLIAMS *et al* *(Defendants)* ..... } APPELLANTS;

AND

ARISTOCRATIC RESTAURANTS (1947) LTD. *(Plaintiff)* ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Picketing—Labour—Certified union having no members among employees —No strike—Patrolling with truthful placards—Whether criminal offence—Whether common law nuisance—Trade-unions Act, R.S.B.C. 1948, c. 342, ss. 3, 4—Industrial Conciliation and Arbitration Act, R.S.B.C. 1948, c. 155—s. 501 of the Criminal Code.

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

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A trade union, certified pursuant to the *Industrial Conciliation and Arbitration Act*, R.S.B.C. 1948, c. 155, as the bargaining authority for the employees of one of the employer's five restaurants, known as unit No. 5, failed to negotiate a collective agreement with the employer. Conciliation proceedings were then taken pursuant to the Act but the report made thereunder was rejected by the union. Although under the Act the union remained the bargaining agent for unit No. 5, it lost all its members among the employees therein; and none of the employees in unit 6 and 7 was a union member. The union picketed these three restaurants by having two men walk back and forth on the sidewalk in front of them each bearing a placard to the effect that the employer did not have an agreement with the union. No strike vote was taken among the employees and in fact no strike occurred. The action by the employer to enjoin this picketing and for damages was dismissed by the trial judge but was maintained by a majority in the Court of Appeal for British Columbia.

Held, reversing the judgment appealed from and restoring the judgment at the trial, that the picketing did not amount to a criminal offence or to a common law nuisance. It was authorized by s. 3 of the *Trade-unions Act,* R.S.B.C. 1948, c. 342 and was unaffected by the provisions of the *Industrial Conciliation and Arbitration Act.*

Per the Chief Justice and Locke J. (dissenting): The conduct complained of constituted a private nuisance which should be restrained by injunction.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing, Robertson J.A. dissenting, the decision of the trial judge which had dismissed the action to enjoin the picketing and for damages.

John L. Farris K.C. for the appellants.

David A. Freeman for the respondent.

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

LOCKE J.:—In this action the respondent company, the operator of five restaurants in the City of Vancouver, sought to restrain the appellant union, its officers, servants and agents from watching, besetting and picketing its premises; for a declaration that the appellants had unlawfully combined to injure the respondent in its trade by illegal means, that they had created a nuisance in and adjacent to the said premises, and for damages. On the *ex parte* application of the respondent supported by affidavits, Wilson, J. granted an interim injunction restraining

(1) [1951] 1 D.L.R. 360.

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the defendants from watching, besetting or picketing the premises until further order. On the application of the appellants to set aside the interim injunction supported by affidavits filed on the defendant's behalf, the matter was by arrangement treated as a motion for judgment and Wilson, J., while granting an injunction restraining the defendants from:—

> establishing a line about the plaintiff's places of business and from stating to prospective patrons that there is a picket line about the said places of business,

dismissed the other claims advanced in the action. No oral evidence was taken and there was no cross-examination upon any of the affidavits.

By the judgment of the Court of Appeal (1) which reversed this finding, it was directed that judgment be entered in favour of the respondent:—

> restraining and enjoining the defendants from watching, besetting and picketing any of the places of business of the plaintiff and from engaging in any activity intended to restrict or limit the plaintiff's business and by directing that the plaintiff recover from the defendants damages to be assessed and by directing that the plaintiff recover from the defendant the costs of the trial and of the assessment of damages.

The action raises questions of great importance affecting the relations of employers of labour and trade unions and their members in the Province of British Columbia and it is necessary in determining them that there be a clear appreciation of the facts disclosed by the material.

The appellant union is a trade union within the meaning of that term as used in the *Industrial Conciliation and Arbitration Act* (R.S.B.C. 1948, c. 155). Under the provisions of that Statute the Labour Relations Board (B.C.) on September 21, 1949, certified the union as the bargaining authority for all the employees in one of the respondent's restaurants referred to as Unit No. 5 at 2501 Granville Street in Vancouver, except those excluded by the *Act*. Following this, negotiations were carried on between the union and the employer for a collective agreement without result. The Board then acting under the provisions of the Statute appointed a Conciliation Officer to confer with the parties, and, no agreement being reached, a Board of Conciliation was appointed consisting of a chairman and

(1) [1951] 1 D.L.R. 360.

one nominee of the employer and one of the employees. This Board met and the union presented what it said was a standard form of agreement which the employer had declined to sign. The chairman and the employer's nominee in a majority award recommended that an agreement be made between the parties, differing substantially from that thus proposed by the union. In place of a clause designated a closed shop clause by the majority but a union shop clause by the representative of the employees, the agreement recommended by the majority would embody a preferential hiring clause. The award recited that the union's representative had stated that all the members of the union who voted at the time of certification were no longer in good standing and that the union was unable to supply the necessary help, and further that, as there were no present members of the union employed in the unit, a maintenance of membership clause would have no value. It further stated that the wage rates requested by the union applied only to some twenty out of seven hundred restaurants in Vancouver and that, as the company had operated at a loss for the past year the existing rates should be continued, and in other respects recommended variations in the proposed agreement. The employees' representative delivered a minority report recommending that the standard agreement should be executed.

According to an affidavit filed on the motion to dissolve the injunction made by A. R. Johnstone, the International Vice-President and General Organizer of the union, he had some further negotiations with the employer following the award of the Conciliation Board. Referring to a conversation which he had with Mr. Freeman, the solicitor for the respondent, he said that he informed the latter that the local union, having rejected the award:—

> the next natural action of Local 28 would be to request that Aristocratic operations be placed on the unfair list of the Vancouver District Trades and Labour Council,

and that if this was done the trade unionists and their friends in the City of Vancouver would be requested not to patronize the Aristocratic operations and that:—

> if the request did not have the effect that we hoped and expected that we might use the medium of picketing to bring the matter more vividly to the attention of the trade unionists in Vancouver.

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According to Johnstone, not having heard from the employer after a lapse of some twelve days, he:—

> arranged to engage in picketing activity as of May 15th.

What followed thereafter is described in the affidavits filed on behalf of the respondent on the motion for the interim injunction. On the morning of May 15 two men commenced to walk back and forth in front of the two restaurants of the respondent designated as Units Nos. 6 and 7 bearing placards which read:—

> Aristocratic Restaurants have no union agreements with Hotel and Restaurant Employees' International Union, Local 28 affiliated with Vancouver and New Westminster Trades and Labour Council.

The union was not the bargaining representative of the employees in either of these restaurants. In conversation with the men engaged in what was obviously regarded both by the union and the employer as picketing, Alder Hunter, the respondent's manager, was informed that they were members of the Seamen's Union and had been told that the picketing would continue until 10:00 at night, that there were two shifts of pickets and that they were being paid at the rate of one dollar per hour for their work. Later in that day the pickets left Unit No. 7 and moved to Unit No. 5 and thereafter from 9:00 a.m. until 10:00 p.m. Units Nos. 5 and 6 were picketed on May 16 and 17 and on May 18 until the interim injunction was granted. There is some dispute as to the activities of the so-called pickets. Walter Jansen, the manager of the respondent's Unit No. 6, stated that he had observed the men talking to people who were apparently intending to enter the restaurant some of whom turned and went away, and on one occasion these pickets were joined by from one to three other persons who walked with them for short intervals. Another employee of Unit No. 6 said that on May 15 she had heard the pickets speaking to people coming to the door of the restaurant using words to the following effect:—

> You are not supposed to go in there. This is a picket line,

and that the pickets commenced to accost customers in this fashion at about 8:00 p.m. that evening and a substantial number of the people approached turned away. George Cooke, one of the seamen employed by the union, however denied that he had told anyone that they were not supposed

to go in to the restaurant, or words to that effect, and said that the only satement he had made was "This is a picket line," except that he had answered questions directed to him by persons who first spoke to him. An affidavit by George Hotra, one of the other seamen who accompanied Cooke, was to the same effect and both of these men swore that their actions in walking back and forth along the sidewalk did not constitute an impediment to the flow of pedestrian traffic.

Wilson, J. considered that there was no evidence of a conspiracy to injure the plaintiff but, being of the opinion that to state to a man "This is a picket line," suggested a state of siege or even of peril in the act of crossing the line and was unlawful, he granted an injunction against a repetition of such acts or of any acts of intimidation or coercion. In rejecting the claim of the respondent that the other actions of the so-called pickets amounted to a nuisance, he said that to establish this it would be necessary to prove not merely that these persons obstructed traffic but that they did so in such a way as to cause the plaintiff damage and that neither had been proved. The learned trial judge was further of the opinion that the actions of the appellants in the present matter, with the above noted exceptions, were in any event permitted by the provisions of section 3 of the *Trade-unions Act,* R.S.B.C. 1948, c. 342, which reads as follows:—

> No such trade-union or association shall be enjoined, nor shall any officer, member, agent, or servant of such trade-union or association or any other person be enjoined, nor shall it or its funds or any such officer, member, agent, servant, or other person be made liable in damages for communicating to any workman, artisan, labourer, employee, or person facts respecting employment or hiring by or with any employer, producer, or consumer or distributer of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-named workman, artisan, labourer, employee or person, at the expiration of any existing contract, not to renew the same with or to refuse to become the employee or customer of any such employer, producer, consumer, or distributor of the products of labour.

O'Halloran, J.A. expressed the view that there was nothing either in section 3 or section 4 of the *Trade-unions Act* which justified the form of picketing patrol employed. Dealing with a different aspect of the matter, he considered that any immunities in respect to picketing granted

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by the *Trade-unions Act*, assuming what took place here came within the meaning of that statute, were suspended by the *Industrial Conciliation and Arbitration Act* until a strike vote of the employees had been taken under section 33 of that *Act* and the majority of the employees had voted to strike and that any such activities were prohibited until this had been done. Since the majority report of the Conciliation Board had never been submitted to the employees for their acceptance or rejection, he considered that no right to picket by anyone had arisen at the times in question and could not arise in any event until the majority vote of the employees was first obtained favouring the strike. Sidney Smith, J.A. did not consider that the matter was to be determined under the provisions of the *Industrial Conciliation and Arbitration Act* but, considering that at common law picketing is watching and besetting and as such illegal, said that any justification for it must be found in some statute and that there was no such justification in the *Trade-unions Act*. Robertson, J.A. who dissented, found that there was no nuisance committed and agreed with the learned trial judge that there was no evidence of a tortious conspiracy and that the matter was not affected by the provisions of the *Industrial Conciliation and Arbitration Act*. In his opinion, section 3 of the *Trade-unions Act* applied and was a defence to the action.

In my opinion, the decisive point in the case is as to whether the actions authorized by the defendants amounted in law to a nuisance causing damage to the respondent. I think it is unnecessary for the dispostion of the matter to consider whether there was evidence of a conspiracy to injure the respondent of the nature referred to in *Crofter* v. *Veitch* (1). In the absence of other evidence than that contained in the material, if there was a nuisance it was, in my opinion, a private one. The question of nuisance or no nuisance is one of fact but as the matter was disposed of upon affidavit evidence alone, we are in an equally good position to determine that question as was the learned trial judge.

A private nuisance is a civil wrong and in the exercise of the equitable jurisdiction of the courts its continuance may be restrained by injunction whenever substantial dam-

(1) [1942] A.C. 438.

age might be recovered in respect of it by an action at law (*Crump* v. *Lambert* (1)). That the establishing of the patrol of pickets resulted in damage to the respondent is established by the affidavits. It is, I think, of some significance that in the reasons for judgment at the trial it is said that the actions of the pickets who warned prospective patrons that "this is a picket line" were unlawful and that to say this suggested a state of siege, an element of wrongfulness or even of peril in the act of crossing the line. The learned trial judge said further as to this:—

> The words, "This is a picket line" are words of intimidation. Pickets have no right to establish a line about an employer's place of business. This action of the picketers was unlawful and the repetition of similar acts and the doing of any acts of intimidation or coercion are enjoined.

The formal judgment entered following these reasons restrained the appellants from, *inter alia*:—

> establishing a picket line about the plaintiff's places of business and from stating to prospective patrons that there is a picket line about the said places of business.

There is no appeal against this portion of the judgment and indeed in the appellant's factum it is said that they had never asserted any right to so conduct themselves and never objected to an injunction in that form.

It is abundantly clear from the affidavit of Johnstone above referred to that he at least considered that the establishment of the patrols outside of the respondent's premises was "picketting activity" intended apparently, to adopt his language, to be carried on for the purpose of bringing the matter more vividly to the attention of the trade unionists in Vancouver. To trade unionists and their friends and indeed, in my opinion, to the vast majority of the people in the City of Vancouver, the establishment of the patrol, with two men constantly walking up and down outside the premises bearing these placards, would be regarded as a picket line in exactly the same manner as if the placards declared that it was a picket line, or the men carrying them told prospective customers or other persons that it was a picket line. Looking at the matter from a practical standpoint I am unable, with respect, to appreciate the distinction.

(1) (1867) L.R. 3 Eq. 409.

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In considering whether or not this conduct amounted to a private nuisance, the intention or purpose of those responsible for the conduct of the so-called pickets is to be borne in mind. In Clerk and Lindsell on Torts, 10th Ed. p. 544, the learned authors essay to define nuisance thus:—

> Nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of (*a*) a right belonging to him as a member of the public, when it is a public nuisance, or (*b*) ownership or occupation of land or of some easement, quasi-easement or other right used or enjoyed in connection with land, when it is a private nuisance.

Salmond on Torts, 10th Ed. p. 221, says:—

> The generic conception involved in nuisance may, however, be found in the fact that all nuisances are caused by an act or omission whereby a person is unlawfully annoyed, prejudiced or disturbed in the enjoyment of land; whether by physical damage to the land or by other interference with the enjoyment of the land or with his exercise of an easement, profit or other similar right or with his health, comfort or convenience as the occupier of such land.

As to the nature of the damage sufficient to support the action, it is said that any such interference with the physical comfort or convenience of persons occupying the premises is a sufficient interference with the beneficial use of them upon which to found the claim. In Pollock, 14th Ed. pp. 322, 323, the learned author says that in the modern authorities nuisance includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession, and quotes Blackstone's phrase that it is "anything done to the hurt or annoyance of the land, tenements, or hereditaments of another" done without any lawful ground of justification or excuse. These statements by leading text book writers appear to me to accurately state the result of the authorities.

In determining whether or not the conduct of the appellants should be so classified, little assistance is to be obtained from the authorities. In *Lyons* v. *Wilkins* (1), there are, however, some general statements of the law which are of assistance. Lindley, M.R. at p. 267, referring to the expression "watching and besetting" which appears in section 7 of the *Conspiracy and Protection of Property Act 1875,* said that such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset and would support an action at

(1) (1899) 1 Ch. 255.

common law, referring to *Bamford* v. *Turnley* (1); *Broder* v. *Saillard* (2); and *Walter* v. *Selfe* (3). Chitty, L.J. at 271, expressed the opinion that the conduct of the so-called pickets who use no violence or intimidation or threats constituted a nuisance and that:—

> To watch or beset a man's house for the length of time and in the manner and with the view proved would undoubtedly constitute a nuisance of an aggravated character.

In *Quinn* v. *Latham* (4), Lord Lindley said that picketing is a distinct annoyance and if damage results is an actionable nuisance at common law, but that if confined merely to obtaining or communicating information it was rendered lawful by section 7 of the Act above mentioned.

If the matter be considered as if the rights of the parties were to be determined by the common law unaffected by statute, I think it to be clear that the conduct of the appellants amounted to a private nuisance. It is not, I think, oversimplifying the matter to consider whether such conduct would be restrained by injunction if the picketing was carried out at the private house of an employer or other person instead of at business premises. If, by way of illustration, a trade union formed for the purpose of advancing the interests of domestic servants were to organize patrols to walk up and down before the residence of a private individual who employed a servant who did not belong to the union, bearing placards stating that the individual, naming him, did not employ a member of the union, or that the person employed was not a member of the union, it cannot be doubted that such an interference with the peaceful enjoyment of his home by the owner would be restrained by injunction. The expression "watching and besetting" in section 501 of the *Criminal Code* and in section 7 of the *Conspiracy and Protection of Property Act* is not defined in either statute, and by that name does not appear to have been a criminal offence at common law. "Watching", as pointed out by Pallas, C.B., in *Rex.* v. *Wall* (5), implies something more continuous and less temporary than "merely attending" within the meaning of that expression in the *Trade Disputes Act 1906*, s. 2(1). To conduct

(1) (1860) 3 B. & S. 62.
(2) (1876) 2 Ch. D. 692, 701.
(3) (1851) 4 De G. & S. 315.
(4) [1901] A.C. 495, 541.
(5) [1907] 21 Cox 401 at 403.

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such a continuous patrol outside a man's house would, in my view, fall within the meaning of that expression. The legal meaning to be assigned to the word "besetting", originally a military term, appears to me to be unsettled. It is not, however, necessary that the conduct complained of should fall within the meaning of those terms as used by Lindley, M.R. in *Lyons'* case above referred to. To have one or more men parading up and down outside the owner's property hour after hour bearing placards with statements of this nature, however truthful, would be, in my opinion, such an intereference with the comfort and convenience of the occupier of the land as a court would restrain by injunction.

In the case of business premises the pickets patrolling outside of the employer's premises, though merely carrying placards stating that the Aristocratic Restaurants had no agreements with the union, continuing parading throughout the day, constituted, in my opinion, a picket line and would be understood as such by the general public including members of trade unions and was intended to be such by the officers of the union, as indicated by the affidavit of Mr. Johnstone. The effect of such a picket line and the effect which it was intended to produce would be to drive away customers from the respondent's premises, both members of trade unions and their friends who would not cross a picket line and others who, seeing such a line established, would be apprehensive of crossing it, and also people who might consider that their own business or professional interests would be jeopardized by patronizing the restaurants under the eyes of the pickets. I think that, as in the case of a private house, this continuous watching of the respondent's premises by a patrol conducted in the manner described in the material was at common law a private nuisance.

The terms of section 3 of the *Trade-unions Act* of British Columbia are as above stated. The statute in substantially its present form was first enacted by the Legislature of British Columbia by chapter 66 of the Statutes of 1902, following the decision of the House of Lords in *Taff Vale Railway Company* v. *Amalgamated Society of Railway Servants* (1), and presumably in consequence of it. Section 3

(1) [1901] A.C. 426.

by its terms exempts a trade union, its officers, agents or servants from liability for communicating facts respecting employment or hiring by or with any employer to "any workman, artisan, labourer, employee or person." I think it unnecessary to decide whether the "person" referred to is to be construed *ejusdem generis* with the words immediately preceding it, as to which there has been disagreement in decisions of the courts of British Columbia. While that portion of the section which excludes liability for "persuading or endeavouring to persuade by fair or reasonable agreement without unlawful threats, intimidation or other unlawful acts" such persons "at the expiration of any existing contract" does not affect the present matter, where there had been no contract, I think the concluding portion of the section reading:

> to refuse to become the employee or customer of any such employer, producer, consumer, or distributor of the products of labour.

applies. Section 4 reads:—

> No such trade-union or association, or its officer, member, agent, or servant, or other person, shall be enjoined or liable in damages, nor shall its funds be liable in damages, for publishing information with regard to a strike or lockout, or proposed or expected strike or lockout, or other labour grievance or trouble, or for warning workmen, artisans, labourers, or employees or other persons against seeking, or urging workmen, artisans, labourers, employees, or other persons not to seek, employment in the locality affected by such strike, lockout, labour grievance or trouble, or from purchasing, buying, or consuming products produced or distributed by the employer of labour party to such strike, lockout, labour grievance or trouble, during its continuance.

If the appellants were justified in establishing and maintaining the picket line here complained of, the justification must be found in this legislation. While it was true that none of the employees of the respondent were members of the appellant union, it still retained its status as the bargaining authority of the employees of Unit No. 5 under the provisions of the *Industrial Conciliation and Arbitration Act*. The majority award of the Board of Conciliation was unacceptable to the union and in its capacity as bargaining representative it maintained the attitude that the standard form of agreement should be signed by the employer. I think this was a labour grievance within the meaning of that expression where used in section 4. While the affidavit of Johnstone, in which he described the reasons that led him to instruct the picketing, stated the reason as

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being that, as the union had standard agreements with some twenty restaurant operations in the City of Vancouver where the wage rates were considerably above those paid by the respondent and the operators of these had made representations to the union, saying that their agreements requiring them to pay a higher wage placed them at a disadvantage in competition with non-union operators:—

> and that to protect the union operators and to protect the wage rates of the employees in the union shops, we were obligated to bring to the attention of the trade unionists and their friends in Vancouver the status of the various operations of the plaintiff company.

and fails to state that they were endeavouring to advance the interests of those employees of the respondent whose bargaining representative the union was, I think it should be taken that this was one of the union's reasons for the course of action followed.

Sections 3 and 4, while exempting unions, their officers and servants from liability for communicating information of the nature described for the defined purposes, makes no attempt to define the manner in which this may be done. The British Columbia Act was followed in 1906 by the enactment in England of the *Trade Disputes Act*. Section 2 of that *Act* provided that it should be lawful for one or more persons acting on behalf of a trade union to attend "at or near a house or place where a person resides or works or carries on business or happens to be" if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." Neither sections 3 or 4 of the British Columbia Act contain the above quoted language but I think, in order to give the sections a reasonable interpretation, they should be construed as if they were included. While the statements contained on the placards carried by the pickets conveyed certain information "respecting employment or hiring by the respondent" and the statements were true, to convey the information in the manner adopted is not, in my opinion, authorized by the statute. The language of the sections is not capable of interpretation as meaning that such information might be conveyed in a manner which would be at common law a private nuisance. Very clear language indeed would be required to justify any such

invasion of the common law rights of employers and none such is to be found, in my judgment, in the *Trade-unions Act*. I think the injunction granted by the Court of Appeal should be continued and the appeal dismissed with costs.

In the view that I take of this appeal, it is unnecessary to consider the other questions which were so fully and ably argued by counsel for both parties.

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

KERWIN J.:—The respondent, Aristocratic Restaurants (1947) Ltd. operates five restaurants in Vancouver known as units 5, 6 and 7. It is the plaintiff in an action in the Supreme Court of British Columbia and the defendants appellants are Robert Williams and D. P. Morrison, on behalf of themselves and all others, members of Hotel and Restaurant Employees' International Union, Local 28, and as officers and trustees of the said local, and the local itself. Williams and Morrison are respectively President and Secretary of local 28. An *ex parte* injunction having been granted by Wilson J., a motion before him for its dissolution was by consent treated as the trial of the action upon the pleadings and the affidavits filed. The result of that trial was as follows: (1) An injunction was granted restraining the establishing of a line about the respondent's places of business and from stating to prospective patrons that there is a picket line about the said places of business: (2) The respondent's claim to a perpetual injunction restraining the appellants and each of them, their servants and agents, from watching, besetting and picketing any of the restaurant units operated by the respondent in the City of Vancouver was dismissed. (3) The respondent's claim to a declaration that the appellants did unlawfully combine, conspire and agree with each other and others wilfully together to injure the respondent in its trade, and to advance their own interests by illegal means and to watch, beset and picket the places of business of the respondent with the intention of compelling the respondent to enter into an agreement with them, was dismissed: (4) The respondent's claim to a declaration that the appellants, their, and each of their servants or agents, have unlawfully injured the respondent in its trade, by creating a nuisance in and adjacent to the premises occupied by the respondent at the

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City of Vancouver, and by watching, besetting and picketing the respondent's premises was dismissed: (5) The respondent's claim to damages from the appellants was dismissed: (6) Each party was ordered to bear his own costs.

In the Court of Appeal (1), Robertson J. A. would have dismissed the appeal but the majority, consisting of O'Halloran J.A. and Sidney Smith J.A. allowed the appeal with costs and the order made was that judgment be entered in favour of the respondent restraining and enjoining the appellants from watching, besetting or picketing any of the places of business of the respondent and from engaging in any activity intended to restrict or limit the respondent's business, and that the respondent recover from the appellants damages to be assessed, and that the respondent recover from the appellants the costs of the trial and of the assessment of damages. From that judgment the present appeal is taken.

The Court of Appeal and the trial judge do not differ as to the facts as shown by the affidavits. On September 21, 1949, pursuant to the *British Columbia Industrial Conciliation and Arbitration Act,* R.S.B.C. 1948, c. 155, hereafter referred to as the Conciliation Act, the local union was certified by the Provincial Labour Relations Board as bargaining agent for the employees of respondent's unit 5. Thereupon the local and the respondent entered into negotiations with a view to reaching an agreement concerning rates of pay and conditions of service in that unit. Upon the failure of these negotiations and following the procedure laid down in the Conciliation Act, a Board of Conciliation was appointed to try to negotiate an agreement and, failing that, to recommend terms upon which the local and the respondent should agree. No agreement was reached, and in February, 1950, majority and minority recommendations of the Board were issued. The union did not accept the majority report, nor did it hold a strike vote amongst its members who were employees in unit 5, as provided for by section 31 of the Conciliation Act and in fact no strike occurred. Either because the employees dropped their union membership, or because they resigned and were replaced by non-union workers, by May 15, 1950, no employee of unit 5 was a member of the local.

(1) [1951] 1 D.L.R. 360.

While by virtue of the first sentence in subsection 7 of section 7 of the Conciliation Act, the Board might at any time cancel the certification of the union, if it was satisfied that the union had ceased to be a labour organization or that the employer had ceased to be the employer of the employees in unit 5, neither of these conditions existed. However, the second sentence of the subsection applied, by which the Board might cancel the certification of the union, but only after the expiration of ten months from its date, if the Board were satisfied that the union had ceased to represent the employees in the unit. As that period had not expired at the relevant date, the union continued to be the bargaining agent for unit 5. As to units 6 and 7, not one of the workmen therein was a union member.

On May 15, 1950, persons employed and paid by the local, and therefore its agents, commenced to picket not only unit 5 but also units 6 and 7. At unit 6 two men walked back and forth in front of the restaurant each carrying a placard bearing these words "Aristocratic Restaurants have no union agreements with Hotel and Restaurant Employees' International Union, Local 28, affiliated with Vancouver and New Westminster Trades and Labour Council." At the same time the picketers accosted prospective customers and said to them: "You are not supposed to go in there. This is a picket line", or merely, "This is a picket line". Units 5 and 7 were also picketed by two men, in each case, but they did not address any words to prospective customers. As a result of the picketing the respondent suffered damage through a falling off in its business.

Upon these facts the appellants admit they were not justified in establishing a picket line about respondent's place of business and in stating that there was such a line; that is, the admission is that the statement combined with the picketing was unlawful and not that peaceful picketing *per se* was unlawful. Reading in that way what I have described as (1) in the trial judge's order, no question arises as to its propriety. On the other hand, the third item in that order is not now disputed by respondent, that is, that there was no evidence of unlawful conspiracy on the part of the appellants. With these two clauses out of

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the way there still remain to be determined important questions touching the rights of labour unions and employers of labour in British Columbia.

So far as the criminal law is concerned, the matter is dealt with by section 501 of the *Criminal Code*, R.S.C. 1927, chapter 36, the relevant part of which, as amended by section 12 of chapter 47 of the Statutes of 1934, reads as follows:—

> 501. Every one is guilty of an offence punishable on indictment or on summary conviction before two justices and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,
>
> * * *
>
> (*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be;
>
> (*g*) attending at or near or approaching to such house or other place as aforesaid, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

Since the appellants are not charged with having committed an offence, we are not directly concerned with this section but it is important to note that one who besets or watches within clause (*f*) with a view to compelling any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain, is guilty of an offence if he does so wrongfully and without lawful authority. In *Reners* v. *The King* (1), it was decided that such actions were wrongful and without lawful authority if they amounted to a nuisance or to a trespass or if those engaged constituted an unlawful assembly. That was before clause (*g*) was added by the 1934 amendment although, as appears at p. 505, because of the facts in that case, it would have had no application.

By chapter 111 of the Revised Statutes of British Columbia, 1948, the civil law of England as it existed on November 19, 1858, if not inapplicable from local circumstances is in force in the province but modified by all legislation having the force of law. The position in England as of 1858 was that the Statute of Labourers and the Com-

(1) [1926] S.C.R. 499.

bination Acts had been repealed in 1825 although the enactment of that year left unrepealed that part of the common law under which it was generally held at the time that the combination or agreement to alter conditions of work was a conspiracy because it was a combination in restraint of trade. This statute repealed one of the preceding year which had been more helpful to trade unions and workmen than the Act of 1825. Of course, the various English statutes subsequent to 1858 never were in force in British Columbia.

The *English Trade Disputes Act of 1906* amending the *1875 Conspiracy and Protection of Property Act* was anticipated in British Columbia in some respects by the *Trade-unions Act,* chapter 66 of 1902, which with immaterial verbal changes is now R.S.B.C. 1948, chapter 342. The present *Act* consists of four sections, of which the first merely gives the short title, and in view of the result reached we are not concerned with section 2 which deals with the non-liability for damages of trade unions and their trustees for any wrongful act in connection with any strike, lockout or trade or labour dispute except under certain conditions. Section 3 is as follows:—

> 3. No such trade-union or association shall be enjoined, nor shall any officer, member, agent, or servant of such trade-union or association or any other person be enjoined, nor shall it or its funds or any such officer, member, agent, servant, or other person be made liable in damages for communicating to any workman, artisan, labourer, employee, or person facts respecting employment or hiring by or with any employer, producer, or consumer or distributer of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-named workman, artisan, labourer, employee, or person, at the expiration of any existing contract, not to renew the same with or to refuse to become the employee or customer of any such employer, producer, consumer, or distributer of the products of labour.

I agree with the trial judge that the holding aloft of the placards was a "communicating" to "a person" facts respecting employment or hiring by the respondent. There is no reason that the word "person" should be read *ejusdem generis.* It is only the last part of the section, commencing with the words "or for persuading or endeavouring to persuade" that is related to the words "at the expiration of any existing contract". No opinion is expressed as to section 4 since, for its application, it would be necessary to find that

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there was a labour grievance or trouble although, notwithstanding the local continued to be the bargaining agent under the Conciliation Act with reference to unit 5, actually at the time of the acts complained of no member of the union was an employee of the respondent at that unit and, furthermore, it might be argued that section 4 had no relevancy to the picketing of units 6 and 7.

There is no question here that the appellants did not trespass or engage in an unlawful assembly but did the picketing amount to a nuisance? It could not be said that one picketer would commit a nuisance by walking up and down in front of the respondent's premises, carrying the placard and in my opinion neither did the two pickets. On this point several decisions were cited, particularly *Lyons* v. *Wilkins* No. 1 (1), *Lyons* v. *Wilkins* No. 2 (2) and *Ward Lock and Company* v. *Operative Printers' Assistants' Society* (3). It is difficult to reconcile all the statements that appear in the several opinions expressed in these cases but I think one fact emerges and that is that the approach to labour questions has changed materially down through the years. This change of approach is evidenced particularly in the decision of the House of Lords in *Crofter Hand Woven Harris Tweed Company Limited* v. *Veitch* (4). Such an approach places workmen and unions in a position, comparable at least to some extent to that held by employers, and does not relegate them forever, even at common law, to the conditions existing at the time of the Statute of Labourers, the Combination Acts, the English Acts of 1824 and 1825, in 1899, or even in 1906 the date of the *Ward Lock* decision. It was said, at page 506 of the *Reners* case, that the judgments in the *Ward Lock* case and the *Lyons* case concur in the view that watching or besetting, if carried on in a manner to create a nuisance, is at common law wrongful and without legal authority. Picketing is a form of watching and besetting but that still leaves for decision, in each case, what amounts to a nuisance. Whatever might have been held some years ago, in those days the actions of the appellants did not constitute a nuisance.

It is argued that the provisions of the Conciliation Act affect the matter. This *Act*, after providing for the right

(1) (1896) 1 Ch. 811.
(2) (1899) 1 Ch. 255.
(3) (1906) 22 T.L.R. 327.
(4) [1942] A.C. 435.

of an employee to be a member of a trade union or employees' organization, and the right of an employer to be a member of an employers' organization, prohibits the latter to interfere with the formation or administration of a trade union. Then follows sections 5 and 6, to which specific reference will be made later. Subsequent sections authorize the Labour Relations Board to certify a bargaining authority, such as local 28, and provision is made for collective bargaining by agreement, and failing that, for the appointment of a Conciliation Board and sending of copies of the reports of such Board, and the prohibition of strikes or lockouts until that has been done. It is to be remembered that in the present case no strike or lockout occurred. Sections 5 and 6 read as follows:—

5. (1) Except with the consent of the employer, no labour organization and no person acting on behalf of a labour organization shall attempt at the employer's place of employment during working-hours to persuade an employee of the employer to join or not to join a labour organization.

(2) No labour organization and no person acting on behalf of a labour organization and no employee shall support, encourage, condone, or engage in any activity that is intended to restrict or limit production.

(3) No act or thing required by the provisions of a collective agreement for the safety or health of employees shall be deemed to be an activity intended to restrict or limit production.

6. No person shall use coercion or intimidation of any kind that would have the effect of compelling or inducing any person to become or refrain from becoming, or to continue or to cease to be, a member of a labour organization.

Even if it could be said that there was an attempt to persuade an employee to join a union within subsection 1 of section 5, there was no such attempt *at* the respondent's place of employment. The words "during working-hours" and in fact the whole tenor of the subsection indicate that what is aimed at are attempts in or on the employer's place of employment. The decision in *Larkin* v. *Belfast Harbour Commissioners* (1), to which we were referred, is on an entirely different point under the *Conspiracy and Protection of Property Act of 1875* as amended by the *Trade Disputes Act of 1906,* and Larkin, without permission, addressed a crowd of workmen on a quay, the property of the Belfast Harbour Commissioners. On the evidence there is no basis in fact for the suggestion that any of the appellants supported, encouraged, condoned, or engaged in any activity

(1) (1908) 2 Ir. R. 214.

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that was intended to restrict or limit production within the meaning of subsection 2 of section 5 of the Conciliation Act. The matter dealt with by that subsection is an entirely different one. There was no intention to restrict or limit the preparation of meals at the restaurants in the sense that it might be said that under given circumstances certain actions were intended to slow down any manufacture. Again, as to section 6, once it is held that there was no nuisance, there is no factual foundation for the argument that the communicating, in the manner described, of the fact that the respondent had no union agreements with the union was coercion or intimidation.

The appeal should be allowed with costs here and in the Court of Appeal, and the judgment of the trial judge restored.

RAND J.:—In this appeal the question is whether the so-called picketing of the three restaurants was unlawful in the sense that it was a civil wrong. It consisted of two men walking back and forth on the sidewalk in front of a restaurant each bearing a placard to the effect that the proprietor did not have a labour agreement with a named union. The provisions of three statutes are relevant to the determination of the question, and I will deal, first with section 501 of the *Criminal Code*.

That section provides penalties against intimidation. The offence is committed by one

> who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do or to do anything which he has a lawful right to abstain.

does certain acts described in six items of particulars. The article applicable here is paragraph (*f*):—

> Besets or watches the house or other place where such other person resides or works or carries on business or happens to be,

and it is qualified by paragraph (*g*):—

> Attending at or near or approaching to such house or other place as aforesaid in order merely to obtain or communicate information shall not be deemed a watching or besetting within the meaning of this section.

This language has been taken almost verbatim from clause (4) of section 7 of the Imperial statute entitled *Conspiracy and Protection of Property Act, 1875* and it has come before the English Court of Appeal for interpretation directly in

at least two cases. The first was *Lyons* v. *Wilkins* reported, on the appeal from an interlocutory injunction, in (1896) 1 K.B. 811, and on the appeal from the final judgment, in (1899) 1 Ch. 255. As expressed by Lord Lindley, then Lord Justice, speaking for himself, at p. 825 in the report of 1896 it was found and held that, "They (the defendant workmen) are there to put pressure upon Messrs. Lyons by persuading people not to enter their employment; and that is watching and besetting within clause (4), and is not attending merely to obtain or communicate information": such conduct was a private nuisance which at common law gave rise to an action on the case. This may mean that the conduct envisaged by the proviso excludes compulsion as the object in view. If it does, then with every respect for this high authority, I am unable to follow it; unless the conduct within the exception has that object it would not be within the first part of the definition: it is assumed in determining a question under clause (4) and the proviso that there was an intention to act with a view to compel by "attending at or near . . . in order . . . to communicate information." If the meaning is that the compulsion cannot be brought about by persuasion, I confess I am equally unable to follow the reasoning. For what conceivable use or purpose would information be furnished if not to win support by the persuasive force of the matter exhibited? The persuasion is not ordinarily or necessarily sought of the person to be compelled; economic pressure is to affect him; but that pressure, quite legitimate by those who exert it, may easily be set in motion by persuasion exercised upon either workmen or the public is a frequent experience of labour controversy. If "attending at or near or approaching to such house" for the purpose mentioned is not to be taken as a form of watching or besetting, then likewise it is outside of the penalized conduct and could not be excepted from it. It is no doubt probable that Parliament was guarding against the interpretive inclusion of doubtful conduct, but the object of compulsion remains, in any case, an essential element.

The word "communicate" signifies, as I interpret it, to pass on information at the place of attending and not subsequently at another place, and it contemplates matter different from that "obtained" there. If "persuading" means

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to influence by the force of rational appeal, then the interpretation given the proviso, if it is to be applied in all cases without exception, seems to me to be unwarrantably restrictive; certainly it would appear to be so where the appeal is to the public, and it is not necessary to decide whether it is impossible in the case of workmen. In Lyons, the objects of persuasion were persons continuing at or seeking work in defiance of a strike, and in the special circumstances of the case it may be difficult to imagine what persuasive information could be passed on to them. But that could not be said of members of the public here. The interpretation must meet this group as well and it may be that the judgment is properly to be taken as turning on the finding that there was not in fact any real communication of information. There is nothing in the statute placing a limit of time on the "attending"; but there is a difference between watching and besetting for the purpose of coercing either workmen or employer by presence, demeanour, argumentative and rancorous badgering or importunity, and unexpressed, sinister suggestiveness, felt rather than perceived in a vague or ill defined fear or apprehension, on the one side; and attending to communicate information for the purpose of persuasion by the force of a rational appeal, on the other. That difference was acted upon by Wilson J. at the trial in this case in the limited injunction granted.

In the later case of *Ward Lock* v. *Printers Society* (1), with substantially similar facts, the Court of Appeal in 1906 held the conduct to be within the proviso and to be unobjectionable. The section generally was interpreted to attach to certain acts, already at least tortious, certain penal consequences, but neither to add to nor diminish civil remedies. Assuming the conduct to be within the proviso, it became a question of the right or remedy at common law: that would, in any event, be the effect here under section 501. The proviso was taken to include peaceable persuasion by the communication of information in the vicinity of the premises and its inclusion in the section to be a matter of legislative caution. As persuasion, the conduct was justified by the interest of the Society in the labour dispute; and as conduct, it was not productive, to ordinary sensibilities, of that degree of annoyance, disquiet and discomfort which

(1) (1906) 22 T.L.R. 327.

materially impairs the enjoyment of property. To compel by the lawful effects of such persuasion for such a purpose is a normal incident of industrial competition. The general view of the section was followed by the Court of Appeal in *Fowler* v. *Kibble* (1).

There is next the *Trade-unions Act* of British Columbia. Section 3 absolves every person from liability for

> communicating to any workman, artisan, labourer, employee, or person facts respecting . . . employment . . . by or with any employer . . . or consumer or distributor of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-mentioned workman . . . or person, . . . to refuse to become the employee or customer of any such employer, consumer, distributor of the products of labour.

This language is seen to deal with persuasion both by spoken words and written communications. Section 4 likewise absolves the publishing of information respecting a strike or other labour grievance or trouble or for urging any person from purchasing, buying or consuming products distributed by the employer who is a party to any labour grievance or trouble. In both sections, the mode of communication and publishing is undefined, and I take the word "person" to include members of the public.

There was clearly a trade dispute as well as a grievance in this case and the information conveyed by the placards as clearly was relevant to the patronage of the restaurants by consumers. The question, then, is whether the mode of persuasion followed was authorized. How could information be effectively communicated to a prospective customer of such a business otherwise than by such means? The appeal through newspapers or at a distance might and probably would be utterly futile. The persons to be persuaded can, with any degree of certainty, be reached only in the immediate locality, and I must take the legislature to have intended to deal with the matter in a realistic manner. What was attempted was to persuade rationally rather than to coerce by insolence; there was no nuisance of a public nature, and the only annoyance would be the resentment felt almost at any act in the competitive conflict by the person whose interest is assailed. That those within the restaurant, either employees or patrons, were likely to

(1) (1922) 1 Ch. 487.

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be disturbed to the degree of apprehensive disquiet already mentioned, could not be seriously urged. Through long familiarity, these words and actions in labour controversy have ceased to have an intimidating impact on the average individual and are now taken in the stride of ordinary experience; but the information may be effective to persuade and it is such an appeal that the statute is designed to encourage.

Since, then, the conduct was not criminal either under the Code or at common law, any common law civil liability has been removed by these sections. But even if they should not extend to a public appeal, I should hold the act innocent where it is done for such an object: the public is obviously and substantially interested in the fair settlement of such contests.

There remains the question whether the conduct was in violation of the *Industrial Conciliation and Arbitration Act*. That statute deals somewhat comprehensively with labour disputes. It provides by section 10 for the certification of a labour organization as the bargaining agent for all employees in an employment unit, and so long as that certification continues, the bargaining representative by section 13 has exclusive authority to bargain collectively on behalf of the unit and to bind it by a collective agreement. That appointment, with its investment of authority, embraces all such incidental and subsidiary authority as may be necessary to enable the labour organization to accomplish its purpose. Section 14 provides for a notice from either side for the commencement of collective bargaining; section 16 requires that the bargaining commence within five days after notice, and forbids the employer to alter any terms or condition of employment until either a collective agreement has been concluded or the report of a conciliation board has been submitted to a separate vote of employers and the employees affected. If the vote of both is in favour of acceptance, the employer is forbidden to cause a lockout and the employees to go on strike. Section 33 forbids a strike until after a vote "of the employees in the unit affected" has been taken and the majority have voted in favour of it. The employer and the bargaining agent were

unable to conclude an agreement, and a conciliation board was appointed. Its report was made, but it was not submitted to a vote of the employees of the unit. It is said to have been rejected by a vote of the union, but as can be seen, that is quite different from a vote of the employees. Since there was no such vote, the provision of section 16 forbidding a strike did not become operative.

In such circumstances, then, is the action of the union in making an appeal to the public forbidden? I cannot think so. There is nothing in the Act that touches these ancillary means of advancing the interests of either party. It seems to me that the prohibitory provisions are carefully limited, and I can find no necessary implication that subsidiary action not incompatible with express provisions is intended to be affected.

I do not take it to be obligatory to submit the conciliation report to a vote of the employees. Even where the vote is for acceptance, there is only the prohibition of a strike thereafter; the terms of the report themselves are not declared to constitute an agreement. If no vote is taken, the parties, subject to the Act, are again in negotiation with all its legitimate modes of waging the contest. To imply a ban against any of them in that unsettled situation would tend to a stalemate and to force a strike vote, both against the policy of the statute. If, by further negotiation or through persuasion, an agreement were brought about, that policy would be promoted. Once the report of the conciliation board is submitted, the parties are restricted only by the conditions of strike and lockout and, in the absence of a vote or its dispensation or of an agreement, by the maintenance of the existing terms of employment; within that area all lawful steps are open.

The fact that two of the restaurants were not within the unit of employees for which the union was authorized to act does not affect the question; the owner's economic strength is derived from his total business; and it is against that that the influence of information is being exerted.

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

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KELLOCK J.:—The material facts out of which this appeal arises are as follows. On September 21, 1949, the appellant union was certified pursuant to s. 12 of the *Industrial Conciliation and Arbitration Act*, R.S.B.C. 1948, c. 155, as the bargaining authority for the respondent's employees in "Unit No. 5," one of a group of five restaurants operated by the respondent in the City of Vancouver. The union thereupon made certain demands upon the respondent, including a demand for a union shop, and submitted for execution by the respondent its standard form of agreement. As the respondent did not accede to the union's requests, conciliation proceedings were taken in pursuance of the statute, resulting in February 1950 in majority and minority reports.

The points of difference related to wage rates and the question of union shop. The respondent accepted the award, but the union at its meeting in the month of March rejected it.

Subsequently, during the month of April and into the month of May, the parties carried on negotiations, the union insisting on the substance of the minority report. Ultimately the union advised the respondent that its next step, failing agreement, would be to request that the respondent be placed on the "unfair list" of the Vancouver District Trades and Labour Council, which meant that trade unionists in the city would be requested not to patronize the respondent. The union further advised the respondent that if this did not have the desired result, "picketing" might be resorted to. Some discussion took place as to the possibility of a joint survey of the respondent's operations being made by representatives of both parties for the purpose of seeing if improvements in the respondent's operations could be brought about, but when nothing came of this, the union commenced the activities which are the immediate subject of this litigation. Briefly, commencing on the 15th of May, 1950, two men began walking back and forth on the public street in front of three of the respondent's five restaurants, carrying placards bearing the following words:

> Aristocratic Restaurants have no union agreements with Hotel and Restaurant Employees International Union Local 28, affiliated with Vancouver and New Westminster Trades and Labour Council.

It is admitted on behalf of the appellant that the purpose of these activities was to bring pressure to bear upon the respondent to accede to the demands of the union through loss of custom which it was hoped would result. It is in evidence that there was some accosting of persons on the street, apprising them that "this is a picket line," but an injunction was granted with respect to this latter activity, and no question arises with respect to it on this appeal. The conduct complained of continued from May 15 to May 18 when the writ was issued. The learned trial judge dismissed the action, but his judgment was reversed on appeal (1), Robertson J.A. dissenting.

It is provided by s. 12, subsection 2 of the statute already referred to, that where a labour organization applies for certification as a bargaining authority for a "unit," if the board has determined that a "unit" is "appropriate for collective bargaining," and is satisfied that the majority of the employees in the unit are members in good standing of the labour organization, the board shall certify the applicant as the bargaining authority of the employees in the unit. Subsection 3 of s. 12 provides that, for the purposes of the statute, a "unit" means simply a group of employees. Accordingly, the appellant, by reason of the certification, became the bargaining authority for the group of employees of the respondent's restaurant No. 5, and it is clear, by reason of the provisions of s. 12 that at the date of certification, the board was satisfied that the majority of this group were members in good standing of the appellant union. It is provided by s. 13 that where a bargaining authority is certified for a unit, that bargaining authority "shall have exclusive authority to bargain collectively on behalf of the union and to bind it by a collective agreement until the certification is revoked."

S. 12, subsection 7 provides for the revocation of certification in the following cases: (*a*) if the board is satisfied that the labour organization has ceased to be such, or (*b*) that the employer has ceased to be the employer of the employees in the unit, or (*c*) if ten months have elapsed after certification and the board is satisfied that the labour organization has ceased to represent the employees in the unit.

(1) [1951] 1 D.L.R. 360.

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It appears from the report of the conciliation board that, at the time of the hearings before it, all the employees of the unit who had been members of the appellant union at the date of the certification, had since ceased to be members. This fact, however, is not one of the circumstances which, under the statute, affect the status of the appellant union as the certified bargaining agent, and as ten months had not elapsed after certification, the provisions of s. 12, subsection 7 do not apply. It is not shown that there was any change in the personnel of the group at any time after certification. Accordingly, the appellant union continued to have the exclusive right to bargain collectively on behalf of the group of employees concerned, and to bind them by a collective agreement as provided by s. 13 (*a*).

By s. 2, subsection 1, "collective bargaining" is defined as negotiating with a view to the conclusion of a collective agreement or the renewal thereof, or to the regulation of relations between an employer and employees, and it is provided by s. 14 that where the board has certified a bargaining authority for employees in a unit and no collective agreement is in force, the bargaining authority may by notice require the employer to "commence" collective bargaining.

It is contended on behalf of the respondent, that because there were no members of the appellant union remaining in the group of employees in question at the time of the award of the conciliation board, it would have been out of the question for the board to have acceded to the union's demand that an agreement should have been settled containing a union shop clause, as it would have meant that after a limited period, which respondent's counsel suggested might be six months, the respondent would have been obliged to discharge all employees in the group who were unwilling to become members of the union. Counsel further contends that when the appellant union continued to insist on such a term in the negotiations occurring subsequent to the conciliation award, it in effect repudiated its true function under the statute as agent for the employees in the group, and became a protagonist in its own interests as distinct from theirs.

I am unable to accede to this view. In my opinion, it breaks down on the facts. It is in evidence that the

original instructions of the appellant union included a demand for a union shop clause, and it does not appear that these instructions were at any time countermanded or altered. Further, it is provided by s. 8 of the statute that nothing therein is to be construed as precluding the insertion in a collective agreement of a provision requiring, as a condition of employment, membership in a specific labour organization.

I therefore conclude that, at the time of the activities in question, the appellant union retained exclusive authority to negotiate with respect to the conclusion of a collective agreement or with respect to the regulation of relations between the respondent and the group of employees in question.

The respondent refers to s. 16(*b*) of the statute, which prohibits an employer from increasing or decreasing rates of wages or from altering any term or condition of employment until after the conciliation board has reported to the Labour Relations Board and until the question of acceptance or rejection of the award has been submitted to a vote of the employees affected, and seven days have elapsed after the vote has been reported to the Labour Relations Board. The respondent contends that, as there was no vote in the present case, the employer was prohibited from acceding to the union's demands and consequently the activities of the union designed to have the employer accede to these demands, involved something which the respondent was prohibited by statute from doing. It is therefore said that the activities in question were wrongful.

Clause (*c*) of s. 16, however, provides that the Labour Relations Board may make regulations authorizing an employer affected by clause (*b*) to increase or decrease wages or alter any term or condition of employment. Consequently, the respondent, had it seen fit, might have applied to the Board for such purpose, and that being so, I do not think it can be said that it was wrongful for the union to have taken steps to induce the respondent so to do.

In the opinion of O'Halloran J.A. (1), what the appellants had done was specifically prohibited, in the circumstances, by s. 5(2) of the statute. Robertson J.A. was of a contrary opinion. In a sense, to induce customers not to buy will have the effect of limiting the output of the person from

(1) [1951] 1 D.L.R. 360.

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whom the buying might otherwise take place, but I do not think that the subsection is directed at the sort of thing in question here, nor, in any event, could it reasonably be interpreted so as to conflict with the express provisions of ss. 3 and 4 of the *Trade-unions Act*, R.S.B.C. 1948 c. 342, with which I will subsequently deal.

This brings me to the question as to whether or not the picketing here in question gave rise to any cause of action on the part of the respondent. This resolves itself, in the present instance, into the question as to whether or not such conduct was, in itself, unlawful. The learned trial judge held that this conduct did not amount to a common law nuisance, and in any event, was authorized by s. 3 of the *Trade-unions Act*. In the Court of Appeal (1), Robertson J.A. was in substantial agreement with the learned trial judge. In the view of the majority, however, the respondents were guilty of a watching and besetting illegal at common law and not authorized by the provisions of the statute just referred to.

With respect to ss. 3 and 4 of the statute, it is not possible to peruse the course of legislation with respect to picketing, and the decisions thereunder, without concluding that the draftsman had in mind their subject matter, but the rather odd thing is that in neither of the sections is "watching or besetting" expressly referred to. Before considering these sections further, however, it would seem relevant to refer to the history of the legislation.

It is not necessary to go farther back than the Canadian Act of 1872, 35 Vict. c. 31, which, so far as material, reproduces the essential provisions of the English statute of 1871, 34-35 Vict. c. 32. By s. 1 every person who

> 3. molests or obstructs any person in manner defined by this section—
>
> * * *
>
> (*e*) being a master, to alter the mode of carrying on his business, or the number or description of any persons employed by him—

shall be guilty of an offence and punishable by imprisonment. Subsection 4 provides that for the purposes of the statute, a person shall be deemed to molest or obstruct another person if

> (*c*) he watches or besets the house or place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place . . .

(1) [1951] 1 D.L.R. 360.

In his charge to the grand jury in the *Cabinet-Makers' Case*, reported in a note in (1899) 1 Ch. at 262, the late Mr. Russell Gurney said, in terms described by Lindley M.R. in *Lyons* v. *Wilkins* (1), as "a masterly statement of the law as it stood in April 1875":

> And here you must observe that the question is, not whether they have endeavoured to take their stand by themselves refusing to work, and by persuading others not to work: this they have a right to do; but the question is whether they have tried to effect that object in a way that is forbidden by the Act, and with that purpose. That they did watch the place of business, probably, there is no doubt, but there are some purposes for which they had a perfect right to watch. When a contest of this sort is going on, it is not unusual, I believe, to watch, in order to see that none of the men who receive what is called "strike pay", are also receiving wages from the employer. But the more important object, no doubt, that the watchers had in view was, to inform all comers when, for instance, any might have been attracted to come there by the advertisements which had been inserted in the newspapers to inform them of the existence of the strike, and endeavour to persuade them to join them. All this is lawful so long as it is done peaceably, without anything being done to interfere with the perfect exercise of free will on the part of those who were otherwise willing to work on the terms proposed by the employer.

In the following August, the *Conspiracy and Protection of Property Act*, 1875, 38-39 Vict. c. 86, was passed, repealing the Act of 1871 and enacting s. 7 as follows:

> Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—
>
> * * *
>
> 4. watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place . . .

should, on conviction, be liable to a penalty. The section was subject to a proviso that

> Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

This legislation had its counterpart in Canada in 39 Vict. c. 37, s. 2. It is apparent that while attending to obtain or communicate information was expressly authorized in accord with the construction of the earlier statute referred to above, persuasion, even though by peaceful means, was not ex-

(1) (1899) 1 Ch. 255 at 268.

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pressly mentioned. Following this statute, *Regina* v. *Bauld* (1) was decided, and it was held by Baron Huddleston that watching and besetting for the purpose of persuading was not permitted. In *Lyons* v. *Wilkins,* No. 1 (2), the same view was taken by the Court of Appeal, which held that any conduct going beyond that described in the proviso to s. 7 was expressly prohibited by the statute.

In *Lyons* v. *Wilkins,* No. 2 (3), which was the same case as the above but after trial, the first decision having been on a motion to continue an injunction, it was argued for the defendants that "watching and besetting" under the Act of 1875 should have the same meaning as in the Act of 1871, so as not to prohibit peaceful persuasion. It was contended that the proviso to s. 7 was merely put in *"ex majori cautelâ"* and was not an instance of *"expressio unius exclusio est alterius."* It was also argued that, by reason of the presence in the statute of the word "wrongfully," it must be shown, apart from the statute, that some legal right of the plaintiff had been infringed by the acts complained of. These arguments, however, were expressly rejected.

With respect to the argument founded on the words, "wrongfully and without legal authority," Lindley M.R. was of opinion that it was not necessary to show the illegality of the overt acts complained of by evidence other than that which proved the acts themselves, if no justification or excuse for them was reasonably consistent with the facts proved. That this was the correct construction was, in his Lordship's view, clear from the fact that under subsection 1 of the section,

> uses violence to or intimidates such other person or his wife or children, or injures his property.

such acts were wrongful in themselves. Accordingly, the words in question were superfluous with respect to the acts described in subsection 1, and in order to construe the various subsections consistently, it must be held that the statute intended to prohibit the conduct described in each subsection, if done with the view mentioned in the beginning of the section. The same view was taken by Chitty L.J. In the view of the majority, therefore, these words meant "without lawful excuse or justification."

(1) (1876) 13 Cox 282. (2) (1896) 1 Ch. 811.

(3) (1899) 1 Ch. 255.

On the other hand, Vaughan Williams L.J. was of opinion that the words meant "unwarranted by law." Notwithstanding, however, the learned judge took the same view as did the majority insofar as the subsection dealing with watching or besetting was concerned, in that he expressly held that the statute rendered illegal all watching and besetting which could not be brought within the proviso. He said at p. 273:

> Then came the Act of 1875, which, in my opinion, is intended to *define* what kind of watching and besetting shall in future be warranted by law; and the definition, in my opinion, means that watching and besetting shall in future be confined to "watching and besetting merely for the purpose of obtaining or communicating information." . . .
>
> If the persuading takes any other shape than that of a communication within the meaning of the proviso contained in s. 7, this would, in my opinion, make it unwarranted by this section, *even though this persuasion might not otherwise be of such a character as to constitute a nuisance at common law.* And, even if the persuasion does take the shape of such a communication, yet it may be made in such a manner as to constitute a common law nuisance, and thus be wrongful.

He also said:

> I think that the fact that the communication invites the men to discontinue working for the master as soon as they lawfully may does not thereby cause the communication to cease to be a communication within the meaning of the proviso.

While Lindley M.R. and Chitty L.J. considered that the conduct in question in the case constituted a common law nuisance, Vaughan Williams L.J. was of a contrary opinion.

This legislation was again considered in 1906 by the Court of Appeal in *Ward Lock & Company* v. *Operative Printers' Assistants Society* (1), the court, consisting of Vaughan Williams, Stirling and Fletcher Moulton L.JJ., taking, in my opinion, a fundamentally different view of the statute from that taken in the *Lyons Case.* Vaughan Williams L.J. in the *Ward Lock Case,* said at p. 329:

> When the Act of 1875 was passed, the employers had a good cause of action for various forms of nuisance. The Legislature, by the Act of 1875, gave in respect of some of these nuisances, as to which there was a civil remedy, a summary remedy by summons before a magistrate for acts done for which there was previously only a civil remedy. And it seems to me that the words in the first clause of the section, "wrongfully and without legal authority," were introduced for the very purpose of limiting the remedy by criminal prosecution to cases so tortious as to give a civil remedy.

(1) (1906) 22 T.L.R. 327.

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I find it impossible to reconcile this statement with the statement of the same learned judge in the *Lyons Case* quoted above:

> If the persuading takes any other shape than that of a communication within the meaning of the proviso contained in s. 7, this would, in my opinion, make it unwarranted by this section, *even though this persuasion might not otherwise be of such a character as to constitute a nuisance at common law.*

Although Fletcher Moulton L.J. expressed himself as following the authority of Lindley M.R. in the *Lyons Case,* reaching his conclusion, as he said, by a different route, I am, with great respect, unable to appreciate any agreement between the two as to the proper construction of the statute.

In *Reners* v. *The King* (1), upon evidence involving trespass, a conviction for picketing was upheld. Both the *Lyons Case* and the *Ward Lock Case,* as well as the later case of *Fowler* v. *Kibble* (2), were considered, and in the opinion of the majority, the decisions in the *Lyons* and *Ward Lock Cases* concurred in the view that watching or besetting, if carried on in a manner to create a nuisance or otherwise unlawfully, constituted an infraction of the statute. That was sufficient for the case in hand. It is to be observed that the proviso as to attending &c. for the purpose of obtaining or communicating information was not in the Criminal Code at the time of this decision, it having been dropped when the Code was enacted in 1892. It was, however, re-enacted in 1934 and is now part of s. 501 (*g*) of the Code, which reproduces in substance s. 7 of the English statute of 1875.

So far as the English authorities are concerned, it may be significant that, shortly after the decision in the *Ward Lock Case,* the Act of 1875 was amended. By 6 Ed. VII c. 47, the proviso in s. 7 was repealed and it was enacted that it should be lawful to attend not only for the purpose of peacefully obtaining or communicating information, but also for the purpose of peacefully persuading any person to work or abstain from working.

In this state of the authorities I come back to the *Trade-unions Act.* S. 3 exempts the unions, their members, etc., from liability to injunction or damages for

> communicating to any workman, artisan, labourer, employee or person facts respecting employment or hiring by or with any employer, producer

(1) [1926] S.C.R. 499. (2) (1922) 1 Ch. 487.

or consumer or distributor of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-named workman, artisan, labourer, employee or person, at the expiration of any existing contract, not to renew the same or to refuse to become the employee or customer of any such employer, producer, consumer, or distributor of the products of labour.

While the section covers communication of information and use of persuasion, the authority conferred by the section is expressly conferred apart from "unlawful acts," which leaves open the question as to the legality of the means employed in the communication or persuasion.

As already mentioned, the conduct in question in the case at bar has been found by the learned trial judge and by the learned dissenting judge in the Court of Appeal, not to amount to a common law nuisance, and in that opinion I respectfully concur. No other illegality in connection with the activity carried on is alleged apart from the provisions of s. 501 of the *Criminal Code*, and, in my opinion, the conduct here in question falls squarely within the provisions of paragraph (*g*). Insofar as the statement contained on the signs carried by the pickets was intended to persuade customers or prospective customers not to deal with the respondent, I would agree with the view expressed by Vaughan Williams L.J. in *Lyons* v. *Wilkins*, No. 2, with respect to the invitation contained in the signs in question in that case, which I have quoted above. Accordingly, it is not necessary to consider the question as to whether a breach of s. 501 could form the basis for a civil suit. The contrary appears to have been the opinion of the Court of Appeal for Ontario in an analogous situation; *Transport Oil Company* v. *Imperial Oil Company* (1).

In my opinion, therefore, on the facts proved, s. 3 of the statute affords express authority for what was done by the appellants in the case at bar. Should the proper construction of the section require that the word "person," where used therein the third and fourth times, be read *ejusdem generis*, I know of no ground upon which the signs would become unlawful, merely because in the ordinary course of events, others might also read them.

In the result, therefore, I would allow the appeal and restore the judgment of the learned trial judge, with costs here and below.

(1) [1935] O.R. 215.

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Cartwright J.

CARTWRIGHT J.—The relevant facts of this case are sufficiently stated in the judgments of other members of the Court and do not require repetition.

I am in agreement with the view that the conduct described in the record cannot be said to be criminal, being saved by clause (*g*) of section 501 of the *Criminal Code*. It remains to be considered whether it is actionable and so liable to be restrained by injunction.

Those portions of the judgment of the learned trial judge against which no appeal was taken restrain the defendants "from establishing a line about the plaintiff's places of business and from stating to prospective patrons that there is a picket line about the said places of business." The judgment of the Court of Appeal (1), in addition to this would restrain the defendants "from watching, besetting or picketing any of the places of business of the plaintiff and from engaging in any activity intended to restrict or limit the plaintiff's business" and would award the plaintiff damages to be assessed.

It does not seem to me to be necessary or desirable to attempt to formulate general rules which will be applicable to all cases, and I propose to confine myself to a consideration of the facts of this particular case.

What is complained of is the fact that two paid agents of the defendant Union, continuously through the hours during which the plaintiff's places of business were open, walked up and down the highway outside such places of business carrying placards bearing the following words:—

> Aristcratic Restaurants have no Union agreements with Hotel and Restaurant Employees' International Union, Local 28, affiliated with Vancouver and New Westminster District Trades and Labour Council.

It appears from the material before the Court that the actions of these agents at no time impeded traffic or interfered with the free and usual use of the highway in such manner as would constitute a public nuisance. It is not suggested that the statements on the placards were not true. It appears from the material that the activities of the defendants' agents caused a falling off in the plaintiff's business and thereby caused damage to the plaintiff. It is conceded that this result was intended by the defendants.

(1) [1951] 1 D.L.R. 360.

For the respondent it is argued that at common law, on the facts stated, the plaintiff would have had a cause of action for a private nuisance. It is said that the conduct of the defendants, mentioned above, resulted in a continuous injury to the plaintiff in the enjoyment of the property of which it is in possession causing it annoyance, inconvenience and actual damage and that, while the defendants' intention may not be material in determining the existence of a nuisance, the intention to injure will be a factor to be considered by the Court in determining whether or not to award an injunction where a nuisance has been held to exist.

I do not think it necessary to decide whether the acts of the defendants would have amounted to an actionable private nuisance at common law. I will assume, for the purposes of this appeal, that they would have done so, but I think it clear that but for the circumstance of the carrying of the placards no nuisance could have been found to exist. It was the conveyance of the information on the placards to the members of the public using the highway, including the prospective patrons of the plaintiff, which caused the annoyance, inconvenience and damage of which complaint is made and on the facts of this case it appears to me that without the conveyance of such information there would have been neither nuisance nor damage.

Having reached this conclusion it seems to me that whether or not the conduct complained of would have been actionable at common law the right of action in this particular case is expressly taken away by section 3 of the *Trade-unions Act,* R.S.B.C. 1948, c. 342. The section reads as follows:—

> 3. No such trade-union or association shall be enjoined, nor shall any officer, member, agent, or servant of such trade-union or association or any other person be enjoined, nor shall it or its funds or any such officer, member, agent, servant, or other person be made liable in damages for communicating to any workman, artisan, labourer, employee, or person facts respecting employment or hiring by or with any employer, producer, or consumer or distributer of the products of labour or the purchase of such products, or for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation, or other unlawful acts, such last-named workman, artisan, labourer, employee, or person, at the expiration of any existing contract, not to renew the same with or to refuse to become the employee or customer of any such employer, producer, consumer, or distributer of the products of labour.

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Cartwright J.

I agree with my brother Rand that the word "person" as used in the section includes members of the public. I cannot read the words of the section as limited to cases where the conduct of the persons engaged in communicating facts would not be actionable at common law. In such cases no statutory protection or immunity would be required, and the section must be construed, if possible, as serving some useful purpose. Its purpose seems to me to be to provide that the communication of facts, by those mentioned in the section, shall not be actionable whether or not such communication would but for the section have been actionable. The section does not, in my opinion, render lawful any conduct which would be unlawful without the element of the communication of facts, such as, for example, trespass, nuisance or the publication of false statements, but, in the case at bar, as I have already indicated, it seems to me that but for the communication of the facts stated on the placards, the conduct of the defendants would not have been actionable at common law and the Legislature has seen fit to confer immunity from action upon the making of such communications. If the sum total of the conduct of the defendants minus the element of the communication of the information on the placards could be shown to be actionable then, in my opinion, the section would not assist them, but since this cannot be shown, I think they are protected. The fact that in this particular case the plaintiff appears to have suffered a grave hardship can not affect the duty of the Court to give effect to the words of the statute.

For the reasons given by my brother Kellock I agree with him that the conduct of the defendants is not rendered illegal by the provisions of the *Industrial Conciliation and Arbitration Act.*

I would allow the appeal with costs in this Court and in the Court of Appeal and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the appellants: *Farris, Stultz, Bull and Farris.*

Solicitors for the respondent: *Freeman, Freeman and Silvers.*

HIS MAJESTY THE KING .....APPELLANT;

AND

FRED MURAKAMI .....RESPONDENT.

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*May 14
*Jun. 20

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Abortion—Appeal by Crown from acquittal—Statement by accused rejected by trial judge—Onus of Crown not discharged—Criminal Code ss. 303, 1023(3).

Respondent was acquitted of having unlawfully used instruments with intent to procure a miscarriage when the trial judge refused to admit in evidence a statement made by respondent on the ground that he was not satisfied that it was freely and voluntarily made.

Two police officers, who were friendly with the accused, were sent out to obtain information from him. After meeting him and having coffee with him, they asked him to come to the barracks relative to a personal matter. He agreed. There they told him that the girl was in a serious condition and that in all probability serious charges would arise out of it against him. He was then given the usual warning and the statement was elicited by detailed questions, a form suggested by the accused.

The Crown appealed, but the Appellate Division of the Supreme Court of Alberta affirmed the rejection of the statement.

Held, affirming the judgment appealed from (Estey J. dissenting), that there was evidence before the trial judge on which he could properly find that the Crown had not shown affirmatively that the statement had been given voluntarily, without inducement, and that, in the determination of that question, the trial judge had not misdirected himself.

APPEAL by the Crown from the judgment of the Supreme Court of Alberta, Appellate Division (1), confirming, O'Connor C.J.A. and Parlee J.A. dissenting, the acquittal of respondent on a charge of abortion.

H. J. Wilson K.C. for the appellant.

A. Macdonald K.C. and G. J. Gorman for the respondent.

KERWIN J.:—Assuming that we have jurisdiction, I have come to the conclusion that there was evidence before Shepherd J. upon which he could find that the Crown had not shown affirmatively that the confession of the appellant was voluntary in the sense that it was made without inducement.

The appeal should be dismissed.

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

(1) 99 Can. C.C. 347.

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Rand J.

The judgment of Rand and Locke JJ. was delivered by

RAND J.:—The case of *Rex* v. *Boudreau* (1), has laid down the rule to be applied in the case of confessions: was the statement freely and voluntarily made. That means, I think, was it made by one whose mind and will were disposed to the making of it free from any real influence exerted upon them by any direct or indirect inducement of hope or fear held out by a person in authority. We have not complicated that by consideration of the relative weights of the inducement and its alternatives in producing a false as distinguished from a truthful admission.

The only question in the appeal is whether Shepherd J. had evidence before him on which he could properly find that the Crown had not shown affirmatively that the mind and will of the accused were so free and whether, in any manner, in his determination of the question, he misdirected himself. The significant circumstances are these: the police officers, advised that the young woman was in the hospital and in a serious condition and that the accused was suspected of being responsible, had been sent out to obtain whatever information they could from him. They approached him under the cloak of an admitted familiar acquaintance; they had coffee with him and tossed a coin to see who would pay for it; the opening question at their quarters was, "Do you know that your girl friend, Betty, is in the hospital in a serious condition", followed by "in all probability serious charges will arise out of it against you"; the statement was elicited by detailed questions, a form suggested by the accused. These to me furnish ample matter, first, from which to draw the inference that there was an indirect inducement, and, secondly, that its effect had not been removed by the formal warning. Since the officers were out to obtain information from him, what other possible object could the reference to the likelihood of charges have had than to exert upon him a coercive pressure to disclose what he knew? And how can it be said that he might not take that to imply that it would be better for him to do so? To suggest that it was a friendly warning to be circumspect or on guard would falsify the object

(1) [1949] S.C.R. 262.

which they were instructed to and did pursue to the end. I think the trial judge could properly have made the finding he did. Although the word "discretion" is used in some of the cases, I am unable to see the appropriateness of the term to that finding: but having sufficient facts before him and not misdirecting himself as to the requirements of the rule, his finding ought not to be interfered with.

I would dismiss the appeal.

ESTEY J. (dissenting):—This is an appeal on behalf of the Attorney-General of Alberta, under sec. 1023(3) of the *Criminal Code,* from a majority judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the dismissal of a charge preferred under sec. 303 of the *Criminal Code.*

In the course of the trial, when counsel for the Crown tendered a statement made by the accused, the trial judge, in the absence of the jury, heard evidence of the circumstances under which that statement had been obtained. At the conclusion of this "trial within a trial" he held that he was not satisfied that the statement had been voluntarily made within the meaning of the law. Counsel for the Crown at once intimated that apart from the contents of the statement the evidence did not justify his proceeding. The learned trial judge accordingly directed the jury to return a verdict of not guilty. This the jury did and the charge was dismissed.

In the course of the police investigation a sergeant directed two constables, Sargent and Thompson, to interview the accused, with whom they were acquainted. They met him about mid-afternoon and asked him to come to the barracks relative to a personal matter. He agreed. They all three had coffee at a corner café and then proceeded to the barracks at the Court House. There they went into the Court Room and for the first time this matter was discussed. Thompson said to the accused:

"Freddie, did you know that your girl friend Betty was in the hospital?"

and upon his replying that he did not Thompson said:

"Well, she is in the hospital and she is in serious condition", and that there were serious charges likely to arise from her condition, charges against him because of her condition.

(1) 99 Can. C.C. 347.

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Estey J.

Thompson then gave the usual warning and continued:

I explained it to him a little more simpler. I told him that he didn't have to say anything if he didn't wish to and that there was nothing that myself or Constable Sargent could do or say to him that could influence him or make him make any statement or make him say anything if he didn't wish to do so, and I asked him if he understood the meaning of the warning and he replied that he did fully. Following this we sat for a moment or two, none of us saying anything, and the accused had his head bowed and after a moment or two he looked up and he said, "I didn't want to do it, she is the one who wanted it done."

Nothing was then said for another moment or two when Thompson said:

"Fred, how long have you been going with Betty?"

to which the accused replied:

"One year now and six months before."

Then, after a further short silence, Thompson asked:

"Where did you get the stuff, Fred?", and he replied, "At the Sterling Drug Store."

Then Thompson said:

"Well, do you wish, would you like to make a statement covering this business, Fred?"

The accused paused for a moment and said:

"Yes, I might as well."

The accused then said he did not know how to begin, or words to that effect, and Thompson said:

"Well, in that case I might be able to ask you questions to help you to make your statement."

Thompson says he again told him that the

statement must be purely voluntary and in your own words and must be taken down as such, that I didn't want to ask him any questions that might lead him to, if I asked him any questions it would be in such a way it might help him to make his statement.

The constable then proceeded to ask questions and to put these and the answers in writing. When the statement was completed the accused read it through. He was asked if there were any mistakes or errors he desired to correct and, upon his reply that everything seemed all right, he was asked to, and did sign it.

The constables took the statement to the sergeant who had detailed them to make the investigation. While there Thompson was advised that the accused, who had remained in the Court Room, desired to see him. Thompson returned

at once to the Court Room, where the accused expressed the desire to, and did dictate another paragraph, which he read over and signed. Thompson then returned to the sergeant's office, where the matter was discussed and a decision arrived at to lay a charge against the accused contrary to sec. 303.

The statement was not marked as an exhibit, nor was it read by the learned trial judge, and was, of course, neither before the Appellate Division nor this Court.

At the conclusion of this evidence the learned trial judge stated:

> One thing that worries me here, Mr. Moyer (counsel for the accused), is the statement to the accused by Thompson that serious charges are going to be laid against you, are likely to be laid against you arising out of what has happened to this woman . . . Well, is it an inducement or a threat? Aside from that, Mr. Moyer, I can't see anything to keep this statement out.

The argument continued, in which both counsel for the Crown and the accused took part, at the conclusion of which the learned trial judge stated, in part, as follows:

> No, viewing this thing as widely as I can, giving it serious consideration, Mr. Read, you have not convinced me that this confession was gotten out of this Accused freely and voluntarily on the grounds that we have been discussing, in particular the statement of the Police Officer to him, "Serious charges are likely to be laid against him arising out of what has happened to this young woman," that coupled with the method in which the information contained in that statement was elicited, that is by questioning him. I appreciate these things do present difficulties, but they must be solved in favour of an Accused where the Court is in doubt, and I do feel very much in doubt, and I must resolve it in his favour, I would not for a moment suggest any censure of the Police Officers, none whatever, but I think the method they undertook was in error.

In the Appellate Division the rejection of this statement in evidence was affirmed by a majority of the learned judges. Mr. Justice Parlee, with whom Chief Justice O'Connor agreed, dissented and was of the opinion the learned trial judge should have received the statement and would have directed a new trial.

The appeal to this Court, being under sec. 1023(3) of the *Criminal Code,* is restricted to a question of law upon which there has been a dissent in the Appellate Court. *Steinberg* v. *The King* (1); *Rex* v. *Décary* (2).

Mr. Macdonald, counsel for the accused, contends that whether a statement is voluntary within the meaning of

(1) [1931] S.C.R. 421. (2) [1942] S.C.R. 80.

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the law is a question of fact or the exercise of a discretion upon the part of the trial judge and, therefore, cannot be raised as a question of law under sec. 1023(3). Mr. Wilson, on behalf of the Attorney-General, contends that it is a question of law and properly raised within the meaning of that section.

A confession or statement which may tend to prove the guilt of an accused party is admissible in evidence if it be affirmatively proved by the Crown that it was made voluntarily in the sense that it was not obtained by fear of consequence or hope of benefit held out by one in authority.

When such a statement is tendered in evidence at a trial the judge will at once hear the evidence of the circumstances surrounding the making of the confession as tendered by both parties. If it be a jury trial, this trial within a trial will be conducted in the absence of the jury. The judge must be there satisfied that the Crown has, by the evidence adduced, affirmatively proved that the statement, having regard to all of the circumstances, was voluntarily made. If so satisfied, he will find as a fact that the statement was voluntarily made and admit it as evidence; if not, he will reject it. His conclusion may often depend upon which of the witnesses he believes, upon weighing the evidence and construing both oral and written statements. It cannot be said to be a question of law, but rather a question of fact or of mixed law and fact.

In *The Queen* v. *Thompson* (1), Cave J. states the question that has been so often judicially approved:

> Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible.

That was a decision under the *Crown Cases Act 1848* (11 & 12 Vict., c. 28) where a case could be reserved upon "any question of law which shall have arisen on the trial." The evidence adduced before the magistrates did not remove the possibility that the inducement or threat made by a party in authority to a brother and brother-in-law of the accused

(1) (1893) 2 Q.B. 12; 17 Cox C.C. 641; L.J., M.C. 93.

had not been communicated to him and, therefore, as stated by Cave J. on behalf of the Court at p. 18:

> . . . it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary, and that they did not discharge themselves of this obligation.

In *Ibrahim* v. *Rex* (1), Lord Sumner stated at p. 610:

> With *Reg.* v. *Thompson* ((1893 2 Q.B.D. 12) before him, the learned judge must be taken to have been satisfied with the prosecution's evidence that the prisoner's statement was not so induced either by hope or fear, and, as is laid down in the same case, the decision of this question, albeit one of fact, rests with the trial judge.

Lord Sumner dealt with the question asked in the *Ibrahim* case and construed it, though in form a question, to be, in effect, "indistinguishable from an exclamation of dismay on the part of a humane officer." No misdirection was found and the reception of the statement was affirmed.

Prosko v. *The King* (2), was an appeal under sec. 1023. This Court, though a question was asked, affirmed the decision of the trial judge that the statement received in evidence was voluntary.

Sankey v. *The King* (3), was also an appeal under sec. 1023. Five grounds of appeal, based upon the dissenting opinion of the Appellate Court, were considered in argument. Under one of these it was contended that the statement given to the police by the accused was not voluntarily made and was improperly received at the trial. The appeal was in fact disposed of and a new trial granted upon one of the other grounds, but Chief Justice Anglin, in delivering the judgment of the Court, continued at p. 440:

> We feel, however, that we should not part from this case without expressing our view that the proof of the voluntary character of the accused's statement to the police, which was put in evidence against him, is most unsatisfactory. . . . With all the facts before him, the learned judge should form his own opinion that the tendered statement was indeed free and voluntary as the basis for its admission, rather than accept the mere opinion of the police officer, who had obtained it, that it was made "voluntarily and freely."

In *Gach* v. *The King* (4), also an appeal under sec. 1023, the magistrate had received the admission in evidence and this was affirmed by a majority of the Appellate Court in Manitoba. In this Court it was held that the evidence did not affirmatively prove the statement was voluntary. Mr.

(1) [1914] A.C. 599.
(2) (1922) 63 Can. S.C.R. 226.
(3) [1927] S.C.R. 436.
(4) [1943] S.C.R. 250.

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Justice Kerwin, with whom the Chief Justice agreed, was of the opinion that a threat had been made and that the evidence did not affirmatively prove that the statement had been made before the words constituting the threat, while the majority stressed, in the particular circumstances, the absence of any caution or warning.

In *Boudreau* v. *The King* (1), again an appeal under sec. 1023, the majority of this Court were of the opinion that the learned trial judge had not misdirected himself, as suggested by the dissenting opinion in the Appellate Court of Quebec, and, therefore, affirmed his reception of the statements as voluntarily made.

In *The King* v. *Bellos* (2), the Appellate Court held the statements of the accused, following questions by the police, had been improperly received in evidence at the trial. Leave to appeal was granted under sec. 1024(2) (later 1025). This Court reversed the Appellate Court, holding that the Crown had discharged its burden of establishing the voluntary character of the statements made by the accused. Chief Justice Anglin, speaking for the Court, stated at p. 261:

> The mere asking of a question by the officer subsequently, or his directing the accused's attention to the subject of one of such statements, did not amount to an inducement or persuasion such as would render the statements inadmissible.

In *Thiffault* v. *The King* (3), special leave to appeal was obtained under sec. 1025 of the *Criminal Code*. The Appellate Court in Quebec had held that the decision upon the admissibility of a statement taken from an accused party in answer to questions was a matter of discretion for the trial judge. This Court held that it was not a matter of discretion and, following the Sankey case supra, held that the evidence did not establish the statement had been voluntarily made.

In the foregoing cases, the failure of the trial judge to direct himself as to the burden that rests upon the Crown and its duty to call all available witnesses who were present at the making of the confession, as in *The Queen* v. *Thompson, Sankey* v. *The King* and *Thiffault* v. *The King,* constitutes a misdirection in law. Also, when the trial judge has directed himself that the absence of caution or warning,

(1) [1949] S.C.R. 262. (2) [1927] S.C.R. 258.
(3) [1933] S.C.R. 509.

as in *Gach* v. *The King*, or the mere asking of questions, as in *Bellos* v. *The King*, of necessity excludes the statement, he has misdirected himself in law. On the other hand, where there was no misdirection and there was evidence to support the finding of fact, as in *Prosko* v. *The King* and *Boudreau* v. *The King*, this Court approved the judgment of the trial judge.

There is a difference of judicial opinion expressed in the Provincial Courts, but, when examined, the weight of authority supports the view that whether a statement is voluntary or not is a question of fact, or of mixed law and fact.

The Crown was first given the right of appeal to the Provincial Appellate Courts in 1930 by an amendment to sec. 1013 (20 & 21 Geo. V., c. 11, sec. 28). In *Rex* v. *Rasmussen* (1), the Crown exercised its right to appeal upon a "question of law alone," contending, inter alia, that the trial judge had improperly rejected two written statements or confessions made by the accused. The decision there turned upon the meaning of the reasons given by the trial judge in rejecting the statement. The majority, in construing these reasons, held that the learned trial judge had found the statement to be freely and voluntarily made. In part these reasons read:

> . . . I have the feeling that the statement . . . was obtained freely and voluntarily, but considering all the surrounding circumstances I don't feel that it convinces me to that degree of certainty which I think the law requires.

The trial judge detailed these circumstances and the majority in the Court of Appeal held that the evidence of these circumstances did not justify his rejecting the statement. Baxter J. (later C.J.) stated at p. 240:

> . . . the learned trial Judge was in error in thinking that there were rules of law which precluded him from giving effect to the conclusion of fact at which he had arrived, viz., that the statement was made freely and voluntarily.

Barry C.J.K.B. found a disagreement in his reasons as stated at the trial, and as stated in his certificate under sec. 1020 of the *Criminal Code*, and would have ordered a new trial on that ground. The construction of the learned trial

(1) 62 Can. C.C. 217.

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judge's reasons and whether there was any evidence to justify them and the construction of his certificate all raised questions of law.

The same Appellate Court in *Rex* v. *Robichaud* (1), in a judgment of the Court written by Baxter C.J., affirmed the admission of a statement made by the accused at the trial. At p. 372 it was stated:

> Whether it was voluntary or not was a question of fact for him (trial judge) and for him alone. . . . While agreeing with his action, I would not be at liberty, if I thought otherwise, to overrule it as no principle of law has been violated.

Counsel for the Crown particularly referred to *The King* v. *Lai Ping* (2), where an application for leave to appeal from a conviction, on the basis, inter alia, that the confession of the accused was improperly admitted into evidence, was refused, and where Chief Justice Hunter stated, at p. 471:

> . . . whether the trial Judge was right in coming to the conclusion that the confession was voluntary, is a question of law and can be reserved as such.

He went on to find that the magistrate was right in admitting the confession and refused leave to appeal. In the same case Duff J. (then a member of the British Columbia Court and later Chief Justice of this Court) stated at p. 473:

> . . . if the decision of the preliminary question turned upon conflicting statements of fact made by witnesses, I should have thought it was fairly clear that the correctness of such a decision could not be raised on a question of law. I certainly find some difficulty, myself, in stating a case arising upon such a decision in the form of a question of law.

This was a decision to the effect that, as no error in law was found, the conclusion at trial should be affirmed and leave to appeal refused.

Counsel also referred to *Rex* v. *Baschuk* (3). In that case the Appellate Court in Manitoba, in effect, held that the trial judge had misdirected himself in refusing to hear evidence on the part of the accused that the statement was not voluntary. Dennistoun J.A., in delivering the judgment of the Court, stated at p. 209:

> The admissibility of the statement was a question of law and was for the Judge alone.

(1) 70 Can. C.C. 365. (2) 8 Can. C.C. 467.
(3) 56 Can. C.C. 208.

and cited *Ibrahim* v. *The King, supra.* The Court in the *Baschuk* case was clearly dealing with a question of law and, therefore, the statement just quoted must be read in that relation.

Counsel also cited *Rex* v. *Weighill* (1). The Appellate Court in British Columbia affirmed the reception in evidence of a confession. Mr. Justice O'Halloran, with whom Mr. Justice Robertson agreed, stated at p. 563:

> Under these circumstances the learned Judge, after what is not questioned was a proper "trial within a trial," came to the conclusion that the prosecution had affirmatively proven that the confession was voluntary and admitted it in evidence.

Later in the same case the learned judge stated, at p. 564:

> The appeal was framed as one of law only. But upon it being pointed out that, while the admission or rejection of a confession is undoubtedly a question of law, nevertheless, the supporting findings of fact and the legitimate inferences therefrom may be questions of fact or of mixed law and fact. . . . Counsel for the appellant moved and was granted leave to appeal against those findings of fact or mixed law and fact.

This paragraph illustrates the difficulties involved in this question and, with respect, I think the preferable view is that whether the statement in question is voluntary is a question of fact, or of mixed law and fact, dependent upon a conclusion which involves an appreciation of all the circumstances, including determination of credibility, a weighing of evidence, and construction of oral statements and written documents. The position, as stated by Turgeon J.A., is not unusual:

> The learned Chief Justice was justified, taking into consideration the numerous warnings the accused had already received and listening to his own evidence and observing him, in concluding that he did not make his statement under a promise or a threat of such a nature as to render his action involuntary.

Rex v. *Bahrey* (2).

In *Rex* v. *McLaren* (3), the Appellate Court of Alberta affirmed the reception in evidence of a confession made by the accused on which the case for the prosecution upon a charge of murder largely rested. Harvey C.J.A., writing the judgment of the Court, stated at p. 300:

> The trial Judge accepted the evidence of the policemen and I can see no ground for questioning the correctness of his finding that the confession was voluntary and therefore admissible.

(1) [1945] 1 W.W.R. 561; 83 Can. C.C. 387.
(2) [1934] 1 W.W.R. 376 at 386.
(3) 93 Can. C.C. 296.

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and later, in dealing with a somewhat similar point, he stated at p. 302:

> Unless a confession is voluntary when made to one in authority it is not admissible in evidence and for the purpose of deciding its admissibility the trial Judge must find the fact that it is voluntary . . .

The weight of authority supports the conclusion that when a trial judge finds a confession or statement has been voluntarily made by an accused he is not determining a question of law, but rather a question of fact, or a mixed question of law and fact. The appeal to this Court under sec. 1023 being restricted to a question of law upon which there has been a dissent in the Court below, it follows that no appeal can be taken to this Court under that section unless the dissent in the Appellate Court is upon a question of law in respect of which the learned trial judge, in arriving at his conclusion, has misdirected himself.

The appeal on behalf of the Crown in this case raises two questions of law: (*a*) was the learned trial judge in error in construing the words "that there were serious charges likely to arise from her condition, charges against him because of her condition;" and (*b*) was he in error in directing himself as to the effect of the questions asked in the course of the making of the statement?

The evidence in this case, upon the trial within a trial, was confined to that given by the policemen. It was all to the same effect and the statement would have been admitted as voluntary by the learned trial judge had he not construed the words spoken by constable Thompson "that there were serious charges likely to arise from her condition, charges against him because of her condition" as constituting an inducement or a threat. However these words might under other circumstances be construed, with respect, I cannot, in the circumstances here present, attribute such a meaning. The policemen and the accused were at least well acquainted and, while performing their duty in making the investigation, with commendable care they informed the accused of his position. When the words of Constable Thompson above quoted are read, as they must be, in association with the information which preceded and the warning which followed, it is clear that they did but plainly indicate to the appellant that criminal proceedings might

be taken against him. That he so understood what had been said to him is evident from his subsequent conduct, including his remarks. In the circumstances I do not think that these words did other than inform the accused of his position and did not constitute an inducement or a threat.

The learned judge also felt disposed to find the statement not voluntary because it was elicited by the asking of questions. It is the duty of the police to investigate and, so far as possible, to ascertain who has and in what manner they have violated the criminal law. In the course of their investigations it is necessary to ask questions, but, once it has been determined to take criminal proceedings against a party, that party should be advised of his position and appropriately warned. This is not a positive rule or requirement of law, but it is a wise precaution, as all statements made by an accused after his actual or virtual custody must be affirmatively proved to have been voluntarily made. If, thereafter, questions are asked, the nature and character of the questions are but additional facts to be taken into account in determining whether or not the statements have been made voluntarily. The mere fact that questions are asked does not of necessity exclude the confession or statement. Sir Lyman Duff, delivering the judgment of this Court, stated at p. 515:

> It results from this statement of the law that the determination of any question raised as to the voluntary character of a statement by the accused elicited by interrogatories administered by the police is not a mere matter of discretion for the trial judge, as the court below appears to have thought.

Thiffault v. *The King* (1); *Rex* v. *Best* (2); *Rex* v. *Bahrey* (3); *Rex* v. *Hanna* (4).

In this case the learned trial judge did not read the statement over and, therefore, was not in a position to pass upon the nature and character of the questions as asked. In view of the issues raised and the evidence given, the questions having been set out in the statement, the reading thereof was indispensable to an adequate appreciation of their possible effect. It may be that the questions did not

(1) [1933] S.C.R. 509.
(2) [1909] 1 K.B. 692.
(3) [1934] 1 W.W.R. 376.
(4) 73 Can. C.C. 109.

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in any way constitute an inducement or a threat, as in *The King* v. *Bellos* (1), where Chief Justice Anglin, speaking for the Court, stated:

> The mere asking of a question by the officer subsequently, or his directing the accused's attention to the subject of one of such statements, did not amount to an inducement or persuasion such as would render the statements inadmissible.

In these circumstances I am of the opinion that the learned trial judge misdirected himself as to the effect of the words of Constable Thompson and that, therefore, a new trial should be had. The learned trial judge also misdirected himself if his view was that the mere asking of questions precluded a finding that the statement was voluntarily made. This issue in this case must be determined at the new trial by a reading of the statement in relation to the other relevant evidence.

The appeal should be allowed and a new trial directed.

CARTWRIGHT J.—The relevant portions of the evidence and of the reasons of the learned trial judge for refusing to admit the statement of the accused are set out in the reasons for judgment of my brother Estey.

I am unable to find that the learned trial judge misdirected himself on any point of law. There is nothing in the record to suggest that he was unmindful of the well settled rule that the statement of the appellant should not be admitted in evidence against him unless it were shewn by the prosecution to have been voluntary in the sense that it was not obtained from him either by fear of prejudice or hope of advantage induced by a person in authority. It appears to me that the learned trial judge, on a consideration of the evidence as to all the circumstances surrounding the making of the statement, was not satisfied that the burden resting upon the Crown had been discharged.

It is not, I think, shewn that the learned trial judge directed himself that he must, as a matter of law, exclude the statement because prior to its making one of the officers had said to the appellant:—

> "Well, she is in the hospital and she is in serious condition," and that there were serious charges likely to arise from her condition, charges against him because of her condition.

(1) [1927] S.C.R. 258 at 261.

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nor does it appear to me that the learned trial judge directed himself, as a matter of law, that the statement must be excluded because it was made as a result of questions put to the accused by the police officers. I think he treated both of these circumstances as matters to be weighed with the rest of the evidence in reaching his final conclusion. The majority of the Court of Appeal have concurred in the view of the learned trial judge and I find myself quite unable to say that they were wrong. It is not relevant to inquire whether I would necessarily have reached the same conclusion in the first instance.

Having formed the opinion that no error on the part of the learned trial judge has been shewn, I do not find it necessary to consider the question, so ably debated before us, whether the alleged errors, if established, could have been said to involve questions of law alone.

I would dismiss the appeal.

Appeal dismissed.

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

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

HAROLD HANNEN GILMOUR *(Defendant)* ..... APPELLANT;

1951

*May 16, 17

*Jun. 20

AND

MARION L. MOSSOP *(Plaintiff)* .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Master and Servant—Negligence—Safety of premises—Housekeeper tripped over dog on stairway—Duty of employer.

The respondent had been employed for a month as housekeeper in appellant's bungalow when, on her way to the basement, she fell to the bottom of the stairway after stepping on a dog belonging to appellant and which was lying on the top step of the basement stairway. Appellant owned two dogs who, when indoors, were either in the basement or in the house itself. Respondent, informed by appellant's daughter that the dogs were fond of lying on the top step of the basement stairs, never complained about that. Appellant who was aware of this habit of the dogs did not warn respondent of

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

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any possible danger and was unaware that his daughter had done so. The trial judge and the majority in the Court of Appeal for British Columbia maintained the action.

Held, reversing the judgment appealed from and dismissing the action, that the claims that the lighting of the stairs was inadequate and that appellant knowingly permitted the dog to occupy the stairway were not borne out by the evidence; the appellant, as was his duty, provided premises that were reasonably safe for the carrying on of the work for which the respondent as housekeeper was employed and there was no evidence of any actionable negligence on his part.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming, Smith J.A. dissenting, the maintenance of the plaintiff's action.

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

H. L. Harkley for the respondent.

KERWIN J.:—The duty of an employer is to supply and install proper equipment for his employee's work and a proper system of work so far as care and skill can secure these results: *Marshment* v. *Borgstrom* (2). He is also, of course, liable for any personal negligence. These rules are applicable to household work. The circumstances in the present case appear elsewhere and I am unable to find in them that the appellant failed in his duty in any respect.

Apparently the stairway was well constructed and there was no necessity of having any railing. The claim that the appellant knowingly permitted the dogs to be on the stairway is not borne out by the evidence because, as Mr. Justice Sidney Smith (1) points out, when the appellant found either of his two dogs on the stairway he "kicked them off." The respondent had been warned by the appellant's daughter that the dogs liked to sleep on the stairs and she knew of this propensity.

On the last point, I am of opinion that the stairs were properly lighted. If they could have been better illuminated by the ceiling light in the kitchen nearest the stairs, that was something that could, and should have been done by the respondent. On the evidence she was not forbidden to use this light but merely directed to turn out all unnecessary lights. In view of the respondent's position

(1) [1951] 1 D.L.R. 440. (2) [1942] S.C.R. 374.

in the household and her knowledge of the habits of the dogs, I can come to no conclusion other than that the occurrence was an unfortunate accident.

The appeal should be allowed and the action dismissed with costs throughout.

The judgment of Rand and Locke JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) dismissing the appeal of the present appellant from a judgment for damages, for personal injuries sustained by the respondent during the course of her employment as a housekeeper in the appellant's home in Vancouver. Sidney Smith, J.A. dissented and would have allowed the appeal and dismissed the action.

The facts, in so far as they appear to me to be relevant, are as follows:—The respondent entered the service of the defendant on December 1, 1948, her duties, as described by her, being those of housekeeper which included cooking, washing and keeping the house generally in order. The appellant's home is a bungalow with a stairway leading from the basement into the kitchen. At the time of the commencement of the employment and throughout its duration the appellant owned two small dogs, one a black Scotch terrier and one referred to by the respondent as a white Highland terrier. These animals were apparently house dogs who spent their time when indoors either in the house itself or in the basement. According to the respondent, the appellant's married daughter lived in the house during the first two weeks of the employment, apparently with the view of explaining the respondent's duties to her, and during this period informed her that the dogs were "rather fond of lying on the basement stairs" and said further that they had "quite a habit of staying on the top step of the basement stairs" and pointed out that this was dangerous. The respondent admitted that she knew that the dogs slept on the top step occasionally. She apparently was fond of the dogs and allowed them, at least at times, to sleep in the kitchen while she was doing her work: the weather had been cold around Christmas and she said that the black dog was usually

(1) [1951] 1 D.L.R. 440.

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lying under the kitchen range and the white dog in front of the kitchen register. About the middle of December the appellant's daughter left, leaving the respondent in charge of the housework. It is clear that during this period she frequently went to the basement in carrying on her duties. The stairway was carpeted with a dark coloured carpet and was some nine steps in length, and from the ceiling at the bottom there was suspended a light which could be turned on by a switch located on the wall immediately to the right of the entrance to the stairway. In addition to this, the doorway led directly from the stairway into the kitchen and there were two lights in the ceiling in this room, one at least of which when turned on would materially improve the lighting at the head of the stairs. There was no handrail on either side of the stairway.

On the evening of the accident when the appellant, his son and the respondent had sat down to dinner, the latter discovered that she had forgotten some food and got up from the table to proceed to the basement to procure it. According to her evidence she had turned out one of the lights in the kitchen, in accordance with general instructions received by her from the appellant to turn off the lights when the room was not in use. On approaching the entrance to the stairway she switched on the basement light and then stepped on the black dog, which was apparently lying on the top step, falling down the stairs and sustaining injuries. This dog, she said, had been lying under the kitchen range all that afternoon and had attempted to follow her into the dining room, presumably when she went in to dinner. She had ordered him back and she concluded that he had gone back to sleep under the stove where it was warm. She said that when she had last seen him he was sitting at the dining room door trying to get in.

There is really no dispute between the parties as to these habits of the dogs. The appellant was aware that they slept on the basement stairs at times and said that "we all knew it." The black dog, he said, would very often lie on the top step looking into the kitchen through the open doorway. There was no complaint made to him by the respondent and he did not warn her of any possible danger and was unaware that his daughter had done so.

The plaintiff's claim is founded in negligence and the particulars pleaded are:—

(*a*) The stairway was unlighted and very dark and there was no lighting or means of lighting provided.

(*b*) There was no handrail.

(*c*) The defendant knowingly permitted his dog to occupy the stairway without providing adequate lighting for the protection of those using the stairway.

Coady, J. by whom the action was tried, found as a fact that the respondent had been advised when she came to work that the dogs were in the habit of lying on the stairway and, while she had not observed them lying there at any time before the accident, she knew that they were from time to time to be found there. Considering, however, that the defendant knew that the dogs were from time to time to be found lying there and that he knew or ought to have known the danger which this would create for anyone using the stairway, unless "precaution was observed to determine before stepping on the stairway that the dog was not there", he found there was a breach of duty unless the doctrine *volenti non fit injuria* applied or the employee was guilty of contributory negligence. The learned judge was not satisfied that the respondent had freely and voluntarily, with full knowledge of the nature and extent of the risk she ran, impliedly agreed to incur it: as to contributory negligence he considered there was none. While finding that had the respondent hesitated at the top of the stairway when she put the light on and peered down at the first step the lighting was sufficient to enable her to see the dog there, he did not think this was a failure on her part to exercise reasonable care for her own safety. On the appeal O'Halloran, J.A., considering that the trial judge had neither misapprehended the evidence or erred in the application of appropriate legal principles, held that the appeal failed. Robertson, J.A. agreed with the learned trial judge that there was no contributory negligence and no volens. Finding that the appellant had never warned the respondent of any danger while knowing that her duties required her to go several times a day to the basement, he considered that the appellant was under a duty to take steps to guard against the danger she ran of stepping

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on the dog and falling. The fact that the respondent was well aware that the dogs at times lay on the steps and had been warned of the danger by the appellant's daughter is not noted.

While neither the judgment at the trial nor the reasons of the majority of the Court of Appeal appear to support the verdict on any of the three grounds of negligence pleaded, the matter should not, I think, be disposed of on this footing. The absence of the handrail does not appear to have been considered as affecting the matter by any of the learned judges who have considered the case. As to the lighting, the learned trial judge, as stated, found that it was sufficient to disclose the presence of the dog, had the plaintiff looked before starting down the stairway. There was no evidence to support the contention that the appellant knowingly permitted the dog to occupy the stairway and that he was aware of the dog's presence there. The respondent's case must, therefore, rest upon the ground that in the circumstances disclosed the appellant owed a duty to her to guard her in some manner against such risk as was inherent in the fact that the dogs were permitted to be in the house and at times on the basement stairs, with the risk of falling to which this might subject the respondent.

In my opinion, the judgment appealed from cannot be sustained. I agree with Mr. Justice Sidney Smith that the evidence does not disclose a cause of action. An employer who has a housekeeper or domestic servant is bound at common law to provide premises that are reasonably safe for the carrying on of the work for which the employee is engaged. As in the case of other employers he must not expose his servant to unreasonable risks. With great respect for the opinion of the learned trial judge, I think the principle upon which such cases as *Baker* v. *James* (1), where the liability sought to be established was on the ground that the employer had supplied the injured employee with a defective motor car, has no application to the present matter. *Smith* v. *Baker* (2) and *Wilsons and Clyde Coal Company* v. *English* (3), are the leading cases in which liability was sought to be established on the basis

(1) [1921] 2 K.B. 674. (2) [1891] A.C. 325.
(3) [1938] A.C. 57.

that there was some defective system of work or defective machinery and plant. There was nothing of this nature in the present case unless, indeed, the system of lighting was insufficient and I think the evidence does not support any such view. It cannot be contended on the evidence that the appellant's house was other than a reasonably safe place to carry on the duties with which the respondent was charged. The stairway to the basement was that usually found in houses of this nature and afforded a proper and safe means of access to the basement to any person exercising ordinary care. The common law infers that when a person enters into a contract of service he takes on himself the ordinary risks incident to such work as is lawfully carried on upon the master's premises. It is common place to find in private houses in Canada where housekeepers or servants are employed small house pets such as dogs and cats. The habits of these small animals of sleeping on the floor in various places throughout dwellings and as well upon stairways is a matter of common knowledge and, in my opinion, it is an implied term of such contracts of employment that any slight risk that this may involve is assumed by the employee. I regard that as being in the same category as other risks ordinarily involved in doing housework, the assumption of which I consider also to be implied. If such risk was increased by a failure to supply proper lighting, other considerations would arise but here it is plain from the evidence that the light available to the respondent from the basement light provided was adequate to enable her to see the dog: if further light had been required it was available from the overhead light in the kitchen, which she failed to turn on. To hold that in these circumstances the appellant is liable is, in my opinion, to make him an insurer of the safety of his servant.

The appeal should be allowed and the action dismissed with costs throughout.

ESTEY J.:—I agree that this appeal should be allowed and the action dismissed. The defendant is entitled to his costs throughout.

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GILMOUR v. MOSSOP

Cartwright J.

CARTWRIGHT J.:—There does not appear to be any dispute as to the relevant facts in this case. Such facts are fully set out in the judgment of my brother Locke.

In my view there is no evidence that the injuries suffered by the plaintiff were caused or contributed to by the breach of any duty owed by the defendant to the plaintiff. I think that her injuries were the result of an unfortunate accident.

The appeal should be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *L. St. M. Du Moulin.*

Solicitor for the respondent: *Harold L. Harkley.*

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* Apr. 30
* May 1, 2, 3
* Oct. 2

J. LUCIEN DANSEREAU (*Defendant*).....APPELLANT;

AND

COLETTE BERGET (*Petitioner*).....RESPONDENT;

AND

THE PROTHONOTARY OF THE SUPERIOR COURT OF THE DISTRICT OF MONTREAL..... } MIS-EN-CAUSE;

AND

DAME FANNY IRÉNÉE GABRIELLE COLIN..... } INTERVENANT.

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

Wills—Letter purporting to be a will—Probate in Quebec—Jurisdiction of Supreme Court of Canada—Arts. 756, 857, 858 C.C.—Art. 44 C.P.

The respondent sought to probate as a will a letter written by the deceased in these terms: "Je me suis senti très fatigué dernièrement et n'ai pas eu le temps de m'occuper de ton testament. De toutes façons j'aimerais à te dire que s'il m'arrivait quelque chose tout ce qui m'appartient est à toi". The trial judge held that this letter was not a will but the Court of Appeal for Quebec reversed his decision.

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

Held (the majority assuming the jurisdiction of this Court without expressing any opinion on the question): That the letter meets all the conditions of a will; it was written and signed by the testator and showed his intention to dispose of his property in favour of the respondent. Even if all the surrounding circumstances are taken into account, there was nothing in the evidence to indicate a contrary intention.

Rand and Estey JJ. would quash the appeal on the ground that the issues raised and contested before the trial judge could not, in the proceedings to probate, issue in a final judgment, and consequently this Court was without jurisdiction.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the decision of the trial judge and holding that the letter in question was a will.

L. E. Beaulieu KC., E. Masson K.C., and *A. Dansereau* for the Appellant.

André Forget and *T. H. Montgomery* for the Respondent.

J. P. Charbonneau K.C., for the Intervenant.

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

TASCHEREAU J.:—La requérante intimée Colette Berget s'est adressée à la Cour Supérieure du District de Montréal, pour faire vérifier un testament olographe signé par Eugène Berthiaume, le 21 août 1946. Ce document présenté pour vérification a été fait à New-York, É.-U., et est rédigé dans les termes suivants:

21 août 1946.

Ma bien chère Colette,

Je me suis senti très fatigué dernièrement et n'ai pas eu le temps de m'occuper de ton testament. De toutes façons j'aimerais à te dire que s'il m'arrivait quelque chose tout ce qui m'appartient est à toi.

Je suis content d'apprendre que tu passes un temps plaisant au cours de tes vacances et te dis à bientôt.

Ton oncle affectionné,

(Signé) Eug. Berthiaume

En outre de demander la vérification de cet écrit, la requête conclut à ce que la vérification d'un testament antérieur, en date du 14 mars 1935, soit déclarée nulle et que les dossiers de la Cour soient corrigés en conséquence.

(1) Q.R. [1950] K.B. 415.

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Taschereau J.

L'appelant Lucien Dansereau, bénéficiaire en vertu du premier testament, a contesté cette requête, et M. le Juge Louis Cousineau l'a rejetée avec dépens. Il en est arrivé à la conclusion que cette lettre adressée à Colette Berget n'était pas un testament. La Cour d'Appel (1) a infirmé ce jugement, et le dispositif de l'ordonnance de cette Cour se lit ainsi:

> Par ces motifs,
>
> Accueille l'appel avec dépens; infirme le jugement de la Cour Supérieure; et, faisant droit avec dépens à la requête de l'appelante, *reconnaît l'écrit présenté par la requérante pour vérification, savoir: la lettre qu'Eugène Berthiaume lui a adressée le 21 août 1946,* comme le véritable et dernier testament dudit Eugène Berthiaume et en ordonne l'homologation avec toutes les conséquences que de droit; *annule le jugement rendu par le député-protonotaire de la Cour Supérieure* du District de Montréal le 4 septembre 1946, *par lequel a été reconnu et vérifié un testament fait par ledit Eugène Berthiaume, le 14 mars 1935;* et ordonne au protonotaire de la Cour Supérieure du District de Montréal, mis en cause, de noter en marge des registres qui sont sous sa garde et où apparaît la vérification dudit testament du 14 mars 1935, le présent jugement, à toutes fins que de droit.

Lors de l'argument, une question de juridiction soulevée par le banc, s'est présentée. Certains membres de la cour ont en effet émis des doutes sur les pouvoirs de cette cour d'entendre un appel sur un jugement en vérification de testament. En vertu de la Loi de la Cour Suprême du Canada, pour que la cour ait juridiction, il faut nécessairement qu'il s'agisse d'un jugement final, qui détermine en tout ou en partie un droit absolu de l'une des parties.

L'effet d'un jugement de vérification n'est pas uniquement d'autoriser qu'il soit délivré des copies certifiées du testament, lesquelles copies ont un caractère d'authenticité. (C.C. 857.) Ce jugement de vérification établit que le testament est *prima facie valide,* et comme le disent les Commissaires chargés de la codification (5ème Rapport, 178): "Il y a intérêt à ce que la validité subisse une première épreuve". Ce jugement donne effet au testament jusqu'à ce qu'il soit infirmé sur contestation. (C.C. 857); jusqu'à là, il constitue une *"preuve provisoire".* (*Mignault* v. *Malo* (2); *Wynne* v. *Wynne* (3); *Amiot* v. *Dugas* (4); *Billette* v. *Vallée* (5); *Latour* v. *Grenier* (6); Mignault,

(1) Q.R. [1950] K.B. 415.
(2) (1872) L.R. 4 P.C. 123.
(3) (1921) 62 Can. S.C.R. 74.
(4) [1929] S.C.R. 600.
(5) [1931] S.C.R. 316.
(6) [1945] S.C.R. 749.

Vol. 4, 313; Langelier, Vol. 3, 139). De plus, les héritiers appelés à la vérification peuvent ensuite contester le testament. (858 C.C.)

Il s'ensuivrait que le jugement rendu par la Cour d'Appel n'est pas définitif, en ce sens qu'il n'a pas déterminé finalement les droits des parties. Nous n'avons pas eu cependant le bénéfice d'un argument complet sur ce point, car aucune des parties n'a émis de doute sur notre juridiction. On a semblé plutôt prendre pour acquis que cette Cour était légalement saisie de la cause.

Si j'en venais à la conclusion que cet appel devrait être maintenu, il faudrait déterminer au préalable cette question de juridiction, mais comme je crois qu'il doit être rejeté au mérite, il n'est pas nécessaire de l'examiner davantage.

Je m'accorde avec le jugement de la Cour d'Appel qui a ordonné la vérification. Cette cour qui avait évidemment juridiction pour entendre la cause en vertu des dispositions de l'article 44 C.P., ne s'est pas tant basée, pour rendre son jugement, sur la preuve volumineuse produite par l'appelant concernant les motifs qui ont pu inspirer le de cujus Eugène Berthiaume, à écrire cette lettre du 21 août 1946, que sur l'analyse et l'examen *du document lui-même,* c'est-à-dire sur la question de savoir s'il constitue ou non un testament au sens de la loi. La Cour d'Appel a en effet exprimé des doutes sur son droit d'aller rechercher ailleurs que dans l'écrit, les raisons pour lesquelles la vérification doit être ordonnée. Ceci me paraît conforme au jugement rendu par le Conseil Privé dans la cause déjà citée de *Mignault* v. *Malo,* où l'on trouve ce qui suit:

> It is very doubtful whether any allegation or plea as to the merits, for instance, a plea or allegation setting up insanity or undue influence could be propounded, *or would be admitted on an application for probate.*

A tout événement, la Cour a exprimé l'opinion que je partage, que même s'il y avait lieu de tenir compte de toutes les circonstances extrinsèques, il n'y a rien dans la preuve qui permette de conclure que Berthiaume n'a pas eu l'intention de tester en faveur de l'intimée.

Il reste donc à déterminer si cet écrit constitue bien un testament au sens de la loi. Il y a longtemps qu'il ne fait plus de doute qu'une lettre missive peut constituer un testament olographe valide, qui comme on le sait, n'a pas

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besoin d'être entouré de formules sacramentelles. Du moment qu'un document est écrit en entier de la main du testateur, qu'il est signé par lui, qu'il contient une disposition de biens à l'exclusion de simples recommandations, qu'il révèle chez son auteur une volonté de tester, et qu'il n'est pas seulement un projet, alors, il est véritablement un testament.

La lettre du 21 août 1946 rencontre-t-elle ces conditions? Il est admis qu'elle est écrite en entier et signée par le testateur, mais c'est la prétention de l'appelant qu'elle ne révèle pas une intention de léguer, mais plutôt une promesse de compléter un autre testament déjà commencé et fait suivant la loi anglaise. De plus, l'emploi du conditionnel "j'aimerais à te dire" créerait suffisamment d'équivoque et d'ambiguïté pour sous-entendre de la part de Berthiaume des conditions et des réserves qui empêcheraient cette lettre d'être une disposition à cause de mort.

Je ne puis admettre ces prétentions. Tout d'abord, la référence à un testament antérieur et incomplet que la fatigue ou la maladie l'aurait empêché de terminer, indique bien de la part de Berthiaume l'intention de tester en faveur de l'intimée. Le but de cette lettre est évidemment d'assurer l'intimée que de "toutes façons", c'est-à-dire que le de cujus ait ou non le temps de compléter son testament antérieur, elle sera son héritière. Il veut lui dire que si dans l'intervalle "il lui arrivait quelque chose", c'est-à-dire "dans l'éventualité de sa mort", "tout ce qui lui appartient" est à elle. Tous ces mots font clairement de l'intimée une légataire universelle. Je ne puis voir aucune ambiguïté, aucune réserve, aucun indice qu'il ne s'agirait que d'un projet de tester. Il y a là, à mon sens, une complète disposition testamentaire.

L'emploi du conditionnel "j'aimerais à te dire" n'affecte en rien la valeur légale du testament. Ces mots signifient "je tiens à te dire". On sait que le conditionnel est souvent employé pour exprimer autre chose qu'une condition. Il remplace souvent l'indicatif pour rendre une même idée. Il sert à exprimer un souhait, ou bien encore une affirmation adoucie. Ainsi, "je voudrais vous parler" a le même sens que "je veux vous parler". "Je serais heureux de vous voir" marque évidemment un désir et n'implique aucune condition.

Aux présentes procédures est intervenue Fanny Irène Colin, épouse d'Eugène Berthiaume. Elle soumet que ledit Berthiaume a signé un testament olographe le 1er novembre 1937, en vertu duquel elle serait légataire universelle, et que le 28 septembre 1943 un autre testament notarié, reçu devant Léonard Léger, N.P., serait au même effet. Elle admet que ce testament a été révoqué le 6 avril 1946, mais soutient que si la lettre du 21 août 1946 n'est pas le dernier testament d'Eugène Berthiaume, elle serait l'héritière en vertu du testament du 1er novembre 1937, ou dans l'alternative de la moitié de la succession en vertu de l'article 624*b* du Code Civil. Comme je crois avec la Cour d'Appel, que cette lettre du 21 août 1946 est le dernier testament d'Eugène Berthiaume, il s'ensuit que les prétentions de l'intervenante ne peuvent être accueillies.

Je suis d'opinion que le présent appel et l'intervention doivent être rejetés avec dépens.

The judgment of Rand and Estey JJ. was delivered by

RAND J.:—In this appeal there are two questions, one, whether the letter written by the deceased interpreted in the background of the circumstances, can be found to be his will, and the other, whether that issue can be adjudicated in the proceedings before us.

These latter originated in a petition which, among other things, prayed for the probate of the document. In Quebec, the articles of the Code dealing with probate provide for a preliminary verification of a testament, that is to say, it is presented to a prothonotary or a judge of the Superior Court, whose function it is to satisfy himself that provisionally, at least, the document ought to be admitted to registration. But by art. 858 "The probate of a will does not prevent its contestation by persons interested." That means, in my opinion, any manner of contestation, and it would be raised in an action or other appropriate proceeding. The jurisdiction is essentially non-contentious. As it appears in *Dugas* v. *Amiot* (1):

> Et l'on peut dire que la juridiction exercée en ces matières est plutôt "gracieuse ou non contentieuse" que judiciaire. (Migneault, Droit civil canadien, vol. 4, p. 314).

(1) [1929] S.C.R. 600 at 611.

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In *Migneault* v. *Malo* (1), an unsigned document had been presented to a judge of the Superior Court for probate, and its verification was contested on the ground that by the law of Quebec the document could not be admitted as a testamentary instrument. Witnesses were heard, examined and cross-examined, judgment was rendered as in an ordinary juridical issue, and probate granted. Thereafter an action was taken based upon the will and the same parties again raised the issue of validity. This action took its usual course from the Superior Court to the courts of appeal in the province and ultimately to the Judicial Committee. In the latter the provisions of the statute of 1801 were carefully examined, and the view of the Committee was that on their proper construction the proceedings in probate were intended to be assimilated to probate in England and that a contestation made and determined established res judicata of the issues involved. On the other hand, for a period of over seventy years, another interpretation had been given them to the effect that the probate determined no legal rights. In view of that practice, the Committee held the decision on the issue raised and contested before the judge in probate not to be a final determination and that the contestation was open to the defendant in the latter proceedings.

The point involved, as I have said, was one of law, whether an unsigned document could constitute in 1866, before the Code, a will. The Code deals with the matter in a number of articles, but I do not construe them as changing nor do I understand that any construction has been suggested which changes the nature of the proceedings or jurisdiction from what they bore earlier. In Migneault's language, it is "gracieuse ou non contentieuse", and it must be taken not to go to the judicial determination of substantive rights.

In *Malo,* Sir Robert Phillimore observed that in the seventy years' experience to which he referred no case of appeal in probate had ever been taken. Here, however, an appeal has been taken, and the issues that were fought out before the Superior Court were likewise debated on appeal. On the law established in that case, those contentions were beyond the jurisdiction of the Superior Court and conse-

(1) (1872) L.R. 4 P.C. 123.

quently of the Court of King's Bench. The appeal was obviously from a decision on matter on which the judge below could adjudicate, but since that was not an adjudication in a determinative judicial sense, the court in appeal could not add to it any jurisdictional virtue of its own.

Notwithstanding the foregoing, I have considered the substantive question of fact, and I agree with the Court of Appeal (1) that the deceased did intend the letter to constitute an interim disposition of his property, that he intended it to be his will until such time as a more formal instrument could, as he contemplated, be made. It was not merely an expression of intention to make the disposition subsequently, nor was it a simulated will held out as an inducement to keep the young lady in a favourable attitude towards him in his difficulties. In coming to this conclusion, I have, of course, taken into account all the relevant circumstances.

Nevertheless, being bound by the decision in Malo to hold the Superior Court and the Court of King's Bench in appeal to have been without jurisdiction to adjudicate substantive rights of the parties, I must hold there is no jurisdiction in this Court to hear the appeal. On that ground, it should be quashed and the respondents given costs as of a motion to that effect. The intervention of Fanny Irène Colin, widow of the deceased, should be dismissed without costs.

Appeal and intervention dismissed with costs.

Solicitor for the Appellant: *Edouard Masson.*

Solicitors for the Respondent: *Montgomery, McMichael, Common, Howard, Forsyth & Ker.*

Solicitors for the Intervenant: *Charbonneau, Charbonneau & Charlebois.*

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(1) Q.R. [1950] K.B. 415.

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*Feb. 15, 16, 19.

*Oct. 2

DAVID COOK *(Defendant)* .....APPELLANT;

AND

ROBERT LEWIS *(Plaintiff)* .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Hunting accident—Jury's finding that plaintiff shot by one of two defendants but unable to say by which one—Whether finding of absence of negligence was perverse—Onus.

The respondent while hunting was shot in the face by bird-shot. The appellant and a member of his party of three hunters admitted discharging their guns in the vicinity practically at the same time but not at the same bird. Appellant's party had agreed to divide the bag evenly. The jury found that the respondent had been shot by one of these two hunters but were unable to say by which one. They also found that the injuries were not caused by the negligence of either. The action was dismissed by the trial judge but the Court of Appeal for British Columbia ordered a new trial.

Held (affirming the judgment appealed from) (Locke J. dissenting), that the finding of the jury exculpating both defendants from negligence was rightly set aside.

Per Rand J.: The jury should have been instructed that if the victim, having brought guilt down to one or both of two persons, could bring home to either or both of them the further wrong of having impaired his remedial right of establishing liability, then the legal consequence would be that the onus would be shifted to the wrongdoer to exculpate himself.

Per Estey, Cartwright and Fauteux JJ.: The proper verdict would have been reached had the jury been instructed that once the plaintiff had proven that he was shot by one of the defendants the onus was then on such defendant to establish absence of both intention and negligence; and that if the jury found themselves unable to decide which of the two shot the plaintiff, because in their opinion both shot negligently in his direction, both defendants should be found liable.

Per Locke J. (dissenting): Since neither of the defendants was liable for the negligence of the other, in the absence of a finding as to which of them had shot the plaintiff, the action was properly dismissed. Since the answers declared the inability of the jury to say which of the defendants had fired the shot which caused the injury, no question arose as to whether the finding that neither of the defendants had been negligent was perverse.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) setting aside the dismissal of the action by the trial judge and ordering a new trial.

(1) [1950] 4 D.L.R. 136.

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

G. N. Shaver K.C. and *F. S. Cunliffe K.C.* for the appellant.

A. Leighton and W. G. Burke-Robertson for the respondent.

RAND J.:—I agree with the Court of Appeal (1) that the finding of the jury exculpating both defendants from negligence was perverse and it is unnecessary to examine the facts on which that conclusion is based.

There remains the answer that, although shots from one of the two guns struck the respondent, the jury could not determine from which they came. This is open to at least four interpretations: first, believing that only one discharge could have inflicted the injuries, they found it difficult to decide which testimony, whether that of Cook or Aikenhead, was to be accepted, the evidence of each, taken at its face, excluding guilt; or that the shots from both guns having been fired so nearly at the same time and to have been aimed so nearly at the same target, it was impossible for them to say which struck the eye: or that they were unable to say whether the situation was either of those two alternatives: or finally, that they were not unanimous on any one or more of these views.

It will be seen that there is one feature common to the first three: having found that either A or B had been the cause of injury to C, the jury declare that C has not satisfied them which of the two it was. It is then a problem in proof and must be considered from that standpoint.

A cause may be said to be an operating element which in de facto co-operation with what may be called environment is considered the factor of culpability in determining legal responsibility for damage or loss done to person or property. But in that determination the practical difficulty turns on the allocation of elements to the one or other of these two divisions of data. In considering the second and third possibilities in this case, the essential obstacle to proof is the fact of multiple discharges so related as to confuse their individual effects: it is that fact that bars final proof. But if the victim, having brought guilt down to one or both of two persons before the court, can bring home to either of them a further

(1) [1950] 4 D.L.R. 136.

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Rand J.

wrong done him in relation to his remedial right of making that proof, then I should say that on accepted principles, the barrier to it can and should be removed.

The Court of Appeal of England has laid down this principle: that if A is guilty of a negligent act toward B, the total direct consequences of that act are chargeable against A notwithstanding that they arise from reactions unforeseeable by the ordinary person acting reasonably; *Polemis* v. *Furness Withy* (1). In that case, the presence of benzine was known, but that a spark could occur in the fall of a plank into the hold sufficient to set off an explosion, although a potentiality of the total circumstances, was outside the range of anticipation; a falling plank might do some damage to the ship, but would not ordinarily be associated in the impact on wood or iron with fire, and, a fortiori, with sparking explosive fumes.

Similarly would that result follow where, instead of an unforeseen potentiality, an element is introduced into the scene at the critical moment of which or its probability the negligent actor knows or ought to have known. That element becomes, then, one of the circumstances in reaction with which the consequences of his act manifest themselves, among which, here, is the confusion of consequences. If the new element is innocent, no liability results to the person who introduces it; if culpable, its effect in law remains to be ascertained.

What, then, the culpable actor has done by his initial negligent act is, first, to have set in motion a dangerous force which embraces the injured person within the scope of its probable mischief; and next, in conjunction with circumstances which he must be held to contemplate, to have made more difficult if not impossible the means of proving the possible damaging results of his own act or the similar results of the act of another. He has violated not only the victim's substantive right to security, but he has also culpably impaired the latter's remedial right of establishing liability. By confusing his act with environmental conditions, he has, in effect, destroyed the victim's power of proof.

(1) [1921] 3 K.B. 560.

The legal consequence of that is, I should say, that the onus is then shifted to the wrongdoer to exculpate himself; it becomes in fact a question of proof between him and the other and innocent member of the alternatives, the burden of which he must bear. The onus attaches to culpability, and if both acts bear that taint, the onus or prima facie transmission of responsibility attaches to both, and the question of the sole responsibility of one is a matter between them.

On the first interpretation, the answer of the jury was insufficient as a return. Their duty was to determine the facts from the evidence laid before them as best they could on the balance of probabilities, and it could not be evaded in the face of such divergent testimony either because of a tender regard for distasteful implications or for any other reason. The jury might have reached a deadlock from which there was no escape: but with the proper direction as to onus, that would have been obviated. The result is that there has been no verdict on an essential question, and the judgment based upon the answer cannot stand.

Although counsel were quite willing that questions be put, it seems evident that they had no part in formulating them; and I cannot but think that to ask ". . . are you able to decide by which one" was unfortunate because it opened to the jury a means of escape from an unpleasant duty, and it implied that it would be proper for them to answer as they did: they ought to have been asked to find from which gun came the shots that did the harm. Even without the direction as to onus, they should have been sent back to endeavour to complete their findings.

If, next, the answer means, as it may, that lack of unanimity was the frustrating factor, there is again a fatal incompleteness of findings, because of which, likewise, the judgment cannot stand.

The remaining interpretations fall within the considerations already expressed. The dominating fact is a confusion of causal factors and consequences resulting in what was, in substance, a small shower of flying shot. In dealing with such a situation, we must keep in mind that the task of the Court is to determine responsibility, not cause, but obviously for that purpose cause as ordinarily

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conceived is a controlling factor. Ultimately, it is cause in a juridical sense that we are to find. In the judicial process, also, auxiliary mechanisms have been adopted which experience has vindicated, such as, for example, onus, estoppel, presumption. Although the facts here, in their precise form, have not, then, previously been presented to the courts of either this country or England, they are such as to which onus is properly invoked.

The risks arising from these sporting activities by increased numbers of participants and diminishing opportunity for their safe exercise, as the facts here indicate, require appropriate refinements in foresight. Against the private and public interests at stake, is the privilege of the individual to engage in a sport not inherently objectionable. As yet, certainly, the community is not ready to assume the burden of such a mishap. The question is whether a victim is to be told that such a risk, not only in substantive right but in remedy, is one he must assume. When we have reached the point where, as here, shots are considered spent at a distance of between 150 feet and 200 feet and the woods are "full" of hunters, a somewhat stringent regard to conduct seems to me to be obvious. It would be a strange commentary on its concern toward personal safety, that the law, although forbidding the victim any other mode of redress, was powerless to accord him any in its own form of relief. I am unable to assent to the view that there is any such helplessness.

Liability would, a fortiori, be the legal result if the acts of several were intended to be co-operative for a common object or if the act of one was so aided or abetted or induced by the act or conduct of another that it could be said to have had the will and the influence of that other behind it; and in determining that fact, the usual understandings between hunters in relation to the existence of conditions that would make shooting in a particular situation dangerous, are relevant.

Assuming, then, that the jury have found one or both of the defendants here negligent, as on the evidence I think they must have, and at the same time have found that the consequences of the two shots, whether from a confusion in time or in area, cannot be segregated, the onus on the guilty person arises. This is a case where each hunter

would know of or expect the shooting by the other and the negligent actor has culpably participated in the proof-destroying fact, the multiple shooting and its consequences. No liability will, in any event attach to an innocent act of shooting, but the culpable actor, as against innocence, must bear the burden of exculpation.

These views of the law were not as adequately presented to the jury as I think they should have been.

I would, therefore, dismiss the appeal with costs. The motion to quash for want of jurisdiction is dismissed with costs.

The judgment of Estey, Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.—This is an appeal by David Cook, one of the defendants, from a judgment of the Court of Appeal for British Columbia (1) setting aside the judgment pronounced at the trial in favour of the defendants and directing a new trial. The other defendant, Akenhead, does not appeal.

The evidence is conflicting as to many matters and, as I have reached the conclusion that the order of the Court of Appeal (1) directing a new trial should be upheld, I will make no further reference to the evidence than is necessary to indicate the points at issue.

On the 11th of September, 1948, the plaintiff was hunting with his brother John Lewis and one Dennis Fitzgerald in the vicinity of Quinsam Lake on Vancouver Island. It was the opening day of the hunting season for blue grouse and deer and it was said that the country in which they were hunting was full of hunters. The defendants, accompanied by John Wagstaff, then sixteen years of age, were hunting grouse together. They were using a dog which belonged to Akenhead. They had agreed to divide their bag evenly.

It is said that Cook, Akenhead and Wagstaff were proceeding approximately in line, Cook being on the left, Akenhead in the centre and Wagstaff to the right. The dog, which was some little distance ahead of them, came to a point and at about that moment Fitzgerald, who had come into view on Cook's left, called out a warning and

(1) [1950] 4 D.L.R. 136.

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pointed towards a clump of trees which was ahead of Cook and Akenhead and in which at that moment the plaintiff was. Cook heard Fitzgerald's call but did not hear what he said. He thought that Fitzgerald was pointing at the dog and was calling attention to the fact that the dog was on point. Akenhead states that he did not hear Fitzgerald's call. Momentarily after this, a covey of some four or five grouse flew up a short distance in front of the dog. Akenhead says that he fired at the bird which was farthest to the right, leaving the other birds to Cook. Cook says that he fired at a bird straight ahead of him. They appear to have fired almost simultaneously. Immediately afterwards there was a scream from the clump of trees, mentioned above, and the plaintiff appeared. He had received several shot in his face, one of which caused the loss of an eye. John Lewis accused Cook of having shot his brother. Some discussion followed in which both Cook and Akenhead asserted that they had not fired in the direction of the trees in which the plaintiff was hit.

It was the theory of the plaintiff that either Cook or Akenhead or both of them had shot him and that each was liable even if only one of them had fired the shot which struck him. The theory of the defendant Cook was that he had fired only one shot and had fired in such a direction that it was quite impossible that any shot from his gun could have struck the plaintiff. He also stated that there had been a third shot fired almost simultaneously with those fired by himself and Akenhead and suggested that an unidentified third person had fired the shot which injured the plaintiff. His counsel disclaimed before the jury any suggestion that Akenhead had shot the plaintiff.

Akenhead's position at the trial was that he had fired to the right, that he could not have shot the plaintiff and that if it was either of them it was Cook and not he who had done so.

The action was tried before Wood J. with a special jury. The learned judge directed the jury to bring in a general verdict. Some time after the jury had retired they returned to the court room to ask some questions and following a short discussion between the Court and counsel it was

decided to put questions to the jury. The questions put and the jury's answers are as follows:—

1. Q. Was the Plaintiff shot by either of the Defendants?
A. Yes.

2. Q. If so by which one of them? (no answer).

3. Q. If the Plaintiff was shot by one of the Defendants are you able to decide by which one?
A. No.

4. Q. Were the Plaintiff's injuries caused by the negligence of either of the Defendants?
A. No.

5. Q. Damages
Special (Nothing filled in).
General (Nothing filled in).

The jury brought in these answers at 6.40 p.m. on a Friday. Counsel for the defendant Cook moved for a dismissal of the action and counsel for the plaintiff submitted that the answer negativing negligence was perverse and that the plaintiff was entitled to a verdict. The learned trial judge stated that he would hear argument on a later date and thereupon dismissed the jury.

At the opening of the argument on the following Wednesday counsel for the plaintiff said:—

First of all I think the jury was dismissed too quickly. I was on my feet intending to argue and to request your lordship to send the jury back, and re-instruct them on certain points I will deal with now, and have them reconsider them in view of certain instructions which I think would have been appropriate in view of the first answer, that is when they found one or other of the defendants fired the shot. That created a condition of affairs that made further instructions proper. Of course we were all tired. It was the end of the day, everybody wanted to get away, and the jury was out before anybody realized what was happening.

and argued that the trial judge should himself direct a new trial. At the conclusion of the argument the learned trial judge dismissed the action, with costs.

The judgment of the Court of Appeal was delivered by Sidney Smith J.A. He rejected the appellant's argument that Cook and Akenhead were joint tortfeasors and that judgment should be entered against both. He expressed the view that the jury should not have had much trouble in deciding which of the two defendants was the guilty party and continued,—

However, having held (rightly as I think) that one of the defendants shot the plaintiff, the jury acted perversely in finding that neither was

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negligent, and I think the plaintiff is entitled to a new trial. *McCannell* v. *McLean* (1937) S.C.R. 341, followed in *B.C. Electric* v. *Protopappas* (1946) 4 D.L.R. 1. I have given thought to the question whether we should try to narrow the issues on the new trial; but I have concluded that it is impracticable to do so, and that we should order a new trial simpliciter; the appellant to have his costs of this appeal, the costs of the first trial to follow the result of the second.

From this judgment the defendant Cook appeals to this Court. Notice of his appeal was served upon Akenhead but Akenhead does not appeal.

Counsel for the appellant before us did not attack the first answer of the jury, that the plaintiff was shot by either Cook or Akenhead. He submitted that the answer to Question 3 was a finding that the Plaintiff had not satisfied the onus of proving that Cook shot him and that on the evidence a jury acting reasonably might properly so find, that there was evidence on which the jury might properly find, as they did in answer to Question 4, that the plaintiff's injuries were not caused by the negligence of either of the defendants and that either of such findings was sufficient to support the judgment dismissing the action.

Counsel for the respondent contended that under the circumstances disclosed in the evidence Cook and Akenhead should both have been found liable regardless of which of them fired the shot which struck the plaintiff, that the Court of Appeal rightly held that the finding of the jury that there was no negligence was perverse, that the failure of the jury to find that Cook fired the shot which struck the plaintiff was perverse, that the jury were wrongly charged as to the onus of proof, that the jury ought not to have been discharged by the learned trial judge but should have been sent back with further instructions to endeavour to determine which of the two fired the shot which struck the plaintiff and that the new trial was ordered by the Court of Appeal in a proper exercise of its discretion.

It is first necessary to consider the finding of the jury in their answer to the fourth question, that the plaintiff's injuries were not caused by the negligence of either of the defendants, for obviously if this finding stands the action must fail. In my opinion the Court of Appeal were right in deciding that this finding should be set aside.

With the greatest respect, I think that the learned trial judge did not charge the jury correctly in regard to the onus of proof of negligence. While it is true that the plaintiff expressly pleaded negligence on the part of the defendants he also pleaded that he was shot by them and in my opinion the action under the old form of pleading would properly have been one of trespass and not of case. In my view, the cases collected and discussed by Denman J. in *Stanley* v. *Powell* (1), establish the rule (which is subject to an exception in the case of highway accidents with which we are not concerned in the case at bar) that where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove "that such trespass was utterly without his fault." In my opinion *Stanley* v. *Powell* rightly decides that the defendant in such an action is entitled to judgment if he satisfies the onus of establishing the absence of both intention and negligence on his part.

Owing to the fact that as Akenhead has not appealed the order directing a new trial must stand so far as he is concerned, I do not find it necessary to discuss whether a jury, properly instructed as to onus, could have absolved him from negligence if they had found that it was he who shot the plaintiff. I think that if the jury found that it was Cook whose shot struck the plaintiff there was no evidence on which, acting judicially, they could have absolved him from negligence. No doubt there was evidence given by Cook which the jury were entitled to believe which negatived negligence on his part but such evidence was equally effective to negative the possibility of his having shot the plaintiff, and the jury's answers to questions 1 and 3 read together shew that they cannot have accepted this evidence. The evidence of Cook, himself, appears to me to indicate that in his opinion to have shot in the direction of the clump of trees where the plaintiff was would clearly have been negligent; indeed, he says that it would have been a crazy thing to do.

For these reasons, I respectfully agree with the Court of Appeal that the jury's answer to question 4 should be set aside.

(1) (1891) 1 Q.B.D. 86.

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This, however, is not enough to dispose of the appeal. It is necessary to consider the answer to the 3rd question in which the jury have indicated that they were unable to find which of the two defendants did fire the shot which did the damage.

The general rule is, I think, stated correctly in Starkie on Evidence, 4th Edition, 860, quoted with approval by Patterson J.A. in *Moxley* v. *The Canada Atlantic Railway Company* (1):

> Thus in practice, when it is certain that one of two individuals committed the offence charged, but it is uncertain whether the one or the other was the guilty agent, neither of them can be convicted.

This rule, I think, is also applicable to civil actions so that if at the end of the case A has proved that he was negligently injured by either B or C but is unable to establish which of the two caused the injury, his action must fail against both unless there are special circumstances which render the rule inapplicable.

The respondent argues that such circumstances exist in this case. It is said that Akenhead and Cook were joint tortfeasors being engaged in a joint enterprise under such circumstances that each was liable for the acts of the other. Reliance is placed on the fact that they were hunting together and had agreed to divide the bag evenly.

I am unable to find any authority for the proposition that the mere fact that a party of persons are hunting together and have agreed to divide the bag renders each liable for the tortious acts of all the others. The American case of *Summers* v. *Tice* (2), relied upon by the respondents is, I think, properly distinguished in the reasons for judgment of Sidney Smith J.A. The decisive finding of fact in that case was that both of the defendants had shot in the direction of the plaintiff when they knew his location. There is no such finding in the case at bar. It is not, I think, necessarily implicit in the jury's findings that one of the two defendants shot the plaintiff but that they can not decide which.

The judgments of the Court of Appeal in *The Koursk* (3), are of only limited assistance as in that case both the

(1) (1887) 14 O.A.R. 309 at 315. (2) (1948) 5 A.L.R. (2nd) 91.
(3) [1924] P. 140.

Clan Chisholm and the *Koursk* had been found guilty of negligence causing the sinking of the *Itria* and the question was not whether both of them were liable but whether their liability was joint or several. At page 155 Scrutton L.J. says:—

> The substantial question in the present case is: What is meant by "joint tortfeasors?" and one way of answering it is: "Is the cause of action against them the same?" Certain classes of persons seem clearly to be "joint tortfeasors": The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree on common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another.

The judgments of Bankes and Sargent, LL.JJ. contain similar expressions.

Can it be said that the facts of the case at bar fall within the definition of joint tortfeasors, quoted above, from the judgment of Scrutton L.J.—"two persons who agree on common action in the course of, and to further which, one of them commits a tort?" It is argued that Cook and Akenhead agreed on common action, that is to go out hunting together and to divide the bag, and that it was in the course of this and in furtherance of it that the shot which injured the plaintiff was fired by one or other of them. The difficulty of applying this definition to the facts of the case at bar is pointed out by Sidney Smith J.A. To do so would bring about the result that every member of a party going out together, with a lawful common object, social or sporting, which could be carried out without negligence, would be vicariously liable for the negligence of any member of the party. So far as I have been able to ascertain, such a liability has not been held in any reported case to exist at common law.

There was, I think, no evidence in the case at bar on which it could be found that the relationship of principal and agent or of master and servant or of partners existed between Akenhead and Cook. They were engaged in a lawful pursuit. Neither had any reason to anticipate that the other would act negligently. Neither had in fact either the right or the opportunity to control the other. Neither appears to have assisted or encouraged the other to commit a breach of any duty owed to the plaintiff. It is argued,

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however, that *Summers* v. *Tice* (*supra*) should be followed and that under the principles stated in that judgment the jury might properly have found both Akenhead and Cook liable for the plaintiff's injury if in their view of the evidence both of them fired in the direction of the clump of trees in which the plaintiff in fact was, under such circumstances that the conduct of each constituted a breach of duty to the plaintiff. I have not been able to find any case in the courts of this country, or of England in which consideration has been given to certain propositions of law laid down in *Summers* v. *Tice*. The underlying reason for the decision appears to me to be found in the following quotation from the case of *Oliver* v. *Miles* (1):

> . . . We think that . . . each is liable for the resulting injury to the boy, although no one can say definitely who actually shot him. *To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence.*

The judgment in *Summers* v. *Tice* reads in part as follows:—

> . . . When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence, it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. This reasoning has recently found favour in this Court.

I do not think it necessary to decide whether all that was said in *Summers* v. *Tice* should be accepted as stating the law of British Columbia, but I am of opinion, for the reasons given in that case, that if under the circumstances of the case at bar the jury, having decided that the plaintiff was shot by either Cook or Akenhead, found themselves unable to decide which of the two shot him because in their opinion both shot negligently in his direction, both defendants should have been found liable. I think that the learned trial judge should have sent the jury back to consider the matter further with a direction to the above effect, in view of their answer to question 3.

(1) (1926) 144 Miss. 852.

I agree with my brother Rand that the wording of question 3 was unfortunate and that the jury's answer to it is susceptible of several interpretations, one being that some members of the jury, but not all, were satisfied as to the identity of the defendant whose shot struck the plaintiff. If this be the right interpretation it would mean that the jury had failed to reach an agreement.

It may be that at the new trial no question of the application of the rule laid down in *Summers* v. *Tice,* will arise. I respectfully agree with the Court of Appeal that the jury should have been able to decide which one of the defendants fired the shot which struck the plaintiff.

In my respectful opinion the perverse finding on the question of negligence following the insufficient direction on the question of onus, the failure of the jury to reach a finding as to who fired the shot which struck the plaintiff and the failure of the learned trial judge to send them back for reconsideration of this question with the added direction indicated above, made it proper for the Court of Appeal to direct a new trial.

In my view the order of the Court of Appeal directing a new trial was not made in the exercise of a judicial discretion in the sense in which that term is used in s. 38 (now s. 44) of the *Supreme Court Act,* but rather on the Court's view that there existed sufficient grounds in law to entitle the plaintiff to have the judgment set aside and a new trial directed. I think, therefore, that we have jurisdiction to entertain the appeal.

The submission contained in the appellant's factum, that in the event of the appeal failing we should direct separate trials, was withdrawn at the hearing and I, of course, express no opinion in regard to it.

I would dismiss the appeal and the motion to quash the appeal, both with costs.

LOCKE J. (dissenting):—The respondent was on the morning of September 11, 1948, hunting, in company with his brother and one Fitzgerald in the vicinity of Quinsam Lake on Vancouver Island, when he suffered a gun shot wound in respect of which he claimed to recover damages from the appellant and one Akenhead. After a trial before

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Wood, J. and a special jury the learned trial judge dismissed the action. The respondent appealed and the Court of Appeal (1), considering that the jury had acted perversely in finding that neither of the defendants were negligent, directed a new trial. The defendant Cook alone appeals to this Court from that judgment.

There was a great divergence between the accounts given by the respective parties of the facts leading up to the accident. According to the respondent, he was hunting grouse in a cut over area in which there were some scattered clumps of trees about one mile distant from Quinsam Lake when he saw three men who later proved to be Cook, Akenhead and a young boy by the name of Wagstaff, also engaged in hunting, approaching downhill from his right at a distance of about 75 yards. Having seen a grouse fly into a clump of small trees, Lewis moved in a westerly direction towards it. According to him, as he was walking towards the trees, Fitzgerald shouted something which Lewis thought was intended as a warning to the other hunting party of his presence. Proceeding into the trees and at a place where the other hunters were apparently not visible to him, he was struck in the face by a number of pellets of shot and suffered grave injuries. According to Jack Lewis, the respondent's brother, the area was "very open country, a little bit of shrubbery here and there, a few small snags lying down. It was quite clear except for these few small fir trees off to our left." He also had gone towards these small fir trees when he saw the other party approaching and heard Fitzgerald call out something to them. Almost immediately afterwards he heard two shots fired and heard his brother scream and going in to the clump of trees found him at a place some 30 to 35 yards distant from where Cook was standing. Fitzgerald who also said that the respondent and his party approached them travelling downhill said that the three approaching hunters had a pointer dog ranging in front of them and that when they got fairly close:—

> There was one man closer to me than the others, quite some distance. I didn't bother about the other men, I just watched this one man, I hollered to him to be careful, something to that effect. He seemed to hear me, looked towards me. Practically, at the same time, or just after a few seconds, two shots were fired, one by this man and one by somebody else in his company, which I didn't know then, and a scream at the same time practically.

(1) [1950] 4 D.L.R. 136.

Fitzgerald says that his shout was directed to the man closest to him who turned out to be Cook. He was not clear as to whether he had shouted loud enough to attract Akenhead's attention. A discussion which ensued made it clear that Cook and Akenhead had both fired: Wagstaff had not. Neither the respondent or his brother saw these shots being fired: Fitzgerald appears to have done so but gave no evidence as to the direction in which they were fired.

According to Akenhead, an experienced hunter who had for many years hunted birds in that part of Vancouver Island, he, in company with the appellant, was walking in line in a westerly direction some thirty feet or so apart along a side hill, with Akenhead's dog ranging about forty yards ahead of them when the dog pointed, and as they continued towards him four birds got up, two going to the left, one ahead and one to the right. He said that the birds did not get up from the trees from which the respondent later appeared but from the ground to the right, or north from the trees, and said that he shot off to the right of the dog and not in Lewis' direction. Questioned as to whether he had heard anyone call out before this shot he said that he had not. He said that in accordance with a long-standing arrangement between them when a covey got up, being on the right he would fire at the birds going to the right and Cook those to the left, saying that they had hunted together for years and also that it was their custom to divide up the bag equally between them. Cook, also an experienced hunter, agreed with Akenhead that there were always a great many hunters in that area on the opening day of grouse hunting, and as to the direction in which the three of them were walking and that it was along a side hill and not down hill, as stated by the plaintiff. He said that as they moved along he saw a man off to his left, (who later turned out to be Fitzgerald) who called out to him and pointed to the dog. According to Cook, Fitzgerald had not shouted and he did not hear what he said but having spoken he moved on, apparently in a westerly direction, and when he looked again the man had disappeared. According to his evidence, he thought this man was moving in the same direction as his own party and he himself then continued towards the

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west when a bird got up straight ahead of him at which he fired. His recollection was that in all there were three shots fired and that his was the first and that it was after the last shot that he heard the respondent scream. Cook said that he did not seen anyone else in the immediate neighbourhood before the shooting other than the man who proved to be Fitzgerald, but that after hearing the respondent's cry the latter appeared from the woods to his left and claimed that he (Cook) had shot him. Immediately thereafter he said Fitzgerald came running along from a point close to where he had first seen him. Cook claims that he denied having anything to do with it, saying that he had shot straight ahead in front of him, and added:—

I could not have shot him because I saw a man a little while back. I said I knew the man was in there somewhere, I would not have shot there because I knew a man was there.

Cook having said this on direct examination, the learned trial judge then said:—

You say you knew there was a man in there somewhere? I must have missed something. I didn't think you had seen him before.

whereupon counsel for the appellant said that Cook was referring to Fitzgerald; this was followed by further questions:—

The Court:

Q. It was only Fitzgerald you had seen, assuming it was Fitzgerald?—A.This man I first saw as he was going in the trees, he was walking down as we were rounding (sic) along this hillside. I presumed he would keep in line as he was walking.

Mr. Cunliffe:

Q. Is that the man that came and said something you didn't hear?—A. Yes that is the man. I didn't see him after he got in the trees.

The Court:

Q. You knew that Fitzgerald, assuming it was Fitzgerald, was in there some place?—A. Yes. Q. You said "I knew a man was in there because I had seen him before." You had not seen Cook before?

Mr. Cunliffe: You mean Lewis, this is Cook.

The Court: Yes.

Q. You didn't know there were two people there?—A. No I didn't know there were two people. I figured that this man that was shot was the man I had already seen that spoke, he had come down behind the trees.

Again the appellant said that he knew the man was on his left and that he had told Lewis that if it had been his

shot that struck him it would have killed him, since they were so close. Later, when cross-examined, he said that the only man of the other party of whose presence in the neighbourhood he was aware was Fitzgerald, that he had gone into the trees off to his left, that the birds which he saw get up did not come from the trees but rose from the ground ahead of him.

The meaning of much of the evidence of this witness was obscure: thus when cross-examined as to the discussion which took place between him and Lewis after the accident he said:—

> I was not excusing myself. I was explaining to Mr. Lewis it could not have been me, because, I said, I knew there was a man on the right side of those trees. It could not have been my partner, he would not shoot in there. That would be a crazy thing to do. Also I was too close to him. If I had shot it would have killed him.

Further questions by the learned trial judge cleared up this statement to this extent that the man to whom he referred was Fitzgerald who, he insisted, he had only seen directly to his left and who, he thought, was proceeding in a parallel direction to that in which he and his associates were walking. What he meant by the expression "on the right side of those trees" was not cleared up. Presumably the "partner" referred to Akenhead, though why it "would be a crazy thing" for the latter to have shot into the trees, if in truth he did not know there was anyone there, is not explained. In a statement given to the police authorities on the day of the accident the appellant, after saying that he had seen a man off to his left who disappeared behind some fir trees, stated that:—

> The young fellow who I thought I had seen go behind the fir trees came out with blood streaming down his face and accused me of having shot him.

The only other material evidence dealing with the occurrence appears to be that of the boy Wagstaff who saw Fitzgerald when he was speaking to Cook and saw the former point towards the dog and said that while Fitzgerald appeared to speak he could not hear what was said. He thought he had heard three or four shots before the injured man cried out. He had only seen one of the hunters in Lewis' party before the shots were fired and did not see either Cook or Akenhead shoot. He also stated that the

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birds which were flushed did not come out of the clump of trees where Lewis was, but flew up from the ground about twenty feet distant from the trees.

The cause of action pleaded against both defendants was for damages alleged to have been caused:—

solely by the negligent conduct of the defendants in recklessly discharging their guns in the direction of the plaintiff, knowing that the plaintiff was in that vicinity, or alternatively, without first making sure that there was no one in the line of fire.

The learned trial judge in charging the jury explained to them that the claim was founded in negligence and that the burden of proof lay upon the plaintiff. Having said that negligence was the absence of reasonable care under all the circumstances, he specifically directed their attention to the question as to whether it was negligent under the circumstances then existing to fire into a thicket or clump of trees without first making sure that there was no one there, having in mind that there were a great many people shooting on the opening day, and that Cook at least knew that Fitzgerald was somewhere amongst the trees. Questions were submitted to the jury and were answered as follows:—

Q. Was the plaintiff shot by either of the defendants?

A. Yes.

Q. If so, by which one? (No answer)

Q. If the plaintiff was shot by one of the defendants are you able to decide by which one?

A. No.

Q. Were the plaintiff's injuries caused by the negligence of either of the defendants?

A. No.

Q. Damages. (Not answered).

Wood, J. then dismissed the jury and after argument on the following day dismissed the action against both of the defendants.

In the Court of Appeal it was contended for the plaintiff that in the circumstances disclosed in the evidence Cook and Akenhead were each liable for the negligence of the other, apparently on the theory that they were joint tort-feasors or joint adventurers and reliance was placed on an American decision of *Summers* v. *Tice* (1), but this contention was not sustained. Sidney Smith, J.A. however,

(1) (1948) 5 A.L.R. (2nd) 91.

who delivered the judgment of the Court, considered that having held that one of the defendants shot the plaintiff the jury acted perversely in finding that neither was negligent and that the plaintiff was entitled to a new trial.

While Cook's evidence was that he heard three shots fired and Wagstaff said that he had heard three or four before the injured man cried out and Cook and Akenhead each fired but once, it is apparently common ground that Wagstaff did not shoot and there is no evidence of either Fitzgerald or Jack Lewis firing, or of there having been any other hunters nearby who might have shot and injured the respondent. None of the witnesses for the respondent saw the direction in which Cook and Akenhead fired and both of the latter swore that they had fired in a direction which would have rendered it impossible for the shot to strike Lewis. The jury clearly did not accept the statement of one or other of the defendants on this aspect of the matter, since they found that the plaintiff had been shot by one of them. The task faced by the jury in this case was a difficult one. They had been informed by the learned trial judge that the plaintiff alleging negligence the burden was on him "to prove his case and to prove that on a preponderance of evidence. It is not the same as in a criminal case, where the Crown must prove its case beyond a reasonable doubt." In *Cottingham* v. *Longman* (1), Duff, J. (as he then was), said that the burden resting upon the plaintiff is to establish facts from which the jury may reasonably draw the inferences necessary to sustain the plaintiff's case and referred to what had been said as to this in *Grand Trunk Railway* v. *Griffith* (2), where the nature of proof upon which a jury is entitled to act in civil cases was fully discussed. That the jury understood the matter in this way is, I think, clear from their answer to the first question where in the face of the denials of the parties they drew the inference from the proven facts that one or other of them had injured the plaintiff. On the argument before us, it was contended for the respondent that in the circumstances there was a presumption of fault against the defendants and that the onus was on them to prove by affirmative evidence that they had

(1) (1913) 48 Can. S.C.R. 542 at 545.

(2) (1912) 45 Can. S.C.R. 380.

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exercised due care, but clearly this contention cannot be supported. There were here no circumstances which could, in my opinion, raise any such presumption.

The answers to Questions 2 and 3 are decisive that upon the evidence the jury could not find which one of the defendants had fired the shot which caused the damage. The claim against Cook was, therefore, left in this position that either he or Akenhead had fired the shot which injured the unfortunate plaintiff, and upon such a finding it was clearly impossible to enter a verdict against him unless he was liable for the act of Akenhead, whether the claim pleaded sounded in negligence or in trespass. As I understand the contention of the respondent, it is that since Cook and Akenhead were hunting together, using the same dog, under an arrangement whereby the bag would be divided equally between them, each was liable for the negligence of the other. Thus, if but one of them had fired, both would be liable. As pointed out in Clerk and Lindsell on Torts, 10th Ed. p. 100, an agent who commits a tort on behalf of his principal and the principal are joint tortfeasors, as are the servant who commits a tort in the course of his employment and his master, and an independent contractor and his employer in those cases in which the law holds the employer absolutely liable. The learned author further says that so are persons whose respective shares in the commission of a tort are done in furtherance of a common design, but that mere similarity of design on the part of independent actors causing independent damage is not enough. There must be concerted action towards a common end. A similar passage in the seventh edition of Clerk and Lindsell, it may be noted, was quoted with approval by Sargant, L.J. in *The Koursk* (1). The facts in the present matter do not, however, in my opinion, support a claim upon this basis. Cook and Akenhead were merely hunting in each other's company: there was no common design in the sense that that expression is used in the passage quoted: they were rather each pursuing their own design of shooting grouse, as they were lawfully entitled to do. I am unable to understand how the fact that, like most hunters, they at the end of the day divided up the bag, the more fortunate sharing his luck with the other,

(1) [1924] P. 140, 159.

can be a basis for any legal liability. There was here no joint venture but rather individual ventures carried on by these hunters in each other's company and I see no ground upon which one could be held responsible for the negligence of the other. I agree with the conclusion of Sidney Smith, J.A. on this aspect of the matter.

In my opinion, this is decisive of the present appeal since, in the absence of a finding that the respondent was shot by Cook and since the latter is not liable if the damage was caused by the act of Akenhead, the action was properly dismissed. In the judgment appealed from, however, a new trial has been ordered on the ground that the jury's answer to the fourth question was perverse, in view of the finding that it was one or other of the defendants who fired the shots causing the damage. With great respect, it appears to me that in view of the failure of the plaintiff to obtain a finding from the jury as to which fired the shot, this question did not arise. A finding that one or other of the defendants was negligent would clearly not have furthered the matter in view of the answer to the third question. If it were necessary to decide the matter I would, however, come to a different conclusion than that reached by the Court of Appeal. In my opinion, it cannot be said that the answer made to the fourth question was so unreasonable and unjust as to justify an appellate court in concluding that the jury could not have been acting judicially (*C.N.R.* v. *Muller* (1): Duff, C.J.C. at p. 769; Lamont, J. at pp. 772-3).

The respondent's case is that Cook is liable, even though it was not his act but that of Akenhead which caused the damage. As to the latter his evidence, which the jury may well have accepted, was to the effect that he had not heard Fitzgerald call out to Cook and did not know when he fired that there was anyone in the clump of trees. The jury may have believed these statements and since the learned trial judge had expressly directed their attention to the question as to whether to fire into a clump of trees without first making certain that no person was there was in itself a negligent act, I am quite unable to understand how it could be said that a finding that even if Akenhead did fire in to the trees he was not negligent, could be set

(1) [1934] 1 D.L.R. 768.

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aside as perverse. As to Cook he had sworn, as had Akenhead, that he did not fire in to the trees where Lewis was, but off to the right where no damage could result and it appears to me that if the jury accepted this statement it could not properly be said that a finding that he was not negligent was perverse.

This appeal should be allowed with costs here and in the Court of Appeal and the judgment at the trial restored. The motion to quash the appeal made on behalf of the respondent should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *F. S. Cunliffe & Company.*

Solicitors for the respondent: *Leighton, Meakin & Weir.*

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*May 9, 10, 11
*Oct. 12

PATERSON STEAMSHIPS LTD. (DEFENDANT) ..... APPELLANT;

AND

ALUMINUM CO. OF CANADA LTD. (PLAINTIFF) ..... RESPONDENT.

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

Shipping—Ship time-chartered—Whether owner of ship lost at sea liable for cargo—Bill of lading—Consignee of goods—Whether lien de droit between owner of ship and owner of goods—Bills of Lading Act, R.S.C. 1927, c. 17, s. 2.

The appellant company, a ship owner and operator, granted a time charter of the SS. *Hamildoc* to Saguenay Terminals Limited. Demarara Bauxite Company Limited shipped a cargo of bauxite upon the vessel from a port in British Guiana for delivery to a port in Trinidad, for reforwarding to the plaintiff at Arvida, P.Q. The bill of lading was signed by an agent of Saguenay Terminals Ltd. at Georgetown on behalf of the master. The cargo was lost at sea, owing to the unseaworthiness of the vessel, and the holder of the bill of lading claiming as the owner and consignee of the goods sought to recover its value from the appellant. The appellant contended that it was not bound by the contract evidenced by the bill of lading and that there was no privity of contract as between the parties. The action was maintained by the Superior Court and by the Court of Appeal for Quebec.

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

Held, dismissing the appeal, that the charter party was not a demise of the ship and the appellant was the carrier of the goods; the respondent as the owner and consignee of the goods was entitled to sue upon the bill of lading.

Wehner v. *Dene Steam Shipping Co.* [1905] 2 K.B. 92 and Carver, 9th Edition, p. 250 referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), maintaining the action of the consignee of a cargo against the owner of a ship lost at sea.

C. R. McKenzie K.C. for the appellant.

R. C. Holden K.C. for the respondent.

The judgment of the Chief Justice and of Rand and Fauteux JJ. was delivered by

RAND J.:—This action was brought by the owner of goods against the owner of the ship *Hamildoc* for the loss of the goods through the unseaworthiness of the vessel. This ground of liability, although strongly resisted in the courts below, was abandoned before us; and the only question now in the appeal is one of parties: whether the appellant is liable directly to the respondent for the loss.

The contention that that is not so arises from the fact that the vessel was under a time charter party to the Saguenay Terminals Limited of Montreal. The charter was executed at Montreal on September 16, 1941 and by its terms the use of the vessel was to be enjoyed by the charterers for "about" six months. The special purpose in mind, although the charter was not limited to it, was to carry bauxite from South American points to Trinidad for furtherance to Canadian and United States points.

The usual provisions of such a charter were stipulated. The owner was to be paid a specified sum monthly; the captain was to prosecute the voyages with despatch: although appointed by the owner, he was to be under the orders and direction of the charterers as regards employment and agency; and the latter were to load, stow and trim the cargo at their expense under the supervision of the captain who was to sign bills of lading for cargo as presented in conformity with notes or tally clerk's receipts.

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The owner was to pay for all provisions and the wages of captain and crew; and maintain the vessel in her class and efficiency. By clause 26 nothing in the charter was to be construed as a demise of the vessel and the owner was to remain responsible for the navigation of the vessel, insurance, crew and all other matters, the same as when trading for its own account.

Under such a charter, and in the absence of an undertaking on the part of the charterer, the owner remains the carrier for the shipper, and in issuing bills of lading the captain acts as his agent. In this case, the bill of lading was signed for the captain by the agents appointed by the charterers certainly for themselves and probably for the vessel also and that fact raises the first of the only two points deserving consideration.

It is, I think, too late in the day to call in question the relation of the time charterer or his or the ship's agent towards cargo. The charterer has purchased the benefit of the carrying space of the ship; he is the only person interested in furnishing cargo; and the captain is bound to sign the bills of lading as presented, assuming them not to be in conflict with the terms of the charter party. The practical necessities involved in that situation were long ago appreciated by the courts and the authority of the charterer to sign for the captain confirmed.

For the purpose of committing cargo to carriage, the captain, the charterer and the ship's agent are all agents of the owner, acting in the name of the captain; and where the charterer has the authority, as here, to sign for the captain, that he may appoint and act by an agent would seem to me to be unquestionable. To hold him to a personal performance would, under modern conditions of traffic, be an intolerable restriction.

In *Wehner* v. *Dene* (1), the bill of lading was signed by the captain but the question was, on whose behalf, the owner's or charterer's, and Channel J. held it to be the former.

In *Kuntsford* v. *Filmanns* (2), both the Court of Appeal and the House of Lords affirmed the holding of Channel J., that under the clause obligating the captain to sign bills of

(1) [1905] 2 K.B. 92. (2) [1908] A.C. 406.

lading as presented, the charterer could sign for him as representing the owner. It was pointed out that the question of the person undertaking the carriage of the goods for the shipper was one of fact: but that in the normal practice under a time charter, that undertaking was by the captain for the owner. The same view was taken by the Court of Appeal in *Limerick* v. *Coker* (1). Here, the charterers had their own steamship line and used one of their own bill of lading forms; but they had signed them on behalf of the captain.

In *Urleston* v. *Weir* (2), the charterers had signed the bills of lading and contended that they were the parties to the contract; but the court held against them. A similar ruling was made in SS. *Iristo, Middleton* v. *Ocean Dom. S.S. Co.* (3). In *Baumwall* v. *Furness* (4), the remarks of Lord Herschell at pp. 17 and 18 are to the same effect.

Finally, in *Larrinaja* v. *The King* (5), Lord Wright, at pp. 254-5, deals with the words "employment and agency" which appear in the present charterparty, and which he treats as referring to the ship: "'Employment' means employment of the ship to carry out the purposes for which the charterers wish to use her"; "'Agency' deals with another aspect of the ship's affairs. The shipowner is entitled in the ordinary course to decide to what firm or person in each port the ship in the course of the charterparty is to be consigned as agent. The selection is here left to the charterers. This is an important matter, because of the multifarious duties and responsibilities which may fall to be discharged according to the mercantile law by the ship's agents."

That Sproston's Limited were authorized by the charterers to act as they did in signing the bills of lading is not seriously to be questioned. The argument against their authority is really that neither the owner nor the captain had anything to do with their appointment; but that contention overlooks the point that the owner has authorized the charterers to sign and that they in turn can do so by agents.

(1) (1916) 33 T.L.R. 103.
(2) (1925) 22 D.L.R. 521.
(3) [1941] A.M.C. 1744.
(4) [1893] A.C. 8.
(5) [1945] A.C. 246.

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The remaining question is whether the respondent is a consignee named in the bill of lading. That document acknowledges the shipment by Demerara Bauxite Company Ltd. on board the *Hamildoc* of the cargo "to be delivered in like order and condition at the port of Chaguaramas, Trinidad, B.W.I. or so near thereto as she may safely get, always afloat, unto For re-forwarding to Aluminum Co. of Canada, Arvida, P.Q., Canada, (or to his or their assigns) on payment of freight and charges thereon in cash without deduction, credit or discount, unless prepaid." The form used was printed and the space for the name of the consignee was filled out in typewriting. From such language I cannot see how any doubt can arise that the Aluminum Company is the named consignee. Transshipment was involved and as the ship undertook only to deliver at the first port, the necessary implication is that the acceptance and forwarding there would be made by some person with responsibility for seeing that the transit was continued to Arvida. The Aluminum Company is named as the ultimate consignee, and it is impliedly so at the intermediate port. In the absence of any contrary indication, the ultimate consignee is the consignee at every stage of the transit; each section of the carriage is directed towards furthering the goods to him; and the intermediate agencies are his, serving the same end and purpose.

The respondent is therefore the named consignee; and that title to the bauxite passed to it on the consignment is equally clear. It is mere trifling with the facts to suggest anything else. "Consigning" goods is delivering them to a carrier who accepts them as initiating his obligation to carry and deliver. The bill of lading is to evidence the terms of the undertaking and to operate as a document of title. Whether it is issued five seconds or five hours after the last pound has been stowed is immaterial; in either case it takes effect as from the moment of the commencement of the duty of the carrier as such. The title passes to the purchaser when the goods have been committed to the vessel for the journey; that is, it has passed on the "consignment" and the requirement of the Bills of Lading Act has been satisfied.

The appeal must therefore be dismissed with costs.

The judgment of Taschereau and Locke JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of King's Bench for Quebec (Appeal Side) (1), dismissing an appeal by the present appellant from a judgment delivered in the Superior Court by Salvas J., whereby the appellant was found liable to the respondent for the value of a cargo lost in the sinking of the *SS. Hamildoc* off the coast of Venezuela in January, 1943.

The respondent's claim as pleaded is that by a bill of lading dated at Georgetown, British Guiana, on December 22, 1942, the appellant acknowledged that there had been shipped in apparent good order and condition on board the *SS. Hamildoc* by Demerara Bauxite Company Limited 3,033 long tons of Demerara Bauxite for carriage to and delivery at the Port of Chaguaramas, Trinidad, for reforwarding to the plaintiff at Arvida, P.Q.: that the plaintiff was the holder of the bill of lading and at all material times the owner and consignee of the goods and that: "in breach of the contract evidenced by the said bill of lading and/or of its duty in the premises implied by law the defendant failed to carry the said goods safely to the said Port of Chaguaramas or to deliver them there in good order or at all."

By the statement of defence, among other matters to be hereinafter referred to, the appellant pleaded that the loss of the *Hamildoc* was due to perils, dangers and accidents of the sea and that the defendant was not liable under the terms of the bill of lading. By way of answer the respondent alleged that the loss arose from the fact that the ship was unseaworthy at the time the voyage was undertaken. Upon this issue the learned trial judge found that the loss of the cargo was due to the unseaworthiness of the vessel and, further, that the appellant had failed to prove that it had exercised due diligence to make her seaworthy before her last voyage, and these findings were upheld on appeal. There being concurrent findings on this question of fact the question was not argued before us.

In so far as they are relevant to the other questions to be decided upon this appeal, the facts are as follows: the appellant company is a ship owner and operator, and

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by a charterparty dated September 16, 1941, chartered the *Hamildoc* to Saguenay Terminals Limited for a term of six months, with an option to continue the charter for a further period. The instrument was a time charter and not a demise of the vessel and provided, *inter alia,* that the owners should have a lien upon all cargoes and all sub-freights for any amounts due under the charter, including general average contributions. By clause 8 it was provided:

> That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the owners), shall be under the orders and directions of the charterers as regards employment and agency; and charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign bills of lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

It was further stipulated that all bills of lading should include a Both-to-Blame Collision Clause which would impose certain obligations towards the ship owner upon the owner of cargo carried, in the event of collision with another ship as the result of negligent navigation of both ships, and an Amended Jason Clause imposing liability in certain circumstances on the cargo owner to contribute with the ship owner in general average. At the time the shipment in question was made in British Guiana, the *Hamildoc* was being operated under the terms of this charter by Saguenay Terminals Limited, a subsidiary of the respondent company.

The lost shipment was part of a large quantity of bauxite purchased by the respondent company from Demerara Bauxite Company Limited, (a company organized in the Colony of British Guiana) by a contract dated May 1, 1942. By the terms of that agreement, wherein the vendor was referred to as Demerara and the purchaser Alcan, the respondent agreed to purchase its requirements of bauxite for the balance of the year 1942 on defined conditions, including the following:

> Demerara shall deliver the bauxite, trimmed in ship's hold, at Mackenzie, B.G. Transportation of the herein described bauxite shall be effected by Alcan, who will however retain Saguenay Terminals Ltd. as "Forwarding Agents". All ocean freight, marine insurance, and other charges related to transportation of the bauxite after it is delivered, trimmed in ship's hold, at Mackenzie, British Guiana, shall be borne by Alcan.

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The cargo in question was delivered by the Demerara Company on board the *Hamildoc* at Mackenzie. The bill of lading issued was upon a form bearing the heading "Saguenay Terminals Limited" and the name of the respondent company did not appear. It acknowledged, as alleged in the declaration, the receipt of the shipment, the place of its destination and in the blank space left for the insertion of the name of the consignee there appeared the words:

> For reforwarding to Aluminum Company of Canada, Arvida, P.Q. Canada (or to his or their assigns).

As stipulated in the charterparty the bill of lading contained, *inter alia,* the Both-to-Blame Collision Clause and the Amended Jason Clause. A further term provided that:

> It is hereby understood and agreed that if Saguenay Terminals Limited are not the owners of the vessel named herein, the shippers, consignees and other persons interested in the goods landed hereby will make and enforce all claims arising under this contract of purchase, whether or not based upon a breach of warranty or seaworthiness, solely against the vessel named herein and/or her owners.

In the clause reserved for the signature the following appeared:

> In witness whereof, the Master, or agent on behalf of the Master of the said vessel has affirmed to 2 Bills of Lading, all of this tenor and date, one of which accomplished, the others stand void.
>
> Sprostons Limited
> Bruce Brebner,
> Master, or Agents.

By its statement of defence the appellant alleged, *inter alia,* that the bill of lading "was not issued by, nor is it a contract to which the defendant is a party" (para. 5), and again:

> That there is no lien de droit between the Plaintiff and Defendant and the Plaintiff is an entire stranger to any and all rights in, to and under the said time charter.

(para. 6).

It was not suggested by the respondent that it was a party to or claimed any rights under the charterparty, its claim being as shown by the complaint founded upon the contract evidenced by the bill of lading and of the "duty in the premises implied by law", which latter phrase was apparently intended as a claim in tort for injury occasioned to the respondent's goods by the carrier's negligence. While denying that there was any contract between itself and

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the cargo owners, the appellant had, in answer to the claim that the loss was occasioned by the ship being unseaworthy, pleaded that the bill of lading was to be construed in accordance with the provisions of the Carriage of Goods by Sea Act of British Guiana and that the appellant had exercised due diligence to make the ship in all respects seaworthy, and further that the loss had been occasioned by perils of the sea, an exception to the owner's liability provided by that statute. These pleas were raised in the alternative and, as has been stated, failed.

As to the liability of the appellant upon the contract evidenced by the bill of lading: the charterparty was a time charter and not a demise of the vessel and provided, *inter alia*, that the owner was to remain responsible for the navigation of the vessel as when trading for its own account. The Both-to-Blame Collision Clause, which it was stipulated should be included in any bill of lading issued, provided that:

> If the ship owner shall have exercised due diligence to make the ship seaworthy and properly manned, equipped and supplied, it is hereby agreed that in the event of the ship coming into collision with another ship as a result of the negligent navigation of both ships, the owners of the cargo carried under this bill of lading.

would indemnify the ship owner in a certain manner, recognizing, in my opinion, the obligation of the owner towards cargo owners for the seaworthiness and proper manning and equipment of the ship. The provision that this clause and the Amended Jason Clause should be included in the bills of lading shows that it was contemplated that there should be a contractual relationship established as between the ship and the cargo owners under the contracts of carriage to be issued. The terms of the charterparty, that cargoes would be taken on or discharged at any place as the charterers or their agents might direct and that the Captain should sign bills of lading for cargo as presented, make it clear that it was intended that the charterers would prepare and issue the bills of lading.

While the charterer was thus empowered to decide on the manner of the employment of the ship and to appoint agents for the ship at points of call, possession of the vessel remained in the appellant through the Captain. The

rule applicable is stated by Channell J. in *Wehner* v. *Dene Steam Shipping Company* (1), as being that in ordinary cases, where the charterparty does not amount to a demise of the ship and possession remains with the owner, the contract is made not with the charterer but with the owner. In Carver, 9th Ed. p. 250, the following passage appears:

> It would seem then that the ship owner is a party to the bill of lading contract; and, that being so, he must be entitled on his side to treat the contract of the shipper as made with himself as principal and to sue for breaches of it. This is, in fact, recognized by allowing him to make claims under the bills of lading against consignees; for example, for demurrage and for freight, even though the bills of lading refer to a charter party. In effect, then, the contract is in general with the ship owner; and the master should be regarded as having made it on his behalf and not on behalf of the charterer.

This appears to me to be an accurate statement of the law relating to a charterparty such as this.

As to the signature upon the present bill of lading, apart from any question as to whether by virtue of the terms of clause 8, Sprostons Limited as the agents designated by the respondent were not authorized to sign on behalf of the master, a practice was established that this should be done if the evidence of the witness Farrar, the Traffic Superintendent of Sprostons Limited, is to be accepted. McEwen, the manager of the appellant company, gave evidence that the *Hamildoc* was but one of sixteen ships owned by the appellant which were chartered to Saguenay Terminals Limited, for use in what was called the shuttle trade between British Guiana and Trinidad and other ports to which bauxite was consigned. The bauxite was loaded at Mackenzie and the information required for the preparation of the shipping documents was cabled from that place to Sprostons at Georgetown. According to this witness, Sprostons Limited signed the bills of lading for the masters of the ships of the appellant from the time they started carrying bauxite towards the end of 1941 until they ceased to do so at the end of 1943 or early in 1944. When a particular vessel carrying this cargo arrived at Georgetown from Mackenzie, one of the clerks from Sprostons Shipping Department would go aboard the vessel, taking with him the bill of lading theretofore prepared, and after checking this with the particulars shown on the dead weight survey and loading scale, which

(1) [1905] 2 K.B. 92 at 98.

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he would receive from the captain, he would hand the latter a copy of the bill of lading, the manifest, the dead weight survey and the ship's loading scale. This was done throughout this period without objection. According to Farrar, S. W. McElroy, a superintendent of the appellant who was in Georgetown as the representative of the appellant, was aware of this practice. McElroy, however, denied this and McEwen also said that he was unaware that the bills of lading were being signed in this manner. Both of these witnesses in fact said that the Naval Control Headquarters at Georgetown enforced secrecy in regard to shipments from that port and forbade the issue of bills of lading. The learned trial judge made no finding upon the question of credibility as betwen these witnesses but found that, under the terms of the charterparty, Sprostons Limited were lawfully fulfilling an obligation imposed upon the master in signing the bills of lading, and that the latter was binding upon the appellant and evidenced the contract of carriage between the parties. Bissonnette J. apparently considered that the evidence of Farrar had not been met by the contrary evidence tendered on behalf of the defendant, a conclusion with which I agree. Hyde J., considering that by virtue of the terms of the charterparty, Sprostons Limited as the agents appointed by the charterers were entitled to sign for the master and thus bind the appellant, did not deal with the question. While the two named officers of the appellant said that they were unaware that this was being done, this may merely indicate that they were not giving close attention to what was transpiring as the various vessels called at Georgetown over this period of years. Without any more assistance than is to be obtained from an examination of the evidence and the perusal of the reasons for judgment which have been given, I think Farrar's evidence on the point is to be accepted.

In my opinion, the appellant was the carrier of the goods under the terms of a contract evidenced by the bill of lading. The respondent was the holder of the bill of lading but, so far as appears from the evidence, that document was not endorsed to it by the shipper Demerara Bauxite Company Limited. Clearly, under the contract for the purchase of

bauxite between the Demerara Company and the respondent, title to the shipment of ore passed when delivery was made on the *Hamildoc* at Mackenzie. By reason of this fact the appellant contends that there is no right of action in the respondent in respect of these goods, in view of the decision of this Court in *The Insurance Company of North America* v. *Colonial Steamships Limited* (1). That decision involved the interpretation of section 2 of the *Bills of Lading Act.* c. 17, R.S.C. 1927, which reads as follows:

> Every consignee of goods named in the bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement shall have and be vested with all such rights of actions and be subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

No evidence was given as to the law of British Guiana where the contract of carriage was made, so that it must be assumed that it is the same as in the Province of Quebec. The decision in the *Colonial Steamships Case* followed the decision of the House of Lords in *Sewell* v. *Burdick* (2), and in each of these cases the claims advanced were by persons claiming as endorsees of the bill of lading. It appears unnecessary to consider the other facts which differentiate these decisions from the present matter, since here the respondent does not claim as endorsee of the contract but as the consignee named in the contract and as the owner of the goods. While the language of the bill of lading is in this respect unusual, I agree with Hyde J. that it should be interpreted as naming the respondent company as the consignee of the shipment and thus entitled to sue upon the contract. In the view I take of the matter, it is unnecessary to consider the claim based upon the appellant's negligence. The learned trial judge found that, even if the bill of lading was not binding upon the appellant, the action should succeed since, in the absence of proof to the contrary, it was to be assumed that the common law of British Guiana was to the same effect as Article 1675 of the *Civil Code* which, in declaring the liability of carriers, says that they are liable:

> for the loss and damage of things entrusted to them, unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force or has arisen from a defect in the thing itself.

(1) [1942] S.C.R. 357.

(2) (1884) 10 A.C. 74.

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Locke J.

The learned judges of the Court of Appeal did not consider it necessary to deal with this aspect of the matter.

The appeal, in my opinion, fails and should be dismissed with costs.

ESTEY J.:—The respondent, Aluminum Company of Canada Limited, brings this action as consignee under a bill of lading dated Georgetown, British Guiana, December 22, 1942, claiming damages for the loss of a cargo of bauxite shipped on the steamship *Hamildoc* which, on January 1, 1943, foundered at sea while en route to its port of discharge, Chaguaramas, Trinidad, B.W.I. The entire cargo was lost. The *Hamildoc* was loaded at Mackenzie (70 miles up the Demerara River from Georgetown, British Guiana).

The Court of King's Bench, Appeal Side (1), for the Province of Quebec affirmed the learned trial judge's finding that the loss was due to the unseaworthy condition of the *Hamildoc* when it sailed on its final voyage. It was, upon the hearing of this appeal, not contended that this concurrent finding of fact should be set aside.

The main issues in this Court concern the validity of the bill of lading, the appellant contending that it was in no way a party thereto; that Sprostons Limited, in signing the bill of lading, was not its agent and was not requested by the master of the vessel or by any other person on its behalf to do so; that never, at any time prior to these proceedings, did it have any knowledge thereof and, moreover, even if Sprostons Limited did act as agent, that the respondent, as consignee therein, cannot recover by virtue of the provisions of sec. 2 of the *Bills of Lading Act* (R.S.C. 1927, c. 17); and finally that if the bill of lading was issued it was in contravention of the prohibition issued by the Naval Control authorities.

The respondent, a producer of aluminum, entered into a contract with the Demerara Bauxite Company Ltd. (hereinafter referred to as Demerara), at Mackenzie, British Guiana, on the 8th day of June, 1942, whereby it agreed to purchase from that company all its requirements of

(1) Q.R. [1951] K.B. 80.

bauxite for the year 1942. The bauxite was to be shipped as ordered and para. 5 of this contract reads as follows:

> Demerara shall deliver the bauxite trimmed in ship's hold, at Mackenzie, B.G. Transportation of the herein described bauxite shall be effected by Alcan, who will however retain Saguenay Terminals Ltd. as "Forwarding Agents." All ocean freight, marine insurance, and other charges related to transportation of the bauxite after it is delivered, trimmed in ship's hold, at Mackenzie, British Guiana, shall be borne by Alcan.

The word "Demerara" in the foregoing paragraph refers to the Demerara Bauxite Company Ltd. and the word "Alcan" to the respondent.

The respondent entered into a verbal contract with the Saguenay Terminals Limited to transport the bauxite from Mackenzie to Trinidad and from Trinidad to Arvida, Quebec. Saguenay Terminals Limited had vessels of their own, but chartered others, including the *Hamildoc,* from the appellant. This charterparty is dated September 16, 1941. It is a time charterparty and cl. 8 thereof reads, in part, as follows:

> 8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts . . .

Moreover, cl. 26 provided:

> 26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account.

Not only is the issue of bills of lading provided for as in cl. 8, but a War Risks Clause, New Jason Clause, Both-to-Blame Collision Clause, U.S.A. Clause Paramount and Canadian Clause Paramount were incorporated in the charterparty. These provided that all bills of lading shall include the Both-to-Blame Collision Clause which provided that the owners of the cargo would, in certain circumstances, indemnify the shipowner; that the New Jason Clause should also be included in all bills of lading which, in certain circumstances, provided that the shippers, consignees or owners of the cargo "shall contribute with the

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shipowner in general average." The Clause Paramount provided that the bill of lading should have effect, subject to the *Water Carriage of Goods Act 1936* (S. of C. 1936, c. 49). The War Risks Clause was with respect to non-issue of bills of lading to blockaded ports, etc., and the liberty of the ship to comply with orders given by the government of the Nation under whose flag the vessel was sailing.

It is conceded that this was a time charterparty under which the captain and his crew, as servants of the owner, remain in charge of the ship which, therefore, remains in the possession of the owner while the charterers direct the use thereof.

The foregoing cl. 8 is a well-known provision in charterparties and the sentence "The captain (although appointed by the owners), shall be under the orders and directions of the charterers as regards employment and agency; . . ." is similar to that construed by the House of Lords in *Larrinaga Steamship Company, Limited* v. *The King* (1), where, at p. 254, Lord Wright stated:

> "Employment" means employment of the ship to carry out the purposes for which the charterers wish to use her; "agency" deals with another aspect of the conduct of the ship's affairs. The shipowner is entitled in the ordinary course to decide to what firm or person in each port the ship in the course of the charterparty is to be consigned as agent. The selection is here left to the charterers. That is an important matter because of the multifarious duties and responsibilities which may fall to be discharged according to mercantile law by the ships' agents.

Under this cl. 8 the parties provided that the captain "is to sign bills of lading for cargo as presented, in conformity with mate's or tally clerk's receipts." It is not suggested throughout the record that the parties to the charterparty ever agreed to the deletion or the variation of this provision. Moreover, apart from the charterparty, the Carriage of Goods by Sea Act of British Guiana, which is the same as *The Water Carriage of Goods Act 1936* (S. of C. 1936, c. 49), expressly contemplates the issue of bills of lading.

The bill of lading covering this particular shipment contained the aforementioned War Risks Clause, New Jason

(1) [1945] A.C. 246.

Clause, Both-to-Blame Collison Clause and U.S.A. Clause Paramount and, in part, it read as follows:

Shipped in apparent good order and condition by Demerara Bauxite Co. Ltd. on board the Steamship *Hamildoc* whereof R. P. Legendre is Master, now lying at the Port of Georgetown B.G. . . . 3,033 long tons (more or less) Demerara bauxite . . . to be delivered . . . at the Port of Chaguaramas, Trinidad B.W.I. . . . for reforwarding to Aluminum Co. of Canada, Arvida P.Q. Canada."

and is signed:

IN WITNESS WHEREOF, the Master, or Agent on behalf of the Master of the said vessel . . .

Dated at Georgetown this 22 Dec. 1942.

Sprostons Limited
Bruce Brebner,
Master, or Agents.

While not signed by the master or captain personally, this bill of lading does purport to be signed by appellant's agents, Sprostons Limited.

The plant and dock superintendent of Demerara deposed that as the bauxite was loaded into the *Hamildoc* it was checked "either by the captain or one of his officers" and that seven copies of a document styled a "Dead Weight Survey," showing the tonnage of the bauxite on board, were prepared and signed by himself. Two of these were retained by the company at Mackenzie "and the remaining five copies were forwarded to Sprostons Limited in Georgetown in a closed envelope in care of the captain."

The traffic superintendent of Sprostons Limited deposed that Sprostons Limited was agent for Paterson Steamships Limited and that, as agents, it signed bills of lading for the Paterson steamships engaged in the same service as the *Hamildoc,* both before and after its sailing on December 22, 1942. He pointed out that when the *Hamildoc* was loaded at Mackenzie the information necessary for the preparation of the bill of lading was radioed to Sprostons Limited; that as agents for Demerara they prepared the bill of lading and when the ship docked at Georgetown an employee went aboard with the bill of lading and received "from the captain an envelope containing copies of Dead Weight Survey and Loading Scale, which envelope had been handed to the master on his departure from Mackenzie." He checked the figures in these documents with the bill of lading as it had been prepared and when his

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work was concluded he left a copy of the bill of lading with the captain and the original and a copy were forwarded to respondent. This practice, he stated, continued in respect of the vessels of Paterson Steamships Limited until they were taken off the service in 1943.

In November, 1941, the appellant had sent a representative to Georgetown "To generally supervise and see that the money and office work was done as far as the boats were concerned." This representative was present at Georgetown when the *Hamildoc* was there in December, 1942, and deposes that he did not see any bill of lading. So far as he knew the captain did not issue a bill of lading and, in reference to their practice: "We never issued any bills of lading for our boats on that shuttle service;" that Sprostons Limited did other work such as making repairs to the ship for the appellant. Their offices were across the street and ". . . we were all the time in contact" and "We had to work very, very closely together . . ." and, while he made the disbursements to Sprostons Limited, he says he never paid an agency fee. He says that the "Naval Control" "issued instructions that I was not to document the ships, and I never had any occasion to go and ask them to change that."

The captain also deposed that he did not have or receive a bill of lading, and other captains in the service deposed to the same effect.

The foregoing evidence of the plant and dock superintendent, as well as that of the traffic superintendent, is in accord with the terms of the charterparty and with what is the general practice among shippers, carriers and consignees. A bill of lading is not only evidence of the agreement between the shipper and the carrier, but through it the goods may be transferred. That so important a document should have been discarded and no substitute provided therefor in respect of shipments extending throughout so substantial a period of time is difficult to accept. Respondent, however, submits, as its justification, the orders of the Naval Control authorities. These orders, it was suggested, were similar to the Defence of Canada Regulations, but were not proved nor was our attention directed to any provision under which judicial notice might

be taken thereof. In order to succeed upon this basis, the respondent should have proved the orders in order that their effect might have been determined.

It follows that the finding of the trial judge, affirmed as it was by the Court of King's Bench, that the bill of lading was signed by Sprostons Limited, acting on behalf of the master, is supported by the evidence and ought not to be disturbed.

The appellant further contends that the respondent, as consignee, cannot succeed under this bill of lading because it is not a party to whom the property in the goods therein mentioned passed upon or by reason of such consignment within the meaning of sec. 2 of the *Bills of Lading Act* (R.S.C. 1927, c. 17, s. 2). Sec. 2 reads as follows:

> 2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, shall have and be vested with all such rights of action and be subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading has been made with himself.

This section, originally sec. 1 of the *Bills of Lading Act 1889* (S. of C. 1889, c. 30), was enacted in order that the consignee might bring an action under the bill of lading in his own name, provided, of course, he otherwise came within the terms of the section. The precise contention of the appellant is that the respondent was the owner of the bauxite before the issue of the bill of lading, by virtue of the provision in cl. 5 of the Agreement for Sale under which Demerara was required to "deliver the bauxite, trimmed in ship's hold, at Mackenzie, B.G.," a place seventy miles up the Demerara River from Georgetown, and, therefore, the property in the bauxite did not pass to it "by reason of such consignment."

This cl. 5 is part of the Agreement for Sale and cl. 4 thereof reads:

> 4. Alcan shall order the said bauxite by means of one or more purchase orders issued to Demerara as soon as possible, and containing instructions concerning shipments, billing, and the various necessary documents.

These clauses 4 and 5 must be read together and the entire agreement must, I think, be read and construed in relation to the usual practice of the trade. This Agree-

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ment for Sale contemplated that orders would be given by the respondent and filled by Demerara by delivering the bauxite as aforesaid and following the instructions with respect to billing. The instructions contemplated in cl. 4 were given under date of May 26, 1942, and provided that Demerara would send one original ocean bill of lading to the respondent, Montreal, Quebec, and one non-negotiable copy of the ocean bill of lading to the Saguenay Terminals Limited at Montreal. It, therefore, would appear that the parties intended that the title should pass to the bauxite when "trimmed in ship's hold" and the shipping documents prepared in accordance with the instructions given. These instructions and the practice developed thereunder were followed throughout 1942. Sprostons Limited were agents for Demerara and the latter apparently followed the practice, as already outlined, of having the bill of lading prepared by its agents at Georgetown with the full knowledge and acquiescence of all parties concerned and, under these circumstances, it cannot be said that the title to the bauxite passed to the respondent until such time as the bill of lading was executed and mailed by Demerara, or its agents, addressed to the respondent. If the point were in issue, I should be prepared to hold that when so mailed and executed the bill of lading related back to, and became effective as of the time when the loading was completed. In *Delaurier* v. *Wyllie* (1), the purchasers (Delaurier & Company) agreed to buy from Stevenson & Company coal to be shipped as follows:

> . . . delivery by steamer of 800 to 1,000 tons, ready to load and sail second fortnight in May.

Stevenson & Company chartered a ship and named itself as consignee in the bill of lading, which it endorsed to Delaurier & Company. The ship with its cargo was lost and Delaurier & Company sued the ship owners (Wyllie and Others) on the bill of lading. Lord Shand, at p. 180, stated:

> In my opinion, the contract between Messrs. Stevenson & Company of Glasgow and the pursuers (Delaurier & Company) was fully executed and completed as soon as the coals were shipped on board of the vessel and the bill of lading was transmitted by Stevenson & Company to the pursuers.

(1) (1889) 17 Ct. Sess. 167.

The case of *Delaurier* v. *Wyllie supra* dealt not only with a shipment of coal, but also with one of iron, and while the property did pass in respect to the iron, the property did not pass by virtue of the endorsement of the bill of lading. There the shippers were instructed to, and did purchase the iron as agents for the endorsees of the bill of lading. When shipped, the bill of lading covering the iron showed the agents as consignees and they endorsed the bill of lading to their principals. In these circumstances Lord Shand stated at p. 184:

> It was taken in favour of the charterers, and must be regarded even in the pursuers' hands as being merely a receipt for the goods, because the indorsation by the charterer did not operate any transfer of the goods, as in the case of a purchaser for value, the goods being at shipment the property of the pursuers.

This case is also distinguishable from *The Insurance Company of North America* v. *Colonial Steamships Limited* (1), where an endorsement of the bill of lading was made for the purpose of presenting a claim to the insurance company and it was held that a subsequent endorsement to the insurance company which acquired the goods by reason of its obligations under its policy, certificate and attached endorsement did not bring the insurance company within the language of the aforesaid sec. 2 of the *Bills of Lading Act*.

The appellant's position is not improved because the *Hamildoc* would have unloaded the cargo at Chaguaramas instead of Arvida. It is true that there is no consignee specified at Chaguaramas, but what the bill of lading further contemplates is a re-forwarding from that port to the Aluminum Company of Canada at Arvida, Quebec. The practice of the parties in this shuttle service was sufficiently well established and followed to justify the conclusion that the Aluminum Company of Canada was the consignee at both points and that the goods would be dealt with at Chaguaramas either by that company or by an agent appointed to protect its interests there.

The respondent is, in the circumstances of this case, a consignee named in the bill of lading to whom the property passed by reason of such consignment and entitled to bring

(1) [1942] S.C.R. 357.

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this action within the meaning of the foregoing sec. 2 of the *Bills of Lading Act*.

The appeal is dismissed with costs.

CARTWRIGHT J.—I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Montgomery, McMichael, Common, Howard, Forsyth and Ker.*

Solicitors for the respondent: *Heward, Holden, Hutchison, Cliff, McMaster, Meighen and Hebert.*

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*May 23, 24
*Oct. 2.

IN RE THE ASSESSORS OF THE PARISH OF BATHURST IN THE COUNTY OF GLOUCESTER ..... APPELLANTS;

AND

THE KING

AND

JOSEPH L. RYAN, JUDGE OF THE GLOUCESTER COUNTY COURT, EX PARTE DEXTER CONSTRUCTION COMPANY LIMITED ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK (APPEAL DIVISION)

Assessment—Taxes—Personal Property—Situs—Contractor having head office and chief place of business in one parish and equipment and machinery in another—Where taxable—"Place of business"—Meaning—The Rates and Taxes Act, R.S.N.B. 1927, c. 190, s. 20.

The Rates and Taxes Act, R.S.N.B. 1927, c. 190, s. 20 provides that all personal property shall be assessed to the owner in the parish where he resides except that if he has a "place of business" in another parish all personal property connected therewith or employed therein shall be assessed in the parish where he has such place of business. The respondent, whose head office was in the Parish of Lancaster, Saint John County, contracted to pave among others, a road leading through the Parish of Bathurst, Gloucester County, to Douglastown,

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

Northumberland County, and acquired 59 acres of land in Bathurst Parish on which it erected 38 buildings, including an office, mess hall, sleeping camps, repair shops, an asphalt plant and a gravel-crushing plant. During the winter months moveable equipment was stored at the property and some 20 men employed in repairing it. The Bathurst Parish Assessors purporting to act under the authority of s. 20 assessed the respondent's personal property in the parish at $600,000. On appeal to the County Court Judge the latter reduced the assessment to $275,000 but otherwise confirmed it. On appeal by way of *certiorari* to the Appeal Division, Supreme Court of New Brunswick, the assessment was set aside on the grounds that the company had no place of business in Bathurst Parish within the meaning of s. 20 of the Act.

Held: (Reversing the decision of the New Brunswick Supreme Court, Appeal Division).

1. That on the facts the assessors could properly find the existence of a business carried on at a "place" in the parish of Bathurst within the meaning of s. 20 of *The Rates and Taxes Act*. *De Beers Consolidated Mines Ltd.* v. *Howe* [1906] A.C. 455 and *Kirkwood* v. *Gadd* [1910] A.C. 422 referred to and distinguished; *Swedish Central Ry. Co.* v. *Thompson* [1925] A.C. 495, *Mitchell* v. *Egyptian Hotels Ltd.* [1915] A.C. 1022, and *San Paulo (Brazillian) Ry. Co.* v. *Carter* [1896] A.C. 31, referred to.

2. That only the machinery and other property used for repairing and storing purposes could be taken to be "connected with or employed in" the business: what was repaired or stored, was not in that language.

3. That in making the assessment the assessors proceded upon a wrong principle in whole or in part but a legal and correct assessment could have been made and as provided by s. 126 the matter should be remitted to them for re-assessment on the principles laid down by this Court. *The King* v. *Assessors of Woodstock* [1924] S.C.R. 457.

Estey J. would have allowed the appeal reducing the amount of the assessment to $175,000.

APPEAL from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1) whereby an appeal from the judgment of His Honour Joseph L. Ryan, Judge of the County Court of Gloucester, was allowed and a rule absolute ordered to quash the assessment by the Assessors of the Parish of Bathurst upon the personal property of the Dexter Construction Co. Ltd.

C. F. Inches K.C. for the appellants.

J. J. F. Winslow K.C. and *M. G. Teed K.C.* for the respondent.

(1) (1950) 26 M.P.R. 1.

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

RAND J.:—The respondent is a company whose main business is the construction of paved highways. Its head office is at Fairville, New Brunswick, and it is not disputed that its residence in the sense of the locus where its central management and control is exercised, is at that place. During the early part of 1947 the company entered into several contracts with the Government of New Brunswick for reconstructing and paving certain roads in Gloucester County, including one section, about 50 miles in length, of the main highway between Bathurst and Douglastown, in Northumberland County, lying to the south. To enable this and any other work in that district of the province awarded it to be carried out, the company acquired about 59 acres of land in the parish of Bathurst. On this land, part of which seems to have been a gravel pit, 38 buildings were erected in the spring of 1947. They consisted of an office, 23 sleeping camps, kitchen, mess hall, storehouse, oil house, shovel shop, truck shop, machine shop, welding shop, 4 stock buildings and a paint shop. There were set up also on this land, an asphalt plant and a gravel crushing plant. The office was opened not later than in May.

During the following winter the units of moveable equipment used for the road work mentioned as well as other units had been kept in storage and repaired at this station by a staff of 20 men.

For the summer operations approximately 200 men were engaged. They included crews for both the asphalt and the gravel crushing plants and the several shops, the truck and machine operators and the general road forces. A superintendent and gang foreman were in immediate charge of the field operations. General instructions would be received from the head office or from an executive field officer. In the office at the Bathurst headquarters three clerks were employed. From slips turned in each night, they made up the employees' time and wages for which they issued weekly cheques drawn on a bank in the City of Saint John. Records were kept of the supplies of food, oil, gas, repair parts and other materials for and used in the several shops and on the road work.

The moveable equipment consisted of trucks, tractors, loaders, bulldozers, shovels and graders. There were also spreaders and other units forming part of or used in connection with the asphalt and crushing plants, machines and tools in the shops, and the furniture and equipment of the office.

The municipality claims to be entitled to tax that property. The general taxing clause is s. 20 of *The Rates and Taxes Act*, sub-secs. (1) and (2) of which are as follows:—

20. (1) All personal property within, or without the Province, owned by an inhabitant of the Province, shall be assessed to the owner in the parish where he resides, subject to the following exceptions:

(*a*) Where any person has a shop, factory, office or place of business in a parish other than that in which he resides, or in which shop, factory, office or place of business he carries on his trade, profession, calling, or business, all his personal property connected with or employed in his trade, profession, calling or business so carried on, shall be assessed to him in the parish where he has such shop, factory, office, or place of business:

(*b*) Where any person has two or more shops, offices, factories or other places of business situate in different parishes, at which he carries on his trade, profession, calling or business, he shall be assessed in each parish for the portion of his personal property connected with, or employed in the business carried on thereat, * * *

By s. 11:—

For the purpose of assessment on property or income, every person carrying on business in any parish shall be deemed to be an inhabitant thereof.

"Person" includes any corporation liable to be rated.

S. 25, ss. (1) provides that personal estate belonging to a joint stock company "having a place of business within the Province, may be assessed within the parish in which it has a place of business in the name of the corporation, or of the president, manager or agent thereof, * * *; and s.s. (3):—

Stocks or goods or any other personal estate, except shares in ships or shipping, used in any trading or mercantile business including any fur bearing animals kept in captivity for breeding purposes or in connection with the business of fur farming, in any city, town or parish, belonging to any person or persons not resident therein, or to any corporation not having its principal place of business therein, may be assessed in such city, town or parish in the name of the owner or owners of such business or of the agent or manager thereof, in such city, town or parish, and such personal estate shall not be liable to be rated or assessed against the owner or owners thereof in the city, town or parish where he or they reside or in the case of a corporation, in the city, town or parish where such corporation has its principal place of business * * *

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Rand J.

The language of the statute has been more or less preserved in its earliest form. Intended to meet the usual and simpler modes of "business" and reflecting possibly the difficulties in attributing characteristics of personality to corporations, the object of s. 25 is not free from doubt, but for the purposes of this case, the essential requirement under both sections 20 and 25 is that the company should have had a "place of business" at which it carried on business within the parish: and the property to be taxed must have been connected with or employed in the business so carried on.

The original assessment was on a valuation of $600,000. It was made, apparently, on an estimate little better than a guess that the company had three times as much equipment as that of another company which some workman "had heard" was valued around $250,000. An appeal was taken to the County Court Judge who reduced the amount to $275,000 but otherwise confirmed it. Neither the particulars of the reduction nor of the amount confirmed have been given us and we are left in the dark as to the basis on which the judge proceeded.

The proceedings were then brought by *certiorari* before the Appeal Division of the Supreme Court and by a unanimous judgment (1), the entire assessment was set aside on the ground that the facts did not show a business being carried on as required and that there was consequently no jurisdiction to make it. That conclusion was founded upon what were considered to be principles laid down in *De Beers Consolidated Mines Limited* v. *Howe* (2), and *Kirkwood* v. *Gadd* (3), and the first question is whether the Court has properly interpreted these two judgments.

Both of them deal with the rather complicated provisions of The Income Tax Act of the United Kingdom, and it is essential in deducing rules or conceptions from those cases that the intricacies of that law be clearly appreciated. In *De Beers* the issue was whether a mining company, incorporated in South Africa and carrying on the business of diamond mining there, was subject to income tax in England. In order to be so, it was necessary, under Schedule D to the second section of The Income

(1) (1950-51) 26 M.P.R. 1. (2) [1906] A.C. 455.
(3) [1910] A.C. 422.

Tax Act, 1853, that it reside in the United Kingdom, and the question was whether it did or not. Following decisions in *Calcutta Jute Mills* v. *Nicholson* (1), and *Cesena Sulphur Co.* v. *Nicholson* (1), the House of Lords laid it down that a company is to be deemed to reside where it keeps house and does business, and that it kept house and did business where its central management and control actually was. The majority of directors and life governors of the company lived in England, their meetings were held in London, and they exercised the real control in all the important activities of the company except the actual mining operations. It was found, therefore, as a fact that in London that central management and control did abide. From this it followed that the company resided in England and carried on some part of its business there. As a result, it came under the charge of the rule of Schedule D that rendered it liable to taxation on the whole of its profits. But it was never suggested that the company was not also carrying on business in South Africa; its business extended to both countries. The decision meant simply that for the purposes of income tax in England the company was resident and doing business there of a central managing and controlling character. The language of Lord Loreburn, "practically all the important business of the company except the mining operations" implies, obviously, that these operations were themselves part of the "important business". But no one questions the fact here that the company through the same degree of control is resident at Fairville; there is no question of residence at all: it is one of doing business at a place of business; and on the authority of *De Beers*, that business is being conducted both at Fairville and in the parish of Bathurst.

In *Kirkwood's* case, the question was whether, under the Money-Lenders' Act, the money-lender was bound to carry on every detail of his business at his registered address, and it was held that he was not. The language of Lord Atkinson must be interpreted in the light of the controversy which he was considering. The acts which were in question were the negotiation of the detailed terms of the loan and the ascertainment of the items of property by which it was to be secured, and it was pointed out that,

(1) (1876) 1 Ex. D. 428.

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in order to carry on the business, some parts of the transactions must necessarily take place elsewhere than at the lender's headquarters. I am unable to see that the decision can, in the slightest way, assist in the construction of the Rates Act.

The case of *Swedish Central Railway Co.* v. *Thompson* (1) is of some interest in presenting another aspect of the question decided in *De Beers*. There the company was incorporated under The Companies' Act, 1862 and 1867, with the object of constructing and working a railway in Sweden. The railway had been leased for 50 years at an annual rent. The central control and management of the business originlly in England was later transferred to Sweden, and in that state of things the taxation was claimed. A committee had been appointed to transact formal administrative matters in the United Kingdom, such as the transfer of shares, affixing the seal to certificates, and signing cheques on the London bank account. All dividends were declared in Sweden and the only moneys transmitted to the United Kingdom were for dividends to the shareholders living there. The annual rent was paid to the company in Sweden. It was held, notwithstanding the central direction in Sweden, that there was a sufficient corporate activity in the United Kingdom to establish a residence for the purposes of taxation. The clause of the schedule applied covered the case where, the central management and control of the business not being carried on in whole or part in the United Kingdom, but a residence for limited purposes being there, tax was chargeable on the amount of profits actually received in that country. What was held, in short, was that a company for different categories of tax could have two residences.

In *Mitchell* v. *Egyptian Hotels Limited* (2), a case of similar facts, Lord Parker, at p. 1037, in the course of his speech, cited the decision of the House in *San Paulo* v. *Carter* (3), to the effect that "a trade or business cannot be said to be wholly carried on abroad if it be under the control and management of persons resident in the United Kingdom, although such persons act wholly through agents and messengers resident abroad. Where the brain which

(1) [1925] A.C. 495. (2) [1915] A.C. 1022.
(3) (1896) 14 App. Cas. 493.

controls the operations from which the profits and gains arise is in this country, the trade or busines is, at any rate partly, carried on in this country."

It is obvious that in these cases there was no thought that the business in its entirety was being carried on in the United Kingdom, and likewise it cannot be said that because the head office of the company in this appeal is in Fairville, its total business is to be deemed concentrated at that point. Paragraph (*b*) of 20(1) contemplates any number of shops, offices, factories or other places of business in different parishes which can constitute, in many forms, branches of one provincial activity, and in interpreting the legislation the difference between ascertaining the conditions upon which personal property can be taxed by a local administration and those by which a company with a highly ramified organization is to be subject to income tax must be kept in mind.

What s. 20 envisages is a business localized at a place in a parish which attracts to itself certain personal property to which it gives a local habitation: a taxation based on the presence of personal property in a parish other than that of the owner's residence but associated with a place of business. Carrying on a business cannot be intended to include every act of management or related to performance which affects it. A business to be conducted in its entirety within a specific local area can, in these days, embrace only the simplest body of simple transactions. S. 20 clearly extends to businesses that are branch activities of a central organization: and the facts here indicate that the company has other units of plant and other groups of equipment elsewhere in the province. Once a complex of repeated or systematized business operations becomes localized about a place and presents its moveable property in more than a mere unfixed or transient employment in the parish, then the precise period of its presence there becomes of minor importance. One can imagine, for example, a special sale of a bankrupt stock conducted in a parish, say, for three months and in premises rented for that period only. How could it be maintained that that was not a business carried on at a shop or place in the parish? Yet its duration would be only a fraction of what was involved in the facts before us. The situation must

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be visualized from the standpoint of the community. Here, for well over a year, these operations of preparing roadbed, gathering and treating gravel, making surfacing material and applying it to the roads, storing and repairing the machines used, hiring, paying and discharging workmen, employing truckers with their vehicles, all under an immediate superintendence centralized at a headquarters, aggregate to what in the ordinary meaning of the words is roadmaking business. The business of the company here lies not in negotiating or making contracts but in performing them: contracts are or may be necessary, no doubt; financing and account books, likewise; but these are formal elements of the operating activities of the company.

The question on *certiorari* is whether on the facts before us the assessors could properly find the existence of a business carried on at a "place" in the parish, and in my opinion they could have done so.

But a further question arises of the scope of the business so centered at Bathurst. It was contended that only the work done in the parish could be taken into account: but that misconceives the statute. The business is what is carried on, at, and from, the place of business within the parish; its reaches of operation are not restricted.

There is no evidence, however, that the work in Kent County was directed from Bathurst. The main road from Bathurst to Douglastown in Northumberland County I take to have been under that direction. Local time offices are stated to have been kept in both Northumberland and Kent counties but it is not clear whether in the former there was other work than that of the main road or not. The fact that all equipment for the three counties was stored and put into condition at Bathurst during the winter does not annex it, in the sense of the statute, to the business conducted in Bathurst: in that branch of the operations, only the machinery and other property used for repairing and storing purposes could be taken to be "connected with or employed in" the business: what is itself repaired or stored is not within that language.

But the whole of that property was included in the statement submitted by the officers of the company and included in the assessment. The latter was made, too, certainly in amount, as an entirety: assessed at $600,000

by the assessors and $275,000 by the County Court Judge, it was a single sum for the total property, and not the sum of individually valued items. This was not a case for such a mode of valuation: the items are disparate and should have been severally valued. The amount representing the property used otherwise than for the work carried on from Bathurst cannot therefore be struck out of the assessment; and that it is not of a "*de minimis*" character is clear.

The authority for dealing with the appeal on *certiorari* is s. 126 of The Rates Act, s.s. (*b*) of which reads:—

> If the Supreme Court, upon any such hearing, is of opinion that any such assessment is not good in law for the reason that the assessors, in making such assessment, proceeded upon a wrong principle in whole or in part, and that a legal and correct assessment could have been made by such assessors, the Court shall remit the assessment to the assessors, and the assessors shall proceed *de novo* to make a new assessment in regard to the particular person or company assessed in and by the assessment so brought before the Court, upon such correct principles as may be set forth or intimated by The Court on the hearing of the matter under the writ of *certiorari* or the judgment delivered by the court in quashing or finding wrong said assessment, which new assessment shall relate in law to the time when the assessment so quashed or found wrong, in whole or part, was made, and may be dealt with as if made at the time of making the first assessment, and the same shall stand as good at law and in fact, as the said first assessment would have stood and been, had it been legally made, and said second assessment may be enforced to the same extent, and in like manner as the first assessment could have been, had it been according to law.

That the assessment proceeded upon a wrong principle "in whole or part" but that "a legal and correct assessment could have been made by" the assessors follows from the conclusions already expressed. A remission of the assessment to the assessors as authorized by the subsection should, I think, have been directed by the Appeal Division below and is what this Court should now direct. That was the view taken by Duff J. (as he was) in *The King Ex Parte Bank of Nova Scotia* v. *Assessors of Woodstock* (1), in which a somewhat similar error was made in assessment principle.

The appeal should be allowed, the assessment set aside and returned to the assessors for a re-assessment on the principles laid down. The appellants will have one-half of their costs in this Court and the respondents their costs in the Appeal Division and before the County Court Judge.

(1) [1924] S.C.R. 457 at 462.

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ESTEY J.:—The Assessors of the Parish of Bathurst, County of Gloucester in the Province of New Brunswick, imposed, in 1948, a tax upon the real and personal property of the Dexter Construction Company Limited (hereinafter referred to as the Company). These taxes were imposed under the provisions of *The Rates and Taxes Act* (R.S.N.B. 1927, c. 190). The Company admits liability for the tax upon its real property, but contends that the provisions of the statute do not authorize the parish to impose a tax upon its personal property.

The assessment of the personal property at $600,000 by the assessors was reduced by the Judge of the County Court to $275,000. The Appellate Division of the Supreme Court held the personal property of the Company was not liable to the imposition of a tax by this parish (1).

The Company, contractors with head office at Fairville, Parish of Lancaster in the County of Saint John, constructed roads throughout New Brunswick and, in 1947, was awarded a contract to construct and pave the highway from Bathurst to Douglastown, passing through the Parishes of Bathurst and Allardville in the County of Gloucester, and Alnwick and Newcastle in the County of Northumberland.

The Company brought its equipment and facilities for the execution of its work under this contract from either its head office at Fairville or from other parts of the Province where it had carried on construction work. The superintendent, foremen and those directing the work were employees of the Company directed to this work from the head office at Fairville. Many of the workmen were employed locally.

The Company, in connection with this work, purchased a parcel of land in the Parish of Bathurst and built thereon a building of portable construction, which included an office and sleeping quarters. It was built "in 8 ft. wide sections, so they will fit on a flat-bottom truck to take away." There were other buildings used for the purposes of a kitchen, mess hall, store house, oil house, shovel shop, truck shop, machine shop, welding shop, paint shop and plant stock. Neither the construction nor the particulars of these buildings were given in detail, but the case has been

(1) (1950-51) 26 M.P.R. 1.

presented upon the basis that when the work under this contract was executed these buildings would either be removed or no longer used.

The Company did purchase some material for the road locally, as well as certain camp supplies. At the camp office tally and weigh sheets of materials and supplies received were kept, as well as the men's time, and the cheques, during the active construction operations, were issued from that office covering the men's time and the payment for the materials and supplies purchased locally. These were apparently the only cheques issued from that office. They were all drawn upon the Company's bank account at Fairville and daily reports were sent to the head office where the books were kept. There was no bank account in the Parish of Bathurst and no cheques were received there. During the winter all cheques were issued from head office.

The Company commenced the construction of this highway in 1947. When cold weather came on in November, 1947, it stored and repaired its equipment, during the winter, in the Parish of Bathurst, and about May 20, 1948, resumed the work of constructing the highway.

The Rates and Taxes Act (R.S.N.B. 1927, c. 190) is generally "applicable to all parishes, cities and towns" in the Province. Under the heading "Assessment of Personal Property," s. 20 provides that, apart from the exceptions there specified, "All personal property within or without the Province, owned by an inhabitant of the Province, shall be assessed to the owner in the parish where he resides." That the Company had both its head office and principal place of business and, therefore, within the view expressed in *De Beers Consolidated Mines, Limited* v. *Howe* (1), resided at Fairville, Parish of Lancaster, County of Saint John, within the meaning of s. 20(1) (*a*), is not disputed.

The Parish of Bathurst contends that the personal property comes within the exception of s. 20(1) (*a*):

> 20. (1) All personal property within or without the Province, owned by an inhabitant of the Province, shall be assessed to the owner in the parish where he resides, subject to the following exemptions:
>
> (*a*) Where any person has a shop, factory, office or place of business in a parish other than that in which he resides, or in which shop,

(1) [1906] A.C. 455.

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> factory, office or place of business he carries on his trade, profession, calling or business, all his personal property connected with or employed in his trade, profession, calling or business so carried on, shall be assessed to him in the parish where he has such shop, factory, office or place of business;

The word "or" in this sub-s. (*a*), where it appears after the word "resides" and before the phrase "in which shop," in my opinion should be read "and." It, therefore, follows that not only must the Company have a shop, factory, office or place of business, but it must therein carry on its trade or business, and the personal property, to be taxable, must be connected with, or employed in its trade or business.

Our attention was directed to a number of cases in which phases similar to "he carries on his trade * * * or business" were considered. In *San Paulo (Brazilian) Ry. Co.* v. *Carter* (1), and *De Beers Consolidated Mines, Ltd.* v. *Howe, supra,* the House of Lords held that, as the place from which the direction and control emanated was in England, the Company was carrying on business there and subject to income tax. Even in the *San Paulo* case Lord Davey stated at p. 43:

> The business is therefore in very truth carried on, in and from the United Kingdom, although the actual operations of the company are in Brazil, and in that sense the business is also carried on in that country.

In *Kirkwood* v. *Gadd* (2), it was held that that part of the business of money-lending transacted in a place other than the registered office of the money-lender did not constitute a carrying on of business within the language of the Money-Lenders Act.

The Rates and Taxes Act expressly contemplates the taxation of personal property at a place of business other than the head office, the principal place of business or the place from which direction and control emanate and, therefore, the considerations so important in the foregoing cases are not conclusive in determining that other place of business contemplated in s. 20.

The foregoing authorities as well as others, and, indeed, the cases decided in Canada, lead to the conclusion that to decide whether or not a company carries on business within the meaning of a particular statute it is first necessary to construe the phrase as used in the particular statute

(1) [1896] A.C. 31. (2) [1910] A.C. 422.

and then to determine, as a question of fact, whether the operation or activity in question comes within the phrase so used and construed.

The business of the Company is admittedly the construction of highways. The pertinent issue is, therefore, granting the Company carried on business in the Parish of Lancaster in the County of Saint John, did it also carry on business within the Parish of Bathurst within the meaning of s. 20? S. 20 requires that three essentials be established in order that a tax upon personal property may be imposed. The Company must have a place of business in the parish, at which it carries on its business and in connection with which it uses the personality. If these three essentials be present then it would seem that the Company is carrying on business within the meaning of that section.

The evidence discloses, with great respect to those who hold a contrary view, that the Company had a place of business, within the meaning of s. 20, at Bathurst. Permanent records were not kept at Bathurst, but it was there that the men's time was recorded, their wages computed and the cheques issued therefor. It is fair to assume that a labourer would attend at that office to complain of any error in his cheque. The supplies purchased locally were recorded and vendors paid therefor by cheques issued from this place of business. Moreover, in connection with the construction of this highway, it would appear that those at head office, as well as those directing and supervising the work of construction, treated the premises at Bathurst as a place of business. It was the place to which at least those associated with the construction work and the local people went to deal with the Company. There is no question but that a large amount of equipment was used upon the highway and used in connection with the business that was carried on at Bathurst. It, therefore, appears that the three essentials required by s. 20, in order that the tax might be imposed, are here present.

Counsel for the respondent pressed that, as the direction and control of the business emanated from the head office in Fairville, and once the contract was completed the facilities at Bathurst would be removed or abandoned, that within the meaning of s. 20 it could not be said that the Company carried on business in the Parish of Bathurst.

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These considerations might well be conclusive under another statute. *The Rates and Taxes Act,* however, contemplates that personal property may be taxed at a point other than that place from which the direction and control emanate. Moreover, that Act does not make the imposition of the tax contingent upon the existence of a permanent place of business; it rather provides that if the three essentials are present the tax may be imposed. The assessors, in determining the amount of the assessment at $600,000, made no distinction between the personal property connected with, or employed by the Company in its business at Bathurst and that present at Bathurst but used elsewhere. Before the learned County Court Judge the Company made this distinction very clear. Mr. Russell Dexter, with whose evidence the learned Trial Judge was favourably impressed, stated that the cost of all equipment at Bathurst was $546,000, while the cost of that used at Bathurst was $341,255. He admitted that a roller was omitted from this latter item, of which he did not have the cost. It is, however, significant that the cost price of the equipment, as given by the expert Farrell, was $348,000. It is, therefore, a fair conclusion that the roller accounted for the difference. The expert Farrell then deposed that the present worth of that equipment used in connection with the business at Bathurst was $175,554.92.

The municipality, before the learned County Court Judge, did not adduce evidence to contradict or vary either that given by Mr. Dexter as to the amount of the equipment used at Bathurst or the valuation of the same as fixed by Mr. Farrell. A suggestion that there may be other equipment that ought to have been included, as used in connection with business at Bathurst, does not, in the circumstances, involve a question of principle, but rather one of additional items and value thereof and, therefore, not a basis for remitting the matter to the assessors.

The learned County Court Judge did reduce the assessment to $275,000, but did not indicate the precise basis upon which he did so. The matter was then brought before the Appellate Division of the Supreme Court in *certiorari* proceedings and I have no doubt that had the learned judges of that Court held that the Company was assessable they would, under the provisions of s. 126(*a*), have struck

from the assessment that part which was not supported by the evidence and directed that the assessment should be in the sum of $175,000, or, under s. 126 (*d*), would have directed that the amount of the assessment should be $175,000 and that the assessors correct the assessment list to that effect.

I would, therefore, vary the assessment accordingly and allow the appeal.

Appeal allowed, assessment set aside and returned for re-assessment. Appellants to have half their costs in this Court, the respondents their costs in the Appeal Division and before the County Court Judge.

Solicitor for the appellants: *Albany J. Robichaud.*

Solicitors for the respondent: *Sanford & Teed.*

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*Feb. 6, 7
*Oct. 22

ISRAEL WINNER, doing business under the name and style of MACKENZIE COACH LINES (DEFENDANT) ..... APPELLANT;

AND

S.M.T. (EASTERN) LIMITED, a duly incorporated company (PLAINTIFF).. RESPONDENT;

AND

ATTORNEY GENERAL OF CANADA and others ..... INTERVENERS.

Constitutional Law—Public bus service engaged in interprovincial and international transportation of passengers—Whether an "undertaking" within the meaning of The British North America Act, s. 92 (10) (a)—Whether such an operation affected by Provincial Legislation—The New Brunswick Motor Carrier Act, 1937, c. 43 and amendments; The Motor Vehicle Act, 1934, c. 20 and amendments.

A public bus service engaged in the interprovincial and international transportation of passengers is an undertaking within the meaning of section 92(10) (*a*) of *The British North America Act.*

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

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The appellant, an American citizen, operated a public bus service between Boston, U.S.A. and Halifax, Nova Scotia. The New Brunswick Motor Carrier Board, purporting to act under the provisions of *The Motor Carrier Act,* 1937, c. 43 as amended, granted him a licence to operate his buses over the province's highways connecting the State of Maine with the Province of Nova Scotia but not to embus or debus passengers within New Brunswick. The appellant having refused to be bound by the restriction, an injunction was sought and it was ordered that three questions be raised for the opinion of the New Brunswick Court of Appeal, viz:

1. Are the operations or proposed operations of the defendant within the Province of New Brunswick or any part or parts thereof prohibited or in any way affected by the provisions of *The Motor Carrier Act* (1937) and amendments thereto, or orders made by the said Motor Carrier Board?

2. Is 13 Geo. VI, c. 47 (1949) *intra vires* of the legislature of the Province of New Brunswick?

3. Are the proposed operations prohibited or in any way affected by Regulation 13 of *The Motor Vehicles Act,* c. 20 of the Acts of 1934 and amendments, or under ss. 6 or 53 or any other sections of the Act?

The Supreme Court of New Brunswick, Appeal Division, having answered the three questions in the affirmative, on appeal to this Court

Held: that the questions should be answered only to the extent necessary to dispose of the issues raised by the pleadings and for that purpose the answer made is that it is not within the legislative powers of the Province of New Brunswick by the statutes or regulations in question, or within the powers of The Motor Carrier Board by the terms of the licence granted by it, to prohibit the appellant by his undertaking from bringing passengers into the province of New Brunswick from outside said province and permitting them to alight, or from carrying passengers from any point in the province to a point outside the limits thereof, or from carrying passengers along the route traversed by its buses from place to place in New Brunswick, to which passengers stop-over privileges have been extended as an incident of the contract of carriage.

Rinfret C.J. answers the first question as follows:—

"The operations or proposed operations of the defendant-appellant within the Province of New Brunswick or any part or parts thereof, as above set forth, are not prohibited or in any way affected by the provisions of *The Motor Carrier Act, 1937* and amendments thereto. On the contrary, such operations or proposed operations are specifically provided for in Regulation 13, made under authority of *The Motor Vehicle Act.* The attempt to restrict them in the Order made by the Motor Carrier Board is illegal and *ultra vires.*"

and declines to answer the second and third questions.

Judgment of the Supreme Court of New Brunswick, Appeal Division, (1950) 26 M.P.R. 27, reversed.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division (1) which answered affirmatively three questions (set out in the preceding headnote) involving the validity of *The Motor Carrier Act*, 1937, c. 43 and amendments, including 13 Geo. VI, c. 47; and of *The Motor Vehicle Act*, 1934, c. 20 and amendments, including in particular ss. 6 and 53 and Regulation 13 promulgated thereunder.

N. B. Tennant, K.C. and *J. M. Neville, K.C.* for the appellant.

C. F. Inches, K.C. and *A. B. Gilbert, K.C.* for the respondent.

F. P. Varcoe, K.C. and *W. R. Jackett, K.C.* for the Attorney General of Canada, Intervenant.

C. R. Magone, K.C. for the Attorney General of Ontario, Intervenant.

L. E. Beaulieu, K.C. for the Attorney General of Quebec, Intervenant.

J. A. Y. MacDonald, K.C. and *L. H. McDonald* for the Attorney General of Nova Scotia, Intervenant.

A. N. Carter, K.C. and *J. E. Hughes* for the Attorney General of New Brunswick, Intervenant.

H. A. Maclean, K.C. for the Attorney General of British Columbia, Intervenant.

W. E. Darby, K.C. for the Attorney General of Prince Edward Island, Intervenant.

H. J. Wilson, K.C. for the Attorney General of Alberta, Intervenant.

C. F. H. Carson, K.C. and *Allan Findlay* for the Canadian National Ry. Co. and the Canadian Pacific Ry. Co., Intervenants.

F. R. Hume for Maccam Transport Ltd., Intervenant.

C. H. Howard, K.C. for Carwil Transport Ltd., Intervenant.

(1) (1950) 26 M.P.R. 27.

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THE CHIEF JUSTICE:—The plaintiff-respondent is a company incorporated under and by virtue of *The New Brunswick Companies Act* and is in the business (*inter alia*) of operating motor buses for the carriage of passengers and goods for hire or compensation over the highways of the Province of New Brunswick. It holds licences granted by The Motor Carrier Board of the Province of New Brunswick to operate public motor buses between St. Stephen, New Brunswick, and the City of Saint John, New Brunswick, over Highway Route No. 1 and between the said City of Saint John and the Nova Scotia border over Highway Route No. 2, for the purpose of carrying passengers and goods for hire or compensation. It maintains a daily passenger service over those routes.

The appellant, who resides at Lewiston in the State of Maine, one of the United States of America, is in the business (*inter alia*) of operating motor buses for the carriage of passengers and goods for hire or compensation under the name and style of MacKenzie Coach Lines.

On the 17th day of June, 1949, on the application of the appellant, The Motor Carrier Board granted him a licence permitting him to operate public motor buses from Boston in the Commonwealth of Massachusetts through the Province of New Brunswick on Highways Nos. 1 and 2 to Halifax and Glace Bay in the Province of Nova Scotia and return "but not to embus or debus passengers in the said Province of New Brunswick after August 1, 1949."

At the time of making the said application, the defendant challenged the validity of the statute of New Brunswick 13 Geo. VI, c. 47 (1949) and *The Motor Carrier Act*, 1937, as affected thereby, as being *ultra vires* of the Legislature of the Province of New Brunswick. The Motor Carrier Board made no specific ruling on the defendant's challenge, but acted under the said statute.

The appellant, by his motor buses, maintains a regular passenger service over the routes above-mentioned, but, since August 1, 1949, he has continually embussed and debussed passengers within the Province of New Brunswick, and it is his intention to continue to do so unless and

until it shall have been declared by some court of competent jurisdiction that such operations are prohibited by *The Motor Carrier Act,* 1937 and amendments, or by any other applicable statute or law.

The appellant further intends to carry passengers not only from points without the Province of New Brunswick but points within the said province, and vice versa, but also in connection with and incidental to his operations, to carry passengers from points within the said province unless and until it shall have been declared by some court of competent jurisdiction that such operations are prohibited by *The Motor Carrier Act,* 1937 and amendments thereto, or by any other applicable statute or law.

The business and undertaking of the appellant consists of the operation of motor buses for the carriage of passengers and goods for hire or compensation between the City of Boston in the Commonwealth of Massachusetts and the Town of Glace Bay in the Province of Nova Scotia and between intermediate points. Such business and undertaking is conducted by the appellant over that portion of its route which lies between the City of Boston and the Town of Calais, Maine, under a certificate granted by Interstate Commerce Commission (a Federal Commission of the United States of America having jurisdiction over inter-state transportation), permitting the appellant to carry passengers and their baggage, as a motor carrier, in seasonal operations from the 1st day of May to the 15th day of December, both inclusive, over a regular route between Boston, Mass., and a point on the United States-Canada boundary line north of Calais, Maine, and thence over the bridge to the United States-Canada boundary line and return over the same routes; service being authorized to and from all intermediate points.

Subsequently and in addition, Inter-state Commerce Commission has permitted the appellant to carry passengers and their baggage, as a motor carrier, and express, mail and newspapers in the same vehicle with passengers, in a seasonal operation extending from the 1st of May to the 15th of December, inclusive, of each year, over alternate regular routes for operating convenience only in connection with said carrier's presently authorized regular route operations.

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The Motor Carrier Board of the Province of New Brunswick, on the 17th of June, 1949, on the application of the appellant, purported to licence the operation of the appellant in the Province of New Brunswick as follows:

> Israel Winner doing business under the name and style of "MacKenzie Coach Lines", at Lewiston in the State of Maine is granted a licence to operate public motor buses from Boston in the State of Massachusetts, through the Province of New Brunswick on Highways Nos. 1 and 2, to Halifax and Glace Bay in the Province of Nova Scotia and return, but not to embus or debus passengers in the said Province of New Brunswick after August 1, 1949.

The Board of Commissioners of Public Utilities for the Province of Nova Scotia has purported to approve the appellant's operations in the Province of Nova Scotia over routes from the New Brunswick border to Glace Bay, via Route No. 4, Wentworth Valley and Truro; via Route No. 2, Parrsboro and Truro; via Route No. 6, Pugwash, Wallace, Pictou and New Glasgow; and also from Truro to Halifax (three miles of each route is within the corporate limits of the Town of Truro and City of Halifax); save that the certificate granted by that Board permitted to suspend operation from January 12, 1949, until May 1, 1949.

The appellant, in fact, operates as a public motor carrier between the City of Boston and the Town of Glace Bay and intermediate points, in accordance with a published timetable, copy of which was filed in the record.

Moreover, between December 15 and May 1 of each year, the appellant proposes to operate as a public motor carrier between the provinces of New Brunswick and Nova Scotia, connecting with New England Greyhound Lines, Inc., a company authorized by the Inter-State Commerce Commission to operate as a public motor carrier between Calais, Maine and Boston, Massachusetts.

Incidental to its operations as aforesaid, the appellant proposes to pick up within the Province of New Brunswick passengers and their baggage having a destination also within the Province of New Brunswick.

The respondent brought this action complaining that since August 1, 1949, the appellant has continually embused and debused passengers within the Province of New Brunswick, contrary to his licence, and he has declared his intention of so doing until stopped by legal process;

and it was the assertion of the respondent that, unless the appellant was restrained from so doing, irreparable damage and harm would be done to the latter. Wherefore the respondent claimed an injunction against the appellant, his servants or agents, restraining him and them from embussing and debussing passengers within New Brunswick, in his public motor buses running between St. Stephen, New Brunswick, and the Nova Scotia border, accompanied by a declaration that the appellant had no legal right to do so, and asking for an accounting of fares received for the carriage of passengers within the Province of New Brunswick together with damages and costs.

By a Statement of Defence, the appellant stated that his operation of public motor buses was primarily international and interprovincial within the meaning of s. 92 (10) (*a*) of *The British North America Act;* and he asked for a declaration that his operations were not prohibited by or subject in any way to the provisions of The Motor Carrier Act and amendments thereto, or by or to any other applicable statute or law; and the declaration that 13 Geo. VI, c. 47 (1949) is *ultra vires* of the Legislature of the Province of New Brunswick.

The case having come for hearing before Hughes, J., in the Chancery Division of the Supreme Court of New Brunswick, the learned judge ordered that certain questions of law be raised for the opinion of the Supreme Court of New Brunswick (Appellate Division) and that, in the meantime, all further proceedings in this action be stayed.

The questions for the opinion of the Appellate Division were as follows:

1. Are the operations or proposed operations of the defendant within the Province of New Brunswick, or any part or parts thereof as above set forth, prohibited or in any way affected by the provisions of *The Motor Carrier Act, 1937* and amendments thereto, or orders made by the said Motor Carrier Board?

2. Is 13 George VI, c. 47 (1949) *intra vires* of the Legislature of the Province of New Brunswick?

And it was further ordered that after the said questions had been answered, then, the matter should be referred back to the Supreme Court Chancery Division for further proceedings, subject to such rights of appeal as may be

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available to either of the parties, the whole without prejudice to the respondent's right to the relief claimed in its Statement of Claim.

Subsequently at the hearing before the Court of Appeal another question was added as No. 3:

Are the proposed operations prohibited or in any way affected by Regulation 13 of *The Motor Vehicle Act,* c. 20 of the Acts of 1934 and amendments, or under sections 6 or 53 or any other sections of *The Motor Vehicle Act?*

The Attorney General of New Brunswick intervened in the action. After hearing, the Appellate Division answered as follows to the several questions submitted:

To Question No. 1: Yes, prohibited, until the Defendant (Appellant) complies with the provisions of the Act.

To Question No. 2: Yes, in respect of this Defendant (Appellant), Richards, C.J., Hughes, J., answering simply "Yes".

To Question No. 3, as it became after the question had been amended by Hughes, J., on the 31st of March, 1950: Yes, until the Defendant (Appellant) complies with the provisions of the Act, and the Regulations made thereunder.

From that decision, the appellant now appeals to this Court.

Richards, C.J., stated that, in his opinion, the appellant did not come within the exceptions under s. 92 (10) (*a*) because he had no office or place of business, or organization, or *situs,* in the Province of New Brunswick; his office or place of business was at Lewiston, in the State of Maine, and it could not be said, therefore, that his undertaking extended beyond the limits of the province. He then proceeded to consider whether the legislation in question fell within s. 91, or s. 92, of *The British North America Act,* and, after having referred to a certain number of cases, he came to the conclusion that the legislation in question was entirely local in character, related to traffic within the province, only incidentally affected traffic passing through the province, and, in his view, the legislation was within the competence of the Legislature of New Brunswick.

Harrison, J., took practically the same view and that, in his opinion, the defendant's undertaking did not come under s. 92 (10) (*a*). To his mind, the province had the right to regulate motor vehicle traffic within its own borders and that included the right to prohibit such traffic when deemed necessary or expedient.

However, he further added that, even if the Acts in question should be held *ultra vires* in respect of a Canadian national carrying on an undertaking locally in Canada for transporting passengers and goods between provinces, it did not follow that the appellant could raise the same defence. The appellant, being a foreign national, was bound to comply with the laws regulating vehicular traffic within the provinces' boundaries, until they were superseded by Dominion legislation; and foreign nationals, insofar as they were concerned, had no status to ask that such laws be declared *ultra vires*.

Hughes, J., sitting as a member of the Appellate Division, concurred in the answers given by Richards, C.J.

It is to be noted that this is an ordinary case and not a reference.

Questions of law were submitted to the Appellate Division for the purpose of securing its opinion, after which, as stated in the Order of Hughes, J. itself, the matter was to be referred back to the Supreme Court Chancery Division for further proceedings and with the object of enabling the trial judge to decide the case.

Under no interpretation of the procedure to be followed could the case be transformed into a reference, which, alone, the Legislature of New Brunswick had the power and the authority to submit to the Courts. The decision on the questions of law was useful only to the extent that it could be used for the purpose of deciding the case as, otherwise, the questions were quite unnecessary.

The conclusions of the plaintiff-respondent in its Statement of Claim were merely that an injunction should issue against the defendant-appellant, his servants or agents, restraining him and them from embussing and debussing passengers within the Province of New Brunswick in his public motor buses running between St. Stephen, New Brunswick, and the Nova Scotia border, and a declaration that the defendant-appellant had no legal right to embus or debus passengers within the Province of New Brunswick, with a consequential demand for an accounting, and damages. That is all that the plaintiff-respondent asked for and all that he can get in the present case.

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The basis of that claim is evidently the so-called licence issued to the appellant on the 17th of June, 1949, by The Motor Carrier Board of the Province of New Brunswick, which has been already reproduced above.

One would look in vain to any of the provisions of *The Motor Carrier Act, 1937,* and its amendments, or to the Statute 13 Geo. VI, c. 47 (1949), of New Brunswick, or to Regulation 13 of *The Motor Vehicle Act,* c. 20, of the Acts of 1934 and amendments, or to sections 6 or 53, or any other sections of *The Motor Vehicle Act,* for any prohibition affecting the appellant, "restraining him from embussing and debussing passengers within the Province of New Brunswick in his public motor buses running between St. Stephen, New Brunswick, and the Nova Scotia border" (to use the very words of the conclusions of the respondent), or for anything affecting "his legal right to embus or debus passengers within the Province of New Brunswick" (also a conclusion of the respondent's Statement of Claim). When once it is granted that the appellant holds, as he does, a licence to operate his motor buses through the Province of New Brunswick, on Highways Nos. 1 and 2, to Halifax and Glace Bay, in the Province of Nova Scotia and return, nothing can be found in either *The Motor Vehicle Act* or *The Motor Carrier Act, 1937,* restraining him from embussing or debussing passengers in the province.

Indeed, what the plaintiff-respondent wishes the Courts to enjoin is based and can find any foundation only on the qualification inserted in the appellant's licence by The Motor Carrier Board.

If, therefore, such qualification is illegal and, in fact, *ultra vires,* because it is not authorized by the two Acts themselves, it follows that it must disappear from the licence and there is nothing left on which the action of the respondent can be maintained.

For the authority of The Motor Carrier Board to insert such a qualification in the licence of the appellant, one must look, of course, to An Act Respecting Motor Carriers (c. 43, Acts of Assembly, 1 Geo. VI (1937), passed April 2, 1937), whereby the Board was constituted.

By that Act, the Board is given the power to grant to any person, firm or company, a licence to operate or cause to be operated, within the province, public motor buses or public motor trucks over specified routes and between specified points.

Section 5(3) of the Act specifies that:

> In determining whether or not a licence shall be granted, the Board shall give consideration to the transportation service being furnished by any railroad, street railway, or licensed motor carrier, the likelihood of proposed service being permanent and continuous throughout the period of the year that the highways are open to travel and the effect that such proposed service may have upon other transportation services.

And section 5(4) adds:

> If the Board finds from the evidence submitted that public convenience will be promoted by the establishment of the proposed service, or any part thereof, and is satisfied that the applicant will provide a proper service, an order may be made by the Board that a licence be granted to the applicant in accordance with its finding upon proper security being furnished.

Section 11 should also be referred to. It reads thus:

> Except as provided by this Act, no person, firm or company shall operate a public motor bus or public motor truck within the Province without holding a licence from the Board authorizing such operations and then only as specified in such licence and subject to this Act and its Regulations.

The three sections just quoted are the only ones to which the Court was referred as affording authority to The Motor Carrier Board to insert in the appellant's licence the restriction therein mentioned.

Moreover, s. 22 of An Act Respecting Motor Carriers states that "the provisions of this Act shall be deemed to be in addition to the provisions of The Motor Vehicle Act". By force of the regulations made under authority of *The Motor Vehicle Act* "no person operating a motor vehicle as a public carrier between fixed termini outside the Province shall operate such motor vehicle on the highways of the Province unless the operator is in possession of a permit issued by the Department setting forth the conditions under which such motor vehicle may operate and after payment of such fees as the Minister may determine fair and equitable" (Regulation No. 13). And that is the regulation specially mentioned in Question No. 3 submitted to the Appellate Division. It would seem, of course, that, if Regulation 13 governs the operations of the appellant—and no reason was advanced why it should not—the permit

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which is to be issued to the appellant "setting forth the conditions under which such motor vehicle may operate" is the permit mentioned in that Regulation 13. If it were not so, one would speculate as to the reason for referring to that regulation in the questions submitted.

It cannot be that, if the permit which the operator of a motor vehicle, as a public carrier, must secure in order to operate such a motor vehicle on the highways of the province, is to be issued by the Department and to set forth the conditions under which such motor vehicle may operate after payment of such fees as the Minister may determine fair and equitable, the intention of the Legislature would be that, by application of *The Motor Carrier Act,* the Board would have anything to do with that permit. The two Acts, as enacted in s. 22 of *The Motor Carrier Act,* must be interpreted together and it stands to reason that the Legislature cannot have had in view that the Board may set forth conditions which the Department has not decreed.

But, moreover, Regulation 13 of *The Motor Vehicle Act* comes under the title of "Non-Residents" and it specifically provides for a person operating a motor vehicle, as a public carrier, between fixed termini outside the province, who intends to operate such motor vehicles on the highways of the province. It says that, in such a case, the permit must be issued by the Department and that it is in that permit that the conditions under which such motor vehicle may operate are to be set forth. On the other hand, s. 4 of An Act Respecting Motor Carriers only deals with the power of the Board to grant to any person, firm or company, a licence to operate or cause to be operated within the province public motor buses or public motor trucks.

Whichever way the two sections are contrasted, it does not leave any room for doubt that, in the case of a non-resident, Regulation No. 13 must prevail, as it is a special enactment referring, in terms, to non-residence, while the other s. 4 of *The Motor Carrier Act* is a general provision, in terms, dealing with persons, firms or companies operating only within the province.

On the record as it stands, it is to be assumed (as no reference whatever is made to it), that the appellant has complied with Regulation No. 13, or, at all events, it must

be decided that, if the appellant needs a permit, it is to be issued to him under Regulation No. 13 of *The Motor Vehicle Act* and that he has nothing to do with the licence provided for by s. 4 of *The Motor Carrier Act*. Indeed, it was not in any way within the competency of the Board to issue to him, a non-resident, a permit or licence under s. 4.

The consequence is that the licence upon which the plaintiff-respondent relied to ask the Court to issue an injunction against the appellant, restraining him from embussing and debussing passengers, was issued wholly without a shadow of authority.

But there is yet another objection to the validity of the licence issued to the appellant, and it is this: That the restriction inserted by the Board in the licence which it issued has nothing to do with highway legislation proper. It does not deal with schedules, or service, or rates, or fares, or charges, or forms, or fees, as provided for in s. 17(1) of *The Motor Carrier Act*; it does not deal in any way with highways in stipulating that the appellant will not be entitled to embus or debus his passengers within the territory of New Brunswick; it is nothing more than an attempt to regulate or control the business of the appellant.

The object of such a restriction has not been explained, nor is it apparent. It was suggested by counsel for the respondent himself that it had in view the prevention of competition by the appellant against the respondent. If so, of course, it is not highway legislation but something which may come under the heading of "Commerce" (and, in the present case, of commerce by an international undertaking), but it has surely nothing to do with traffic. As was suggested, if necessary, it would be quite possible for the appellant to own, along the lines of his motor buses, certain vacant property where his passengers could embus or debus. Yet, the restriction inserted in his licence would prohibit this.

It was argued that, if the Board really had competency to issue a licence to the appellant, notwithstanding the terms of Regulation 13 under *The Motor Vehicle Act*, it could find some authority for what it has done in somewhat general terms in s. 5(3) or 11 of *The Motor Carrier Act;*

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but that argument forgets altogether the rules of interpretation of statutes—that words must be understood in accord with the subject matter of the statute.

As put by Maxwell, on Interpretation of Statutes, 9th Ed., by Sir Gilbert Jackson, at page 55, the words of a statute are to be understood in the sense in which they harmonize with the subject of the enactment and the object which the legislature has in view:

> Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained. It is not because the words of a statute, or the words of any document, read in one sense will cover the case, that that is the right sense. Grammatically, they may cover it; but, whenever a statute or document is to be construed, it must be construed not according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which renders it necessary to read them in a sense which is not their ordinary sense in the English language as so applied (Brett M.R., *Lion Insurance Co.* v. *Tucker* (1883), 53 L.J.Q.B. 189.

And, at Page 63, the following occurs:

> WORDS IN ACCORD WITH INTENTION
>
> It is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter with referencec to which the words are used finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the Legislature intended, they frequently express more, in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular; that is, they must be understood as used with reference to the subject-matter in the mind of the Legislature, and limited to it.

In the present case, however wide may be the general terms implied in s. 3(3), 5(4) or 11, they must be read as being restricted to the subject of highway circulation and cannot be extended to the subject of commercial competition or some other similar objects.

Under such a rule of interpretation, it is not possible to say that the restriction inserted by the Board, in the appellant's licence, was justified by the terms of *The Motor Carrier Act* and it must, therefore, be considered as *ultra vires*.

For those two reasons, both because the permit required by the appellant was within the jurisdiction of the Department and of the Minister and did not come under the competency of the Motor Carrier Board, and also because, even if it did, that Board exceeded its authority and dealt with a matter with which it was in no way concerned, we must come to the conclusion that the licence issued by the Board to the appellant is invalid.

That being so, it disposes of the plaintiff-respondent's action and claim and, with due respect, I find all the other questions irrelevant.

To the questions submitted by the learned trial judge, I would therefore answer:

1. The operations or proposed operations of the defendant-appellant, within the Province of New Brunswick or any part or parts thereof, as above set forth, are not prohibited or in any way affected by the provisions of *The Motor Carrier Act, 1937*, and amendments thereto. On the contrary, such operations or proposed operations are specially provided for in Regulation 13 made under authority of *The Motor Vehicle Act*. The attempt to restrict them in the order made by the Motor Carrier Board is illegal and *ultra vires*.

As the only foundation for the plaintiff-respondent's action is this illegal restriction and, indeed, the complete lack of authority in the Motor Carrier Board to issue the licence at all is sufficient to decide the present case between the parties, it becomes immaterial to pass upon the validity of the two acts of the Legislature of New Brunswick.

As I said, the object of submitting these legal questions to the Appellate Division of the Supreme Court of New Brunswick being limited to the purpose of deciding the case, it is therefore sufficient for that purpose to come to the conclusion that the licence can in no way support the conclusions of the Statement of Claim and it is unnecessary to go further.

Consequently, I decline to answer the second and third questions. The Statute 13 Geo. VI, c. 47 (1949), referred to in Question No. 2 does appear to me to be *intra vires*, for I fail to see how the amendment to section 4 of the said chapter, as amended by c. 37 of 3 Geo. VI, (1939), introduced by 13 Geo. VI (1949), c. 47, can have any bearing on the case. The amendment in question consisted merely in striking out the word "and" in the fourth line thereof

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and substituting therefor the word "or", and in striking out the words "within the province", being the last three words of the said section.

The result of that amendment is, therefore, that s. 4 thereafter read:

> The Board may grant to any person, firm or company, a licence to operate or cause to be operated public motor buses or public motor trucks over specified routes and between specified points.

As originally enacted by *The Motor Carrier Act, 1937,* s. 4 read (without repeating the whole of it):

> * * * a licence to operate or cause to be operated within the province public motor buses * * *

By the amendment of c. 37, 3 Geo. VI, (1939), the words "within the Province" were struck out, where they originally stood, and were added at the end of the section, so that it afterwards read:

> The Board may grant to any person, firm or company a licence to operate or cause to be operated public motor buses or public motor trucks over specified routes and between specified points within the province.

The effect of the amendment by c. 47 of 13 Geo. VI (1949), was that the words "within the Province", being the last three words of the said section, were struck out.

I must confess that I do not see the difference, for, in my opinion, the section, as amended, has exactly the same effect as it had before. Notwithstanding the deletion of the words "within the Province", at the end of the section, the latter continues to be susceptible of meaning and application only to the operations within the province, and the Courts would be extremely loath to give it any other meaning, for the legislation adopted by the Legislature of New Brunswick must necessarily be understood to be limited to the territory of New Brunswick, as that Legislature could not possibly be considered as having attempted to legislate upon operations outside the province.

As for Question No. 3:

> Are the proposed operations prohibited or in any way affected by Regulation 13 of *The Motor Vehicle Act,* Chapter 20 of the Acts of 1934 and amendments, or under Sections 6 or 53 or any other sections of *The Motor Vehicle Act?*

I have already expressed my opinion that none of these sections prohibits the appellant's operation in New Brunswick. On the contrary, they provide for the manner in

which these operations may be carried out in that province. Indeed, s. 7(2) specifies that a foreign vehicle which has been registered theretofore outside of the province need only "exhibit to the Department the Certificate of Title or Registration, or other evidence of such former registration as may be in the applicant's possession or control or such other evidence as will satisfy the Department that the applicant is the lawful owner of the vehicle". It follows, by necessary implication, that this requirement will be held sufficient and that the foreign motor vehicle will then obtain the necessary registration to operate upon any highway in New Brunswick, as provided for by s. 6 (1).

Section 53 goes no further than to say that "no motor vehicle shall be used or operated upon a highway unless the owner shall have complied in all respects with the requirements of this Act". Of course, it adds that no operation can be carried on "where such highway has been closed to motor traffic under the provisions of the Highway Act", which is not only proper but natural.

Then, Regulation 13, as we have seen, specifies that "No person operating a motor vehicle, as a public carrier, between fixed termini outside the Province shall operate such motor vehicle on the highways of the Province unless the operator is in possession of a permit issued by the Department setting forth the conditions under which such motor vehicle may operate and after payment of such fees as the Minister may determine fair and equitable". This, of course, is not prohibition. It is only regulation which assumes that, provided the conditions set forth in Regulation 13 are complied with by the appellant, he will receive the permit to operate on the highways of New Brunswick. To that extent, of course, the proposed operations of the appellant are affected; and that is, in fact, the effect of the answer given by the Appellate Division of the Supreme Court of New Brunswick that all that the appellant has to do is to comply with the provisions of *The Motor Vehicle Act* and the Regulations made thereunder, and, after he has done so, he may operate on the highways of New Brunswick.

All that the appellant had to do, if he has not done so already (and it was assumed at Bar that he had complied with it), is to apply to the Department for a permit which

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will set forth the conditions under which his motor vehicles may operate and pay such fees as the Minister may determine fair and equitable. But, as I have mentioned before, when once he has that permit, or if he has it already, such permits issued by the Department with the approval of the Minister does away entirely with the obligation of getting a licence from the Motor Carrier Board under s. 4 of *The Motor Carrier Act, 1937*. Regulation 13 under *The Motor Vehicle Act* applies specifically to foreign owners who are already registered in their own province or country, while s. 4 of *The Motor Carrier Act* is a general enactment which does not concern the foreign owners. It is quite clear that a vehicle owned by a non-resident, so far as the obligation to obtain a licence is concerned, is particularly dealt with in *The Motor Vehicle Act*, more especially Regulations 8, 9 and 13 under that Act, and not by *The Motor Carrier Act*.

All that we have to do on the present appeal is to give our answers to the questions submitted by the trial judge to the Appellate Division of the Supreme Court of New Brunswick and then, after the questions have been answered, to refer the matter back to the Supreme Court Chancery Division for further proceedings, presumably so that the trial judge shall deal with the case in accordance with those answers.

In the Appellate Division the Court ordered that the plaintiff-respondent should have the costs of its application. As the present answers are contrary to those that were given in the Appellate Division and as they are in favour of the defendant-appellant, I presume that, on the present appeal, it should be said that the appellant shall have his costs both in this Court and in the Appellate Division.

The result of my judgment is that it is unnecessary to pass upon the interventions of the Attorney General of Canada, of the Attorneys General of New Brunswick, Nova Scotia, Ontario, Quebec, Alberta, Prince Edward Island and British Columbia, as well as those of the Canadian National Railway Company, the Canadian Pacific Railway Company, the Maccam Transport Limited and the Carwill Transport Limited. They were interested only in the question of the constitutionality of the New Brunswick Acts.

As it happens, in my respectful view, the Court is not called upon to decide that question, in order to dispose of the present litigation; and it is well within the usual practice of the Judicial Committee of the Privy Council to avoid deciding any other question than that which is necessary to settle the difficulty between the parties. (To support that practice, it is sufficient to refer to the judgment of the Judicial Committee in *Regent Taxi and Transport Co.* v. *La Congrégation des Petits Frères de Marie* (1).

The result would show that, unfortunately, all these intervenants were mobilized to no purpose, except perhaps that this Court has been privileged in listening to very interesting arguments on the question of the constitutionality of a province adopting legislation such as is contained in *The Motor Vehicle Act* and *The Motor Carrier Act* of New Brunswick. It is, of course, a satisfaction that this Court should be relieved of the obligation to decide such a moot question. We should not suppose that the intervenants expected to be granted costs in this matter. They were appearing merely to defend their respective constitutional rights and in those cases it is usual not to grant costs to the intervenants.

Of course, in view of the result, neither the appellant nor the respondent could legitimately obtain an order for costs against either of the intervenants. That also disposes of the motion of the respondent praying that this Court should review its former decision that there should be no costs either for or against the railway companies of their intervention. The motion will, therefore, stand dismissed without costs.

KERWIN J.:—This is an appeal by Israel Winner, doing business under the name and style of MacKenzie Coach Lines, against a decision of the Appellate Division of the Supreme Court of New Brunswick in respect of certain questions of law propounded for its opinion before trial by an order of Hughes J. The action was brought by S.M.T. (Eastern) Limited for an injunction restraining Winner from picking up and letting down passengers within New Brunswick in his motor buses running between

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points in the United States and the Province of Nova Scotia over routes in New Brunswick between St. Stephen and the Nova Scotia border, and also for other relief.

Subsequent to the order of Hughes J., the Attorney General of New Brunswick intervened. The Appellate Division answered the questions in favour of the plaintiff respondent but granted leave to the defendant to appeal to this Court. Pursuant to orders made by this Court or a judge thereof, the Attorney General of Canada, the Attorneys General of several of the provinces, Canadian National Railway Company and Canadian Pacific Railway Company, and two transport companies, intervened and were represented on the argument. On the opening thereof, in order to obviate certain difficulties that might otherwise arise, it was arranged that, with the consent of the Attorney General of New Brunswick, he *ex rel* the plaintiff company, should be added as a party plaintiff *nunc pro tunc* by order of the Supreme Court of New Brunswick, and that has been done.

By agreement of counsel made prior to the hearing before the Appellate Division, the questions for consideration were enlarged. No evidence was given but the matter has been argued on an agreed statement of facts contained in the order of Hughes J. and from this statement the circumstances giving rise to the questions may be summarized as follows.

The appellant, Winner, resides in the State of Maine in the United States of America and operates his coach lines for the carriage of passengers and goods for hire or compensation between Boston, Massachusetts, and Glace Bay, Nova Scotia, and intermediate points. So far as his business and undertaking in the United States are concerned, he operates under certificates granted by the Interstate Commerce Commission (a federal commission of the United States). So far as the Province of New Brunswick is concerned, he holds himself out as a carrier of passengers and goods (*a*) from outside the province to points along his route in the province; (*b*) from points within the province to points outside the province; and (*c*) between points in the province when such carriage is incidental to his international or interprovincial operations.

In view of the argument before us, I take (*c*) to mean not only that he will carry passengers and goods between points in the province as an incident to stop-over privileges in connection with the through passage from points outside to those within the province and from points inside to those outside the province, but also that he will carry all passengers and goods between those points. He applied to the Motor Carrier Board of New Brunswick for a licence to operate public motor buses from St. Stephen, New Brunswick, through New Brunswick to the Nova Scotia border, which licence was granted but on a condition the validity of which he challenges, viz., that he was not to embus or debus passengers in New Brunswick. In fact he operates his bus line so as to attract and carry out the carriage of passengers described in (*a*), (*b*) and (*c*) and proposes to continue doing so unless halted by judicial process.

The plaintiff company is incorporated under and by virtue of the New Brunswick Companies' Act and is in the business (*inter alia*) of operating motor buses for the carriage of passengers and goods for hire or compensation over the highways of the Province of New Brunswick. It holds licences granted by the Motor Carrier Board to operate public motor buses between St. Stephen and Saint John, New Brunswick, over highway route No. 1 and between Saint John and the Nova Scotia border over highway route No. 2 for the purposes of carrying passengers and goods for hire or compensation. Routes 1 and 2 are the ones used by Winner.

As amended, the questions submitted for the opinion of the Appellate Division are as follows:—

1. Are the operations or proposed operations of the defendant within the Province of New Brunswick or any part or parts thereof as above set forth prohibited or in any way affected by the provisions of *The Motor Carrier Act, 1937,* and amendments thereto or orders made by the said Motor Carrier Board?

2. Is 13 Geo. VI, c. 47 (1949) *intra vires* of the legislature of the Province of New Brunswick?

3. Are the proposed operations prohibited or in any way affected by Regulation 13 of *The Motor Vehicle Act,* c. 20 of the Acts of 1934 and amendments, or under sections 6 or 53 or any other sections of *The Motor Vehicle Act?*

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In my view it is unnecessary to detail the provisions of *The Motor Carrier Act* or *The Motor Vehicle Act* since, if the relevant provisions of these Acts are validly enacted and are applicable to Winner, they authorize what has been done by the Board in affixing the condition to the licence granted him. The important matter is whether the Legislature of New Brunswick is competent so to authorize the Board so far as Winner is concerned.

Prior to 1904, the title to the soil and freehold of highways in New Brunswick was vested in the owners of lands abutting on the highways. That year, by 4 Ed. VII, c. 6, s. 4, the soil and freehold were vested in His Majesty. This enactment was repealed in 1908 and, by R.S.N.B. 1927, c. 25, s. 29, His Majesty released any right he might have under the 1904 Act, and the title to the soil and freehold was re-vested in the abutting owners. In my opinion the same ultimate result would follow in provinces where the title is in the Crown. In either case, I take it to be indisputable that highways, generally speaking, fall within "Property and Civil Rights in the Province" under s. 92 head 13 of the *British North America Act*. The public right of passage over highways is in all the members of the public, whether residents of the particular province or any other, or of a foreign country, and subsists whether the fee is in the Crown or abutting owners. That right may be interfered with in some respects by provincical legislatures and no question is raised as to its power to require every public motor carrier to register provincially and carry provincial licence plates. No claim is made to differentiate between residents of New Brunswick on the one hand and, on the other, residents of other provinces, or aliens. So far as residents of the Dominion outside New Brunswick are concerned, it appears inadvisable to pass any comment on the opinion expressed by two members of this Court in *Accurate News and Information Act Reference* (1). Now, as then, I find it unnecessary to deal with the matter. It is also unnecessary to express any view as to aliens but, when that time does arrive, the decisions of the Judicial Committee in *Cunningham* v. *Tomey Homma* (2) and *Brooks-Bidlake and Whitall Ltd.* v. *A.G. for B.C.* (3), will require consideration.

(1) [1938] S.C.R. 100 at 132. (2) [1903] A.C. 151.
(3) [1923] A.C. 450.

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The claim of the appellant, the Attorney General of Canada, and the Railways, is founded upon the exclusive power of Parliament to legislate in relation to "Works and Undertakings connecting the Province with any other or others of the provinces, or extending beyond the limits of the province." It is, of course, settled that the effect of this and other exceptions in head 10 of section 92 of the *British North America Act* is to transfer the excepted works and undertakings to section 91 and thus to place them under the exclusive jurisdiction and control of Parliament in accordance with the final clause of section 91:—

> And the matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Montreal v. *Montreal Street Railway* (1). Contrary to what had been alleged to be the effect of this decision, it was held by the Judicial Committee *in Re Regulation and Control of Radio Communication in Canada* (2) that "'Undertaking' is not a physical thing but is an arrangement under which, of course, physical things are used."

For the respondent and those supporting it, it was argued that if it cannot be said Winner had a work *and* undertaking connecting the province with any other or others of the provinces or extending beyond the limits of the province, he could not possibly come within the exception. This contention in my opinion is not sound and, where necessary, "and" must be read "or". That, I think, follows from the decision in the *Radio* case but, if not, it should now be so declared. Another argument, which was given effect to in the Appellate Division, was that since Winner is a resident of the United States of America he could have no local work or undertaking in New Brunswick and that, therefore, his organization could not be a work or undertaking connecting the province with any other or others of the provinces or extending beyond the limits of the province within 92(10) (*a*). Emphasis is placed upon "Local" and "such" in the opening words of head 10, "Local Works and Undertakings other than such as are of the following classes", and it is said that the connecting or extending

(1) [1912] A.C. 333 at 342. (2) [1932] A.C. 304 at 315.

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works or undertakings later mentioned in (*a*) must be such as have their genesis in the province. In my opinion there is nothing to indicate that the primary location must be so situate.

The latest expression of opinion upon head 10 of section 92 appears in the decision of the Judicial Committee in the *Empress Hotel* case, *C.P.R.* v. *A.G. for B.C.* (1), where it is stated at 142:—"The latter part of the paragraph (10(*a*)) makes it clear that the object of the paragraph is to deal with means of interprovincial communication. Such communication can be provided by organizations or undertakings, but not by inanimate things alone." Whether at some time in the future, under circumstances not now envisaged, "undertaking" will be restricted to means of communication need not concern us at present since it is patent that the term includes the business or organization of the appellant.

The appellant holds himself out as well in New Brunswick as in Nova Scotia and the United States as a carrier of passengers and goods interprovincially, internationally, and intraprovincially. Arguments of convenience and expediency may be advanced to indicate either that regulation by a province of such things as rates and stopping places for people desiring to travel from one point in New Brunswick to another on through buses would not interfere with the regulation by the Dominion of rates and stopping places for through traffic; or, on the other hand, that it would be inconvenient, for instance, for a through bus to stop for a passenger and the driver to find after proceeding some distance that the passenger desired merely to go to another point in New Brunswick.

However, it is sufficient to state that in my opinion the interprovincial and international undertaking of the appellant falls clearly within section 92(10) (*a*) of the *British North America Act* but that the carriage of passengers or goods between points (*a*) and (*b*) in New Brunswick is not necessarily incidental to the appellant's undertaking connecting New Brunswick with any other, or others, of the provinces or extending beyond the limits of the province,

(1) [1950] A.C. 122.

except as to such carriage in connection with stop-over privileges extended as an incident of the contract of through carriage.

The questions put are very broad as they refer; to the provisions of *The Motor Carrier Act, 1937* and amendments thereto; to orders made by the Motor Carrier Board; to "sections 6 or 53 or any other sections of *The Motor Vehicle Act*", c. 20 of the statutes of 1934 and amendments; and to Regulation 13 issued under the latter Act. Furthermore, the questions as settled by Hughes J. were added to merely on the consent of counsel. That is really attempting to do what only the Governor General in Council or Lieutenant Governor in Council are authorized to do. It is inadvisable in such a proceeding as this to attempt to deal with all the provisions of either Act or orders or regulations made thereunder, and in fact many of them were not even referred to in argument.

The questions should be answered by stating that the New Brunswick Statutes and Regulations in question and the licence issued by the Motor Carrier Board to the appellant are legally ineffective to prohibit the appellant by his undertaking from bringing passengers into the province from outside the province and landing such passengers in the province, or from carrying passengers from any point in the province to a point outside the limits thereof. They are also ineffective to prohibit the transportation of passengers between points in the province, to which passengers stop-over privileges have been extended as an incident of a contract of carriage.

The appeal should be allowed, the order of the Appeal Division set aside, and the questions answered as above. The appellant is entitled as against the respondent, S.M.T. (Eastern) Limited, to his costs of the hearing before the Appeal Division and to two-thirds of his costs of the appeal to this Court. The motion by the appellant to vary the terms of the order of this Court granting leave to Canadian National Railway Company and Canadian Pacific Railway Company to intervene was abandoned and it will, therefore, stand dismissed without costs. There will be no costs of other motions to add any intervenant. There will be no costs for or against the Attorney-General of New Brunswick or any intervenant.

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TASCHEREAU J.:—In his action the plaintiff-respondent claims that the defendant has no legal right to embus or debus passengers within the Province of New Brunswick, and prays for an injunction to restrain him from doing so.

The defendant, who resides at Lewiston, Maine, is in the business of operating motor buses for the carriage of passengers and goods. On the 17th of June, 1949, The Motor Carrier Board granted him a licence permitting him to operate public motor buses from Boston, Mass. through the Province of New Brunswick, on highways Nos. 1 and 2 to Halifax and Glace Bay, in the Province of Nova Scotia, and return, but not to embus or debus passengers in the said Province of New Brunswick after August 1, 1949. It is his contention in his statement of defence and counter-claim, that his operation of buses is primarily international and interprovincial, and that incidentally he may therefore embus and debus passengers within the Province of New Brunswick, and also carry passengers from points within the Province to destinations also within the province. He claims that his operations constitute an "undertaking" connecting the Province of New Brunswick with another Province of Canada, and extending into the United States of America, within the meaning of s. 92(10) (*a*) of the *British North America Act.* He asks for a declaration that his operations are not prohibited by or subject in any way to the provisions of *The Motor Carrier Act,* and that 13 Geo. VI, c. 47 (1949) under which the definitions of "public motor bus" and "public motor truck" were altered to include interprovincial and international motor carriage, be declared *ultra vires* of the Legislature of the Province of New Brunswick.

Pursuant to the Rules of the Supreme Court of New Brunswick, Mr. Justice Hughes of the Supreme Court of New Brunswick before whom the matter came, ordered, on the 17th of January, 1950, that certain questions of law should be referred to the Supreme Court of New Brunswick, Appellate Division, prior to the trial of the action. The questions submitted for the opinion of the Court of Appeal were the following:

1. Are the operations or proposed operations of the defendant within the Province of New Brunswick, or any part or parts thereof as above set forth, prohibited or in any way affected by the provisions of *The Motor Carrier Act (1937)* and amendments thereto, or orders made by the said Motor Carrier Board?

2. Is 13 Geo. VI c. 47 (1949) *intra vires* of the legislature of the Province of New Brunswick?

And on the 21st day of March, 1950, the submission to the Appellate Division was enlarged, and the following question was added:

Are the proposed operations prohibited or in any way affected by Regulation 13 of *The Motor Vehicle Act*, c. 20 of the Acts of 1934 and amendments, or under sections 6 or 53 or any other sections of *The Motor Vehicle Act*?

The Court of Appeal, on the 1st of May, 1950, gave the following answers:

1. "Yes, prohibited, until the defendant complies with the provisions of the Act."

2. "Yes, in respect of this defendant." (Messrs. Richards, C.J. and Hughes, J. answering simply "Yes".)

3. "Yes, until the defendant complies with the provisions of the Act and the regulations made thereunder."

The main question to be decided is the interpretation of subsection 10 of section 92 of the B.N.A. Act, which reads as follows:

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

10. Local Works and *Undertakings* other than such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and *undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province*:

(*b*) Lines of steam ships between the province and any British or foreign country:

(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

It is beyond dispute, that the operations of the appellant are an "undertaking" within the meaning of the section. As Lord Dunedin expressed it in the *Radio Reference* (1), they constituted "an arrangement, under which physical things were used". I cannot agree with the proposition that the appellant's "undertaking" does not come within subsection (10) of section 92. It is argued that the "works

(1) [1932] A.C. 304 at 315.

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and undertakings" excluded from the provincial jurisdiction, are those which connect the province with any other, or extend beyond the limits of the province, and are "local" which means within the Province of New Brunswick. As the appellant has no office or location of any kind in New Brunswick, it would follow that it is not "local". It is my opinion that it is not necessary, in order to fall within the scope of the section, that the "undertaking" have its "origin and situs within the province", and that the appellant should have an office or place of business therein. It is I think sufficient to bring the matter within federal jurisdiction, that the bus line operates as it does in the present case, from the United States, through New Brunswick and Nova Scotia, whether the origin of the "undertaking" be in New Brunswick or not. As long as such "undertaking" *connects* the Province of New Brunswick with any other province, or extends beyond the limits of the province, 92 (10) (*a*) applies. As it has been said by Lord Reid in the *Empress Hotel* case (1), the purpose of the section,

> is to deal with means of interprovincial communication. Such communication can be provided by organizations or undertakings, but not by inanimate things alone.

As to the submissions of the respondent concerning the ownership of the highways and the status of the appellant who is a "foreign national", I agree with what has been said by my brother Rand.

There remains a further question to be determined. If, as I think, the operations of the appellant are an "undertaking" which as such fall under federal control, it does not follow that the provinces may not enact legislation relating to all that is not interprovincial traffic, or "incidental" thereto. Interprovincial communications are not of provincial concern, and therefore the appellant may without the authorization of the Province of New Brunswick, debus a passenger coming from the United States, in the limits of the province, and embus a passenger in New Brunswick whose destination is outside the province and vice versa, and also extend stop-over privileges as an incident of the operations. But the embussing of passengers at a point within the province to another point also within

(1) [1950] A.C. 122 at 142.

the province, presents an entirely different situation. This is not "interprovincial communication", and I cannot see how it can be said that it is "incidental" to the undertaking from which it is severable. It is traffic of a local nature, which falls under provincial jurisdiction.

It is probable, that conflicts will arise between both, federal and provincial jurisdictions, but the courts are not legislative bodies. Their duty is to apply the law as they believe it has been enacted. The co-operation of the Central Government and the provinces, is therefore essential, in order to arrive at a satisfactory result. As it has been said by Lord Atkin, in *A.G. for British Columbia* v. *A.G. for Canada* (1),

> It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.

This conclusion which I have reached does not mean, that even if federal control may be exercised over interprovincial operations as indicated, the control of the roads and highways and the regulation of traffic, does not remain within the jurisdiction of the provinces. *Provincial Secretary of P.E.I.* v. *Egan* (2).

As the present appeal is not a reference, this Court should not, I think, be called upon to answer questions which are not essential for the determination of the case. I therefore agree with my brother Locke as to the answer that should be given.

I would therefore allow the appeal and direct the judgment of the Appeal Division to be modified accordingly. The order as to costs should be as proposed by my brother Kerwin.

(1) [1937] A.C. 377 at 389. (2) [1941] S.C.R. 396.

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RAND J.:—This appeal raises the question of the extent and nature of the provincial jurisdiction over highways of New Brunswick. As now constituted, the action is brought by S.M.T. Company Limited as relator on behalf of the Attorney General. That company is a carrier of passengers by bus under a licence to operate on named highways which include one running from St. Stephen near the international boundary bordering the state of Maine, through the cities of Saint John and Moncton and on to the boundary with Nova Scotia. The appellant, Winner, is an American citizen of Maine, who conducts a bus line which for some time prior to 1949 had been operating between Boston and Halifax over the highway mentioned. In June, 1949, he was granted a licence under *The Motor Carrier Act* for the operation of his buses, subject to the restriction that no passengers could be set off or taken on in the province. The result was that only an operation across the province was authorized. In disregard of that limitation, he is taking up and setting down passengers without reference to originating point or destination.

The statutory provisions applicable to highway and bus operations in New Brunswick are contained in two statutes, *The Motor Vehicle Act* and *The Motor Carrier Act*. The former provides generally for the registration of every motor vehicle using the highways and, by s. 58, for the making of regulations dealing, among other things, with fixing fees, classifying vehicles, regulating the size, weight, equipment or loads to be permitted, the speed and handling of traffic, and the operation of vehicles of other provinces or of foreign countries. Among the regulations made are:

9—4. Any commercial vehicle, except a passenger bus, owned by a non-resident and duly and fully registered and licensed in his home province, state or country, used only for international and interprovincial transportation but not for intra-provincial transportation may be operated on the highways of New Brunswick without registration and licensing in the province.

13—8. No person operating a motor vehicle as a public carrier between fixed termini outside the province shall operate such motor vehicle on the highways of the province unless the operator is in possession of a permit issued by the department setting forth the conditions under which such motor vehicle may operate and after payment of such fees as the Minister may determine fair and equitable.

The Motor Carrier Act, as its name implies, deals with the business of public carriage on the highways. By s. 2(1) (*f*) as amended, a public motor bus is defined to mean:

> A motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares.

As enacted in 1937, the clause read:

> "Public Motor Bus" means a motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares to, from or in any part of the province.

This was amended in 1939 by striking out the words "to, from or in any part of the province", and substituting therefor: "from any point within the province to a destination also within the province": in 1949 this last clause was struck out. By s. 3, the members of the Board of Commissioners of Public Utilities are constituted a board for the purposes of the Act; sub-s. (3) endows the Board in relation to motor carriers with all the jurisdiction vested in it in respect of common carriers; sub-s. (4) provides:

> The Board may grant to any person, firm or company a licence to operate or cause to be operated public motor buses or public motor trucks over specified routes and between specified points within the province.

Subsections (3) and (4) of section 5 provide that in determining whether a licence shall be granted, the Board shall give consideration to services furnished by railroads, street railways, or motor carriers, the likelihood of the proposed service being permanent and continuous, and its effect on other services. If found to be in the public interest, the service may be licenced on security being furnished.

Section 8 regulates the abandonment or discontinuance of any service authorized; s. 11 limits public bus or truck operation to that specified in the licence; 17(1) empowers the Board to fix schedules, rates, fares and charges, to fix fees payable to the province, to prescribe forms, to require the filing of returns, and generally to do what is considered necessary or expedient for the safety and convenience of the public; and by s. 21, every licenced carrier is to be deemed a public utility.

These provisions appear to me to be broad enough to empower the Board to restrict the licence as it did.

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The two statutes exhibit clearly two different matters of regulation, that is, of highways as such and of services carried on by means of vehicles using them. The primary jurisdiction of the province in the field of the former is unchallenged; equally so is that over uncomplicated local services. The substantial contention is that under section 92, head 10(*a*) of the *British North America Act*, there is here an undertaking, including all four classes of services, that is, traffic between points in the United States and points in New Brunswick, between United States points and Canadian points involving trans-provincial services through New Brunswick, between points in New Brunswick and points in other provinces, and finally between points in New Brunswick alone, which in its entirety is beyond provincial control.

Mr. Inches, for the relator, and Mr. Carter, for the Attorney General of New Brunswick, supported by the Attorneys General of all of the provinces represented except, in certain respects, the Attorney General of Nova Scotia, assert the right of the province to regulate and control without restriction all traffic of this nature on the highways, regardless of origin or destination. That authority is based primarily on what is said to be the ownership of the highways, which, as claimed, is as extensive in its legislative consequences as that of other public property of the province, to which it is assimilated. The Attorney General for Nova Scotia, on the other hand, represented by Mr. MacDonald, distinguishes between local and other carriage. Agreeing that the undertaking of Winner is not within head 10(*a*), he concedes that international, interprovincial and transprovincial movements fall severally within the residual powers of section 91.

The claim made for provincial control is, in my opinion, excessive. The first and fundamental accomplishment of the constitutional Act was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the institution of a Canadian citizenship. Citizenship is membership in a state; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status.

The Act makes no express allocation of citizenship as the subject-matter of legislation to either the Dominion or the provinces; but as it lies at the foundation of the political organization, as its character is national, and by the implication of head 25, section 91, "Naturalization and Aliens", it is to be found within the residual powers of the Dominion: *Canada Temperance* case (1), at p. 205. Whatever else might have been said prior to 1931, the Statute of Westminster, coupled with the declarations of constitutional relations of 1926 out of which it issued, creating, in substance, a sovereignty, concludes the question.

But incidents of status must be distinguished from elements or attributes necessarily involved in status itself. British subjects have never enjoyed an equality in all civil or political privileges or immunities as is illustrated in *Cunningham* v. *Tomay Homma* (2), in which the Judicial Committee maintained the right of British Columbia to exclude a naturalized person from the electoral franchise. On the other hand, in *Bryden's case* (3), a statute of the same province that forbade the employment of Chinamen, aliens or naturalized, in underground mining operations, was found to be incompetent. As explained in *Homma's* case, that decision is to be taken as determining,

> that the regulations there impeached were not really aimed at the regulation of metal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

What this implies is that a province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action. The contrary view would involve the anomaly that although British Columbia could not by mere prohibition deprive a naturalized foreigner of his means of livelihood, it could do so to a native-born Canadian. He may, of course, disable himself from exercising his capacity or he may be regulated in it by valid provincial law in other aspects. But that attribute of

(1) [1946] A.C. 193 at 205. (2) [1903] A.C. 151.
(3) [1899] A.C. 580.

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citizenship lies outside of those civil rights committed to the province, and is analogous to the capacity of a Dominion corporation which the province cannot sterilize.

It follows, *a fortiori,* that a province cannot prevent a Canadian from entering it except, conceivably, in temporary circumstances, for some local reason as, for example, health. With such a prohibitory power, the country could be converted into a number of enclaves and the "union" which the original provinces sought and obtained disrupted. In a like position is a subject of a friendly foreign country; for practical purposes he enjoys all the rights of the citizen.

Such, then, is the national status embodying certain inherent or constitutive characteristics, of members of the Canadian public, and it can be modified, defeated or destroyed, as for instance by outlawry, only by Parliament.

Highways are a condition of the existence of an organized state: without them its life could not be carried on. To deny their use is to destroy the fundamental liberty of action of the individual, to proscribe his participation in that life: under such a ban, the exercise of citizenship would be at an end. A narrower constitutional consideration arises. Civil life in this country consists of inextricably intermingled activities and relations within the legislative jurisdiction of both Parliament and Legislature; and deprivation of the use of highways would confound matters appertaining to both. To prevent a person from engaging in business at a post office or a customs house or a bank by forbidding him the use of highways is, so far, to frustrate a privilege imbedded in Dominion law. These considerations are, I think, sufficient to demonstrate that the privilege of using highways is likewise an essential attribute of Canadian citizenship status.

The province is thus seen to be the quasi-trustee of its highways to enable the life of the country as a whole to be carried on; they are furnished for the Canadian public and not only or primarily that of New Brunswick. Upon the province is cast the duty of providing and administering them, for which ample powers are granted; and the privilege of user can be curtailed directly by the province only within the legislative and administrative field of highways as such or in relation to other subject-matter

within its exclusive field. The privilege of operating on the highway now enjoyed by Winner so far constitutes therefore the equivalent of a right-of-way.

With these considerations in mind, the approach to the controversy before the Court becomes clearer. Head 10 of section 92 reads:

> 10. Local works and undertakings other than such as are of the following classes:—
>
> (*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province:
>
> (*b*) Lines of steam ships between the province and any British or foreign country:
>
> (*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

What is an "undertaking"? The early use of the word was in relation to services of various kinds of which that of the carrier was prominent. He would take into his custody or under his care either goods or persons, and he was said then to have "assumed" or "undertaken", on terms, their carriage from one place to another; to that might be added the obligation to accept and carry, drawn on himself by a public profession: and the service, together with the means and organization, constituted the undertaking. This is generalized for the purposes of head 10 by Lord Dunedin in the *Radio* case: " 'Undertaking' is not a physical thing but is an arrangement under which of course physical things are used", language used by way of contrasting "works" with "undertakings". But it is or can be of an elastic nature and the essential consideration in any case is its proper scope and dimensions.

One characteristic of carriage is the entirety of the individual service, that is to say, from point A to point B: to be broken down at provincial boundary lines destroys it and creates something quite different: even a trans-provincial movement is an inseverable part of a larger entity. Under the ban imposed here, interprovincial and international trade on highways would be seriously interfered with if not in large measure destroyed.

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It was argued that the expression "works and undertakings" should be read conjunctively, and that whatever else might be said of an organized bus service, it could not be called a "work". But in the interpretative attitude of the Judicial Committee as expressed in *Edwards* v. *Attorney General of Canada* (1), and as exemplified in the *Radio* case (2), the modes of works and undertakings within head 10(*a*) await the developments of the years; and the specific enumerations, buttressed by the general considerations of provincial and dominion scope, are sufficient to warrant a disjunctive construction, although obviously in some cases both may be satisfied. Indeed the question would seem to be concluded by the language of Lord Dunedin in the Radio decision at p. 315.

Carriage by motor vehicle ranges from an individual passenger or a carton of goods carried for reward in a private automobile to a highly organized fleet of buses or trucks covering the country from East to West. Within this expanse all degrees of service might be provided; and we can visualize interprovincial carrier units and local units brought under one ownership and direction with the total operations integrated into a system, the initial form of which might have been either. Even though local services should be limited to those incidental to the others, the multiplication of units, say, over different interprovincial routes could cover a great part of a province, and the incidental be converted into the principal. Local transport has come to furnish a multiplicity of short range accommodations to the immediate necessities of modern life, especially in the larger centres of population: it has in fact become more or less incidental to employment and to community life generally. Its services have thus taken on characteristics distinguishing them from long distance carriage of any form.

What is denoted by the words of 10(*a*) is, *ex facie*, an interprovincial or an international function; no attempt has been made to show any necessary bond in fact or in legislative administration between either of them and the local feature here; and in determining in any case what can properly be taken to be embraced within an undertaking, created as Winner's has been, the interwoven

(1) [1930] A.C. 124. (2) [1932] A.C. 304.

character of legislative distribution under sections 91 and 92 of the Act of 1867 becomes significant.

The analogy of railways and telegraphs was pressed upon us. These works are specifically named, and it is the clear implication that their total functioning was to be under a single legislature. But even they are limited to essential objects: *Attorney General for British Columbia* v. *C.P.R.* (1), in which a hotel operated by the company was held not to be part of the railway. There is toward them also a notion of fixity and determinateness that, although somewhat elusive, underlies the restriction of a declaration of dominion advantage under paragraph 10(*c*) to a "work". But the building-up of an aggregate of services into a unity of operation introduces considerations of a different nature.

The judgment of this Court in *Quebec Railway* v. *Beauport* (2), is not in *pari materia*. There an original railway work declared to be for the general advantage of Canada was subsequently authorized to carry on bus services; those with which the proceedings were concerned had been integrated with the railway and tramway services; and the identity of the original work and undertaking had been maintained.

Whatever may be said of the physical instruments of transportation per se, the function of carriage is an essential element of trade and commerce; it has no other *raison d'être*. As an arterial system, from its trunk lines to the minutest ramifications, in the circulation of persons and goods, it furnishes the moving life of trade and commerce.

The question before us, then, is analogous to that presented in *Lawson* v. *Committee* (3), in which Duff J. (later C.J.) at p. 366, said:

> The scope which might be ascribed to head 2 s. 91 (Trade and Commerce) has necessarily been limited, in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy * * * the provinces were intended to possess.

That necessity exists in the automotive field of carriage, and the lines of limitation are indicated by those laid down for trade and commerce.

(1) [1950] A.C. 122. (2) [1945] S.C.R. 16.
(3) [1931] S.C.R. 357.

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Assuming then that the international and interprovincial components of Winner's service are such an undertaking as head 10 envisages, the question is whether, by his own act, for the purposes of the statute, he can annex to it the local services. Under the theory advanced by Mr. Tennant, given an automobile, an individual can, by piecemeal accumulation, bring within paragraph 10(*a*) a day-to-day fluctuating totality of operations of the class of those here in question. The result of being able to do so could undoubtedly introduce a destructive interference with the balanced and co-ordinated administration by the province of what is primarily a local matter; and the public interest would suffer accordingly. There is no necessary entirety to such an aggregate and I cannot think it a sound construction of the section to permit the attraction, by such mode, to dominion jurisdiction of severable matter that otherwise would belong to the province.

But if, in relation to those primary components, the service is not such an undertaking, then, for the reasons given, it comes under the Dominion regulation of Trade and Commerce. In any case it would fall within the residual powers.

It follows that the province, in the absence of any justifying consideration relating to highway administration or other sufficient exclusive provincial matter, was without power, having admitted these buses to the highways, to prevent them from setting down or taking up either international or interprovincial traffic. On the other hand, it could forbid the taking up or setting down of passengers travelling solely between points in the province.

The judgment of the Appeal Division, holding against Winner on all points, was in the form of giving answers to questions referred to it by the trial judge as follows:

1. Are the operations or proposed operations of the Defendants within the Province of New Brunswick or any part or parts thereof as above set forth, prohibited or in any way affected by the provisions of *The Motor Carrier Act (1937)* and amendments thereto, or orders made by the said Motor Carrier Board?

2. Is 13 Geo. VI c. 48 (1949) *intra vires* of the legislature of the province of New Brunswick?

3. Are the proposed operations prohibited or in any way affected by Regulation 13 of *The Motor Vehicle Act,* c. 20 of the Acts of 1934 and amendments, or under section 6 or 53 or any other sections of *The Motor Vehicle Act?*

As can be seen, they distribute both statutes, and in doing so, they go beyond the actual issues raised by the pleadings. It would be virtually impossible either to anticipate all conceivable points of impact of the statutes directly or indirectly on Winner's operations or to deal with them by any other than general answers. The real issue is whether he can be restrained from taking up and setting down passengers in New Brunswick: the answer to that is: only when it is done in the course of carriages which in their entirety begin and end at points in New Brunswick.

I would allow the appeal and direct the judgment of the Appeal Division to be modified accordingly. The appellant, Winner, is entitled to two-thirds of his costs in this Court and all of his costs in the Appeal Division. The motion of the respondent to review the order that there be no costs either for or against the intervenant railways is dismissed without costs. No other costs are allowed.

KELLOCK J.:—When the appeal was opened, the court raised the question as to the right of the respondent company to sue. In answer, reference was made to the decision of the Appeal Division of New Brunswick in *New Brunswick Power Co.* v. *Maritime Transit* (1). It would appear that that decision proceeded on the view that the holder of a licence under *The Motor Carrier Act* was in a position analogous to the holder of a franchise of market or ferry, and that the court in deciding that case had not had its attention called to the decision of the House of Lords in *Institute of Patent Agents* v. *Lockwood* (2), and to the view expressed by Eve J. in *Attorney General* v. *Premier Line* (3). Without deciding the question thus raised, it was arranged that an application would be made to the court of New Brunswick to add the Attorney General *ex rel* the company respondent as plaintiff in the action. That has now been done, and the proceedings amended accordingly.

The appeal comes to this court upon answers given by the Appeal Division to certain questions of law referred to that court by an order of the court of first instance on the footing of a statement of facts set out in the order

(1) (1937) 12 M.P.R. 152. (2) [1894] A.C. 347.
(3) [1932] 1 Ch. 303 at 313.

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of reference. From these facts it appears that the appellant is in the business of operating a line of motor buses for the carriage for hire of passengers and goods from Boston in the State of Massachusetts, through the Province of New Brunswick to Halifax and Glace Bay in the Province of Nova Scotia. On the 17th day of June, 1949, he was granted a licence by the Motor Carrier Board of New Brunswick permitting these operations insofar as that province was concerned, but it was provided that he should not take up or put down passengers within the said province after August 1st of the said year. The appellant ignored the above condition and has continued since August 1, 1949, to take up and let down passengers within the province, regardless of whether such traffic originated within or without the province, or was destined to points within or without the province.

It is the contention of the appellant that his operations constitute an "undertaking" connecting the Province of New Brunswick with another province of Canada or extending beyond the limits of the province, within the meaning of s. 92 (10) (*a*) of the *British North America Act*, and that, accordingly, such operations are not the subject of regulation by the legislature of New Brunswick. It is to be observed that the appellant cannot rely on any Dominion legislation such as was in question in *Toronto* v. *Bell Telephone Co.* (1). The essence of the opposing contention is that, while the appellant may have his buses and operators for those buses, his undertaking cannot be said to include the right to use the highways of the province. It is said that such right is a common law right bestowed on the appellant as a member of the public in New Brunswick under the laws of that province, and that the control of that right is a matter within the jurisdiction of the provincial legislature.

In the court below, Richards C.J., while accepting the view that the bus line of the appellant might otherwise be regarded as an "undertaking" within the meaning of s. 92 (10) (*a*), thought it could not be so regarded because, in his view, it is only local works and undertakings which have their "origin and situs within the province" which come within the purview of the section, and therefore, as

(1) [1905] A.C. 52.

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the appellant has "no office, no place of business, no organization, no situs" within the province, his operations do not come within the contemplation of the section. While the appellant's undertaking "extends from the State of Maine into the Province of New Brunswick," the learned Chief Justice thought it could not be said that it "extends beyond the limits of the province." Not coming, in his opinion, within the provisions of s. 92(10) (*a*), the learned Chief Justice was of opinion that the provincial legislation here in question was *intra vires,* being entirely local in character in relation to traffic within the province, and only incidentally affecting traffic passing through the province. Harrison J. expressed similar views. In the opinion of that learned judge, the province has the right, not only to regulate but also to prohibit motor vehicle traffic. He was further of opinion that, in any event, the appellant, as a foreign national, had no status entitling him to question the validity of the legislation. Hughes J. agreed with the answers given to the questions by the other members of the court, but gave no reasons.

In my opinion, the fact that the appellant is an alien does not affect his right to challenge the legislation in question. As stated by Lord Reading in *Porter* v. *Freudenberg* (1):

> Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen * * *

Reference may also be made to *Johnstone* v. *Pedlar* (2).

With respect to the main ground upon which the respondents rest their case, namely, the contention that control of the use of provincial highways is a matter of civil rights within the province, I find it impossible to agree. I find nothing in s. 92 of the *British North America Act* which authorizes a province to shut itself off from any other province by denying entry to it to persons presenting themselves at its borders from other provinces or another country.

In the words of Lord Coleridge in *Bailey* v. *Jamieson* (3), "The common definition of a highway that is given in all the text-books of authority is, that it is a way leading

(1) [1915] 1 K.B. 857 at 869. (2) [1921] 2 A.C. 262.
(3) (1876) 1 C.P.D. 329 at 332.

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from one market-town or inhabited place to another inhabited place which is common to all the Queen's subjects." It therefore appears at once that the right to the use of a highway is a right vested in the "subject" who is entitled to the exercise of that right throughout the kingdom. As the preamble to the *British North America Act* states that the constitution of Canada was intended to be similar in principle to that of the United Kingdom, this right, belonging equally to all Canadian subjects of His Majesty, is one which would normally be within the jurisdiction of Parliament unless another disposition has been made by the *British North America Act*. The only provision of that statute which is pointed to for such a result is head 13 of s. 92, but the mere statement of the nature of the right is sufficient to exclude it from the class of civil rights *within* the province.

With respect to the operation of a bus line of the nature of that here in question, I cannot accept the view of the statute taken in the court below. Such an undertaking is, in my opinion, one falling within the terms of s. 92(10) (*a*) and therefore, a subject matter of legislation exclusively within the jurisdiction of Parliament. The very object of the provision, to employ the words of Lord Read in the *Empress Hotel* case (1).

is to deal with means of interprovincial communication. Such communication can be provided by organizations or undertakings, but not by inanimate things alone.

While this language was not there applied to circumstances similar to those in question in the case at bar, I would so apply it. The operation of an undertaking of the character contemplated by the section may not, therefore, be prevented by provincial legislation such as that in question. The question remains, however, as to whether the whole, and if not, what part, of the appellant's operations may properly be regarded as falling within "other Works and Undertakings *connecting* the province with any other or others of the provinces or extending beyond the limits of the province," as those words are employed in s. 92(10) (*a*). In my opinion, it is only the "through" as distinct from the "local" carriage which may be so regarded.

(1) [1950] A.C. 122 at 142.

It is with means of *"interprovincial"* communication only, that the section deals, and therefore it is only the carriage of passengers or goods from a point outside the province to points within the province or beyond the province, and from a point within the province to points beyond the province, which may properly be regarded as "interprovincial," or "connecting," to use the statutory language. Unlike aerial navigation, or radio, which, from their very nature, are not divisible from the local or interprovincial or international standpoints, local carriage by bus is severable and forms no necessary part of the interprovincial or international undertaking with which s. 92(10) (*a*) is concerned. The words, "Lines of ships" and "railways," as used in the section, no doubt include all traffic carried by such means, but that is because these undertakings are specifically mentioned and, being mentioned, include everything normally understood by those words. I do not think, however, that there is any compelling reason for regarding such an undertaking as is here in question as including the purely local carriage of traffic, and, in the absence of such reason, I think there are considerations which dictate the contrary view.

As pointed out by the respondents, local carriage of traffic by bus has become, over wide areas, an essential public service, and, unless regulated to prevent excessive competition, the section of the public dependent upon such service will often suffer. Such regulation would be impossible if any person, merely because he operates across a provincial boundary, perhaps at no great distance away, could compete with a purely local undertaking, free from any local control. It is past question, in my opinion, that a local legislature may, as a purely local matter, authorize the granting of exclusive transport franchises within the province in the interests of the inhabitants intended to be served. Just as an interprovincial or international bus line is withdrawn from provincial control, an intra-provincial bus line is, by the same statutory provision, placed within the exclusive jurisdiction of the provincial legislatures.

If the carriage of purely local traffic is to be considered as part of the undertaking of a through bus line, there would seem to be no reason why such local traffic could not be carried by buses which do not leave the province

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at all, as well as by through buses. As already pointed out, the "undertaking" with which the statute deals is the organization under which the "inanimate things," the buses, operate. The undertaking is not to be identified with the buses. If, therefore, a connecting undertaking is to be regarded as including local as well as through carriage, it is difficult to see why such an undertaking may not also carry its local traffic by a bus which does not go outside the province at all, wherever such a mode of operation is conducive to the efficient management of the undertaking.

Again, if it be suggested that the word "undertaking" is to take its colour from such a word as "railways" in the section, I would see no reason why, in respect of local carriage, the undertaking of a "connecting" bus line should be confined to buses paralleling its through line and would not also include branch lines throughout the province.

As I have already said, "railways" is specifically used in the statute and includes everything normally understood by that word. But unlike a railway which has its own right of way, buses operate on public highways and must share the way thereby furnished with others. It is the "connecting" undertaking which alone is committed to Dominion jurisdiction, while the local undertaking is at the same time committed to that of the provinces. To my mind, it would leave little to the latter, in the case of undertakings of the characteristics of that here in question, if the ambit of a through undertaking were cast as large as that for which the appellant contends. I therefore think that full effect can be given to that which is in the contemplation of the section with respect to the two different kinds of undertakings by giving to it the meaning indicated.

Accordingly, in my opinion, the appellant, although not subject to the provincial control here asserted insofar as his through operations are concerned, can not claim the same exemption with respect to his purely local carriage. There is no doubt an area in which provincial legislation may affect the operation of even a bus line confined to "through" business; *Provincial Secretary* v. *Egan* (1). It is impossible, however, to define that area apart from specific cases as they arise. In arriving at my conclusion

(1) [1941] S.C.R. 396 at 415.

I have not found it necessary to consider s. 91 (2) of the *British North America Act,* upon which the respondents did not found any argument.

The questions here put are broad enough to cover many matters which are not shown to be in any way in issue in this litigation. The court is not to be called upon to answer, in litigation of this character, general questions the answers to which are not required for the purpose of enabling the court charged ultimately with the duty of disposing of the litigation to determine the actual issues. It will therefore be sufficient for the purposes of the case at bar to declare that the provincial legislation here in question is not competent to prevent the appellant's undertaking from bringing passengers into the province of New Brunswick from the United States of America or another province of Canada and permitting such passengers to alight in the said province, or from picking up passengers in the province to be carried out of the same.

I agree with the order as to costs proposed by my brother Kerwin.

ESTEY J.:—In an action between S.M.T. (Eastern) Limited and Israel Winner, doing business under the name and style of MacKenzie Coach Lines, three questions were submitted by the Supreme Court, Appeal Division, in the Province of New Brunswick. From the judgment embodying the answers, leave to appeal to this Court was granted. As of February 7, 1951, the Attorney-General of New Brunswick, *ex relatione* S.M.T. (Eastern) Limited, was added a party as "from the institution" of the action.

The appellant Winner operates a passenger bus service between Boston in the State of Massachusetts and Halifax and Glace Bay in the Province of Nova Scotia and the question here raised is the right of the Province of New Brunswick to prohibit his embussing and debussing of passengers within that province.

The appellant has, at all relevant times, purchased a licence as required under *The Motor Vehicle Act* of New Brunswick (1934—24 Geo. V, c. 20 and amendments thereto). He has also been granted a licence by The Motor Carrier Board under the provisions of *The Motor Carrier Act* of that province (1937—1 Geo. VI, c. 43 and

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amendments thereto), the provisions of which are expressly "deemed to be in addition to those of *The Motor Vehicle Act.*"

Prior to the amendment of 1949 the definition of "Public Motor Bus" read:

2(1) (*f*). "Public Motor Bus" means a motor vehicle plying or standing for hire by, or used to carry, passengers at separate fares from any point within the province to a destination also within the province.

S. 4 of the same Act read at that time:

4. The Board may grant to any person firm or company a licence to operate or cause to be operated public motor buses or public motor trucks over specified routes and between specified points within the province.

The amendment of 1949 (13 Geo. VI, c. 47) struck out all the words in s. 2(1) (*f*) after the word "fares" and in s. 4 the words "within the province." The intent and purpose and, indeed, the effect of these amendments was to enable The Motor Carrier Board to prohibit the embussing and debussing of passengers, as it did in granting a licence to the appellant on June 17, 1949, of which the material portion reads:

Israel Winner doing business under the name and style of "MacKenzie Coach Lines," at Lewiston in the State of Maine is granted a licence to operate public motor buses from Boston in the State of Massachusetts, through the province of New Brunswick on Highways Nos. 1 and 2, to Halifax and Glace Bay in the province of Nova Scotia and return, but not to embus or debus passengers in the said province of New Brunswick after August 1, 1949.

It is the contention of the province that The Motor Carrier Board, in imposing the restrictions contained in the licence, acted within its powers, and the legislation granting to it those powers is *intra vires* of the province.

The appellant submits that his passenger bus service is an undertaking within the meaning of sec. 92(10) (*a*) of the *British North America Act,* therefore subject to Dominion legislation, and, in so far as the province seeks to restrict or prohibit his passenger bus service, its legislation is either *ultra vires* of the province or inoperative as against him. S. 92(10) (*a*) reads as follows:

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

* * *

10. Local works and undertakings other than such as are of the following classes:—

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province:

The word "local" in the foregoing s. 92(10) (*a*), with great respect, cannot be restricted in its scope and meaning as held by the learned judges of the Appellate Court. The section read as a whole indicates that included in the phrase "local works and undertakings" are activities other than, as well as those which were initiated or have their head offices in the province. It is rather the scope of the operations that determines the legislative jurisdiction.

The submission on behalf of the Attorney-General of New Brunswick that the words in s. 92(10) (*a*) "or extending beyond the limits of the province," must be restricted to an extension into some portion of what is now the Dominion of Canada, although it finds support in a reading of s. 92(10) (*a*) and (*b*) together, does not otherwise find such support as to justify its acceptance. Sub-para. (*b*) is restricted to "Lines of Steamships." Even the words "or other ships" are not included. It makes no mention of railways, canals and telegraphs, nor are they elsewhere similarly dealt with. Yet there can be no doubt that the possibility of railways, canals and telegraphs extending into the United States must have been present to those associated with the drafting of the *British North America Act*. In fact, at least one province contemplated the building of such a railway prior to Confederation. It seems difficult to conclude that this possibility was not provided for by the insertion of the unrestricted language just quoted. If there be an overlapping with respect to lines of steamships between (*a*) and (*b*) that, I think, must be attributed to abundant caution in relation to some matter present to the drafsmen in respect of lines of steamships.

As to the meaning of "works and undertakings" under s. 92(10) (*a*), Lord Reid, in *C.P.R.* v. *A.G. for British Columbia* (*Empress Hotel* case) (1), stated:

> The latter part of the paragraph makes it clear that the object of the paragraph is to deal with means of interprovincial communication. Such communication can be provided by organizations or undertakings, but not by inanimate things alone. For this object the phrase "lines of

(1) [1950] A.C. 122 at 142.

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steamship" is appropriate. That phrase is commonly used to denote not only the ships concerned but also the organization which makes them regularly available between certain points.

In the *Radio* case (1), Viscount Dunedin, in referring to s. 92(10) (*a*), stated:

> "Undertaking" is not a physical thing, but is an arrangement under which of course physical things are used.

The appellant's organization under which he operates his bus service is, within the foregoing, an arrangement connecting New Brunswick and Nova Scotia. This arrangement, together with his equipment, constitutes a works and undertaking within the meaning of s. 92(10) (*a*).

There is no question but that the highways are subject to the exclusive legislative jurisdiction of the provinces. *Provincial Secretary of Prince Edward Island* v. *Egan* (2).

At the hearing there was some discussion as to the ownership of the highways in New Brunswick. Whatever the precise position may be in regard to their ownership, whether the province holds them as trustee for the public or whether the right of passage is in the nature of a public easement, for the purpose of this litigation it is sufficient that the province possesses, within the meaning of the British North America Act, complete legislative jurisdiction over its highways.

The appellant, once within the province, has a right to pass and repass his buses over the provincial highways, without regard to his citizenship or residence, upon his compliance with competently enacted provincial legislation. The province has not, at any time, disputed his right in this connection and he, on his part, has, by the purchase of the necessary licences, indicated a clear intention to comply with such legislation. In fact, he has, and his right to do so is not here in question, carried passengers, from points outside, through the province to points beyond it.

In respect of the embussing and debussing of international and interprovincial passengers within the province, while the contracts for their transportation are made both within and without the province, in every case such contracts are performed in part within and in part without the province. They constitute an inherent and important part

(1) [1932] A.C. 304 at 315; Plaxton 137 at 147.

(2) [1941] S.C.R. 396.

of the appellant's works and undertaking and give to it that essential characteristic that, in the scheme of the *British North America Act*, places the appellant's bus service, by virtue of s. 92(10) (*a*), under the legislative jurisdiction of the Dominion. While it was contended by certain of the Attorneys-General that the province possesses the power to prohibit an international and interprovincial bus to pass and repass upon its highways, no authority was cited to that effect. The Dominion of Canada was created by the *British North America Act* as "one Dominion under the name of Canada" (s. 3); and there shall be "one Parliament for Canada" (s. 17). Moreover, there is but one Canadian citizenship and, throughout, the *British North America Act* contemplates that citizens, and all others who may be for the time being in Canada, shall enjoy freedom of passage throughout the Dominion, subject to compliance with competent provincial legislation.

There remains for consideration the embussing and debussing by the appellant of intraprovincial passengers. Immediately the 1949 licence was issued he contended the prohibition was *ultra vires* of the province and has since carried on his business in complete disregard thereof. His position was that he had a right to carry on his international and interprovincial bus service and, as "incidental" thereto, to embus and debus, including intraprovincial, passengers. He did not intimate what he included in the word "incidental," but it would appear that he at least meant the embussing and debussing of intraprovincial passengers along his route in New Brunswick.

In support of his contention counsel directed our attention to railways and telegraphs. These works and undertakings are quite different in character. The owners of the former provide the roadbed and tracks, the latter the wire and poles, and both provide all other facilities necessary to their respective operations. The appellant's works and undertaking consist of his buses and the arrangement under which they are operated. As such, his works and undertaking are designed and developed to operate upon the provincial highways, which must be located, constructed, maintained and controlled by the province. The essential difference is that, while railways and telegraphs operate upon their own property, the appellant operates

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his bus service upon the highways maintained and controlled by the province. The factors that militate against a practical severance of the intraprovincial railway and telegraph businesses are not, to an important degree, present in the appellant's bus service as he has developed it, or as it would be in the ordinary course of such a business. Moreover, from the point of view of the province, it constitutes the utilization of its highways for a purely provincial purpose and, if permitted upon main highways, would go far to destroy the system under which the province has deemed it advisable, if not necessary, to licence the carriage of passengers and goods by buses.

The appellant's essential business is the international and interprovincial carriage of passengers. His buses and the arrangement under which he operates constitute his works and undertaking, all of which are subject to legislative jurisdiction of parliament, and if he enters the province and complies with competent provincial legislation, as already stated, the highways must be available to him. Whenever he seeks to utilize the highways for the further purpose of the carriage of intraprovincial passengers he is outside the scope of his works and undertaking, under 92(10) (*a*). If, therefore, he desires to enter into the bus business of carrying intraprovincial passengers, he must comply with competent provincial legislation in relation thereto.

It should be noted that in this litigation we are not concerned with a body corporate, created and granted certain powers by the Parliament of Canada with respect to which other considerations may arise, but rather with an individual whose works and undertaking are the international and interprovincial carriage of passengers.

There may, in the future, be important questions as to what particular circumstances may constitute international, interprovincial or intraprovincial passengers. These questions must, of course, be decided as they arise, but it does seem necessary to intimate here that the appellant would be entitled to accord to international and interprovincial passengers stop-over privileges, as that term is understood in systems of transportation, without their being regarded as intraprovincial passengers, as they embus and debus within the province.

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The hearing of this appeal has been restricted to the right of the appellant to carry passengers. The questions appear to have been drafted in broader terms than necessary to determine the issues now raised in this litigation. Indeed, it would appear to be a sufficient answer to all of the questions to say that provincial legislation, in so far as it prohibits the embussing or debussing of international and interprovincial passengers, is *ultra vires* the province. In particular, the amendment of 1949 to *The Motor Carrier Act,* in so far as it makes provision therefor, is *ultra vires.* The same may be said of Regulation 13 and Section 58 of *The Motor Vehicle Act* under which it is authorized.

I agree with my brother Kerwin's disposition of costs.

LOCKE J.:—The appellant is a carrier of passengers and freight for reward, operating motor buses from Boston, Massachusetts, to Glace Bay, Nova Scotia. In traversing the Province of New Brunswick en route these vehicles stop in a number of places between St. Stephen and Sackville. The appellant asserts that as such a carrier he is entitled to bring passengers from the United States and from the Province of Nova Scotia into the Province of New Brunswick, to carry passengers from the latter province to the United States or to Nova Scotia and "in connection with and incidentally to his international and interprovincial operations" to carry passengers from one point in New Brunswick to another. Both in his pleadings and in the factum filed before us the appellant has made it plain that he does not claim an unqualified right to carry passengers from one point to another within the province, except to the extent above indicated. This I understand to mean that he may extend stop-over privileges to his passengers, as is commonly done by railway companies: thus, by way of illustration, a person travelling from Boston to Sackville might stop over at St. Stephen and at Saint John and be carried between these points, and from the latter point to Sackville under the contract of carriage. The question to be determined is whether by legislation the Province of New Brunswick can lawfully prevent the carrying on of these activities.

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Heading 10 of section 92 of the *British North America Act*, in so far as it affects this matter, reads:

> Local works and undertakings other than such as are of the following classes:
>
> (*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province:

The operations of the appellant consist of the daily operation of motor buses between the above mentioned points, these running in accordance with a published time table, carrying passengers and their luggage and freight in both directions. A time table, made part of the material submitted with the questions to the Court, under the heading "Index of Stations and Agents" lists a number of places in New Brunswick between St. Stephen and Sackville where these are maintained, and this affords the only evidence as to the extent of the business carried on within the province, other than the stated fact that the motor buses are operated in the above mentioned manner.

The word "undertaking" is, in the absence of a statutory definition, and there is none, to be given its commonly accepted meaning as being a business undertaking or enterprise and, in my opinion, it is beyond doubt that the appellant's business falls within this description. I think it equally clear that it connects the province of New Brunswick with another of the provinces and extends beyond the limits of the province. It is not a physical connection that is referred to (*In re the Regulation and Control of Radio* (1)). Richards C.J.A. and Harrison J. were both of the opinion that the appellant's business was not such an undertaking, since they considered that, in order to fall within the class of matters referred to in subheading (*a*), it was necessary that the undertaking should be local in its nature. As the learned Chief Justice expressed it, the works and undertakings referred to are those "which have their origin and situs within the province." Mr. Justice Harrison considered that, as the defendant had no office or location of any kind in New Brunswick and the time table showed his office to be at Lewiston, Maine: "the undertaking was 'local' in the State of Maine. It is not local in New Brunswick."

(1) [1932] A.C. 304 at 315.

The opening phrase of heading 10 is clearly capable of the construction given to it by these learned judges, namely, that it is to be interpreted as if it read:

> Local works and undertakings other than such local works and undertakings as are of the following classes:

The matter, however, appears to me to be concluded by authority. In *A.G. for British Columbia* v. *C.P.R.* (1) and in *Toronto Corporation* v. *C.P.R.* (2), it was held by the Judicial Committee that heading 10(*a*) applied to the undertaking of that company. In *Luscar Collieries* v. *McDonald* (3), it was held that the subsection applied to the undertaking of the Canadian Northern Railway Company. The undertakings of these companies cannot be described as "local" in the sense that that term has been construed by the learned judges of the Appeal Division, so that I think it must be taken either that subheading (*a*) refers to undertakings other than such as are merely local in their nature and extent, or that a "local" undertaking includes one such as that of the appellant, which carries on its enterprise in whole or in part within the boundaries of the province.

Section 91 declares the power of Parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces and:

> that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated.

In *City of Montreal* v. *Montreal Street Railway* (4), Lord Atkinson, in delivering the judgment of the Judicial Committee, said that the effect of heading 10 of s. 92 was to transfer the excepted works mentioned in subheadings (*a*), (*b*) and (*c*) of it into s. 91 and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament. This applies with equal force to the excepted undertakings, in my opinion. It is thus for Parliament to say whether these activities of the appellant may be carried on or prohibited.

(1) [1906] A.C. 204.
(2) [1908] A.C. 54.
(3) [1927] A.C. 925.
(4) [1912] A.C. 333 at 342.

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This is, in my opinion, decisive of the question as to the right of the province to prevent the appellant from bringing passengers into the province and permitting them to alight and transporting passengers therefrom. There remains the question as to the right of the appellant to engage in what may properly, in my opinion, be described as the local business of carrying passengers other than those entering the province upon his buses, or leaving it in that manner, from place to place within the province. Whether these operations also fall within the exclusive jurisdiction of Parliament must be decided by determining the exact nature of the undertakings excepted from provincial jurisdiction by subheading 10(*a*). These are undertakings connecting the province with another province or extending beyond the provincial limits. The appellant's enterprise is, I think, correctly described in the statement of defence as an international and interprovincial operation. It is properly a part of such an operation to afford to passengers brought into the province, or those who embark upon the buses to be carried out of the province, what are commonly called stop-over privileges of the nature above referred to as an incident of the contract of carriage. I consider, however, that the carrying on of a purely local passenger business of the nature above referred to is not a part of, or reasonably incidental to, the operation of an undertaking of this nature. It is not every activity that the person engaged in the undertaking may decide to carry on in connection with its operation that falls within the exception. The establishment of restaurants at various places in New Brunswick through which the buses of the appellant pass might be an aid to the financial success of the undertaking, but such operations would not, in my view, be part of the undertaking excepted from the provincial jurisdiction. I think a purely local passenger business of the above mentioned nature is in no different position. The distinction between an undertaking such as this and that of the railway companies is that in the case of the latter it is an essential of the operation that there should be railway stations established at regular intervals along the line and large expenditures incurred for that purpose, and that there be facilities afforded for the carriage of both passengers and freight between these

stations as a necessary part of an effective railway operation. These considerations do not, in my opinion, apply to an undertaking such as that of the appellant.

This matter has been brought before us by special leave to appeal granted by the Appeal Division. Two of the questions were submitted for the opinion of that Court by an order of Hughes J. made in the Chancery Division of the Supreme Court, and a third question as to whether the operations of the appellant were prohibited or affected by the provisions of *The Motor Carrier Act, 1937,* as amended, and *The Motor Vehicle Act,* as amended, or by the regulations made under the last mentioned statute, was added by consent of counsel for the parties. The claim of the plaintiff S.M.T. (Eastern) Ltd. against the defendant in the action, the present appellant, was that while the appellant had obtained a licence from the Motor Carrier Board this would not permit him "to embus or debus passengers in the said Province of New Brunswick after August 1, 1949," that the defendant had in spite of this continued to embus and debus passengers within the province and intended to continue to do so, whereby the plaintiff had suffered and would thereafter suffer damage. By the statement of defence it was admitted that the appellant had and intended to continue to permit passengers to alight within the province and to enter the buses within the province in connection with, and incidentally to, his international and interprovincial operations, and by counterclaim the defendant sought a declaration that his undertaking was within the exception contained in subheading 10(*a*) of s. 92 of the *British North America Act,* that his operations were not prohibited by, or subject to, "*The Motor Carrier Act* and amendments thereto or by any other applicable statute or law," and that the statute 13 Geo. VI, c. 47 (1949) is *ultra vires* the legislature of the province. The defence to the counterclaim repeated the allegations in the statement of claim, denied that the defendant's operations were primarily international and interprovincial, demurred on the ground that the counterclaim disclosed no cause of action and said that the 1949 statute was *intra vires.* The plaintiff did not plead to, or raise any issue as to, that part of the claim advanced in the counterclaim in which a declaration was asked that the defendant's

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operations were not prohibited by, or subject in any way to, the provisions of *The Motor Carrier Act* and amendments or by any other applicable statute. No attack had been made upon *The Motor Vehicle Act* or the regulations passed under that Act by the counterclaim. *The Motor Carrier Act* of New Brunswick is a statute containing some 22 sections, while there are 92 sections to *The Motor Vehicle Act* and a lengthy series of regulations. I do not think we should be asked to deal with constitutional questions of such great importance in this manner. This is not a reference to a provincial court for its opinion by the Lieutenant-Governor in Council of a province under a statute such as the Constitutional Questions Determination Acts of other provinces: rather are we asked, at least by the third question, to decide issues not defined in the pleadings because counsel for the respective parties request it.

I think it is well to remember what was said by Sir Montague Smith in *Citizens' Insurance Company of Canada* v. *Parsons* (1), that in performing the difficult duty of deciding questions arising as to the interpretation of sections 91 and 92 we should decide each case which arises as best we can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The particular questions to be determined in the present matter are as to whether by legislation of the province an undertaking such as that of the appellant may be prohibited from bringing passengers into the Province of New Brunswick from the United States and from Nova Scotia and permitting them to alight: from admitting passengers to its buses to be carried out of the province, and to carry passengers along the route traversed by its buses from place to place in New Brunswick to whom stop-over privileges have been extended as an incident of the contract of carriage. The answer to each of these questions is, in my opinion, in the negative. This is sufficient, in my opinion, to dispose of the issues properly raised by the pleadings in this action. I think no further answer should be made.

I agree with the order as to costs proposed by my brother Kerwin.

(1) (1881) 7 A.C. 96 at 109.

CARTWRIGHT J.:—This is an appeal brought pursuant to special leave granted by the Appellate Division of the Supreme Court of New Brunswick from a judgment of that Court answering certain questions of law, said to arise in this action, raised for its opinion by order of Hughes J.

The agreed statement of facts, the questions and the answers given are sufficiently set out in the reasons of other members of the Court and do not require repetition.

With great respect, I think that the procedure followed in this case has proved inconvenient and that the questions in issue between the parties could have been more satisfactorily dealt with if the action had been tried and judgment given leaving any party dissatisfied to appeal if so advised. It is not the duty of the Court in an action to decide questions of law, however interesting or important, except such as require to be determined to enable the Court to pronounce judgment. To make a complete answer to questions 1 and 3 it would be necessary to examine every provision of *The Motor Carrier's Act*, of the orders of the Motor Carrier Board and of *The Motor Vehicle Act* and to state as to each of such provisions whether it affects the operations or the proposed operations of the appellant and if so in what way, although, in this action, as to most of them no question appears to arise at all.

Our first task seems to me to be to ascertain from the pleadings and the assumed facts what questions of law properly arise for determination at this stage of the proceedings.

The plaintiffs in the action are now the Attorney General of New Brunswick *ex relatione* S.M.T. (Eastern) Ltd. and the said S.M.T. (Eastern) Ltd.

Paragraphs 5, 6, and 7 of the Statement of Claim read as follows:

5. On the 17th day of June, 1949, the said Motor Carrier Board granted a licence to the defendant, permitting him to operate public motor buses from Boston in the State of Massachusetts through the Province of New Brunswick on Highways Nos. 1 and 2 to Halifax and Glace Bay in the Province of Nova Scotia and return, but not to embus or debus passengers in the said Province of New Brunswick after August 1, 1949.

6. The defendant by his motor buses maintains a daily passenger service over the routes set out in paragraph 5 hereof.

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7. Since August 1, 1949, the defendant has continually embussed and debussed passengers within the said Province of New Brunswick, contrary to the said order, dated the 17th day of June, 1949, and has declared his intention of so doing until stopped by legal process.

In the prayer for relief the plaintiffs claim:

(*a*) An injunction against the defendant, his servants or agents restraining him and them from embussing and debussing passengers within the Province of New Brunswick in his public motor buses running between St. Stephen, N.B. and the Nova Scotia border.

(*b*) A declaration that the defendant has no legal right to embuss or debuss passengers within the Province of New Brunswick.

(*e*) Such other and further relief as to the Court may seem just.

The plaintiff company also claims damages and an accounting.

In its Statement of Defence the appellant admits paragraphs 5 and 6 of the Statement of Claim. Paragraphs 2 and 4 of the Statement of Defence read as follows:

2. As to paragraph (7) of the said Statement of Claim—

(*a*) he admits that since August 1, 1949, he has continually embussed and debussed passengers within the Province of New Brunswick and that it is his intention to continue to do so unless and until it shall have been declared by some court of competent jurisdiction that such operations are prohibited by *The Motor Carrier Act* and amendments thereto, or by any other applicable statute or law;

(*b*) he intends to carry passengers not only from points without the Province of New Brunswick to points within the said province and vice versa, but also, in connection with and incidentally to his international and interprovincial operations, to carry passengers from points within the said province to destinations also within the said province, unless and until it shall have been declared by some court of competent jurisdiction that such operations are prohibited by *The Motor Carrier Act* and amendments thereto, or by any other applicable statute or law.

4. His operation of public motor buses is primarily international and interprovincial, over the routes more particularly described in paragraph (5) of the plaintiff's Statement of Claim, but that incidentally to such international and interprovincial operation, he operates and intends to continue to operate public motor buses intraprovincially in accordance with and subject to his allegations contained in paragraph (2) hereof.

By way of counterclaim the defendant asks:

1. A declaration that his operations constitute an undertaking connecting the Province of New Brunswick with another province of Canada, viz., the Province of Nova Scotia, and extending into states of the United States of America, beyond the limits of the Province of New Brunswick, within the meaning of section 10 (*a*) of section 92 of *The British North America Act.*

2. A declaration that his said operations are not prohibited by or subject in any way to the provisions of *The Motor Carrier Act* and amendments thereto, or by or to any other applicable statute or law.

3. A declaration that 13 George VI Chapter 47 (1949) is *ultra vires* of the legislature of the Province of New Brunswick.

4. Such other and further relief as to the Court may seem just.

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Nowhere in the pleadings or in the statement of admitted facts does any suggestion appear that the appellant has failed to comply with any requirement of the Statutes of New Brunswick or the orders made thereunder dealing with the use of the highways, such as, for example, enactments prescribing the maximum weight and size of buses, the system of brakes or the carrying of insurance; and it appears to me that we must deal with the questions on the assumption that the appellant has fulfilled all the conditions precedent to the granting of whatever licences he requires to permit his buses to use the highways of New Brunswick.

On this assumption the only question which properly arises for determination is whether the restriction contained in the licence of the 17th June, 1949, granted by the Motor Carrier Board to the appellant is effective. In saying this, I have not overlooked the wide terms of paragraph 2 of the prayer for relief in the counterclaim, quoted above, or the fact that the Attorney General for New Brunswick has been added as a party plaintiff *nunc pro tunc,* and may therefore, I assume, be regarded as a defendant in the counterclaim. In my view, in the circumstances of this case the appellant is not entitled to a declaratory judgment as to what is the law of New Brunswick and as to how far it affects his operations, *vide Smith* v. *Attorney General for Ontario* (1). All the rights of the appellant which are in issue in this action will be sufficiently defined by an answer to the question mentioned in the first sentence of this paragraph, and it is unnecessary to enter upon a discussion of the wider questions of law sought to be raised by the counterclaim.

I agree with my brother Rand that the relevant statutory provisions, if valid, are broad enough to empower the Board to restrict the licence as it did, and the answer to

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the question must therefore turn on whether it was within the powers of the legislature of New Brunswick to so provide.

In the assumed circumstances of this case, set out above, I am in agreement with those members of the Court who hold that the New Brunswick statutes and regulations in question and the licence issued by the Motor Carrier Board, referred to above, are legally ineffective to prevent the appellant by his undertaking from bringing passengers into the Province of New Brunswick from the United States of America or from another province of Canada and permitting such passengers to alight in New Brunswick, or from picking up passengers in New Brunswick to be carried out of the province or from transporting between points in the province passengers to whom stop-over privileges have been extended as an incident of a contract of through carriage; because in so far as they purport so to do they are *ultra vires* of the legislature of New Brunswick. I would so declare and would also declare that no further answer to the questions submitted is required. I would dispose of the costs as proposed by my brother Kerwin.

FAUTEUX J.:—Pursuant to licences granted by the Motor Carrier Board of the Province of New Brunswick, the respondent, a company incorporated under the laws of the province, operates, within the province only and over certain routes, motor buses for the carriage of passengers and goods for hire.

The appellant, a resident of Lewiston, in the State of Maine, conducts like operations between Boston, in the Commonwealth of Massachusetts, and the town of Glace Bay, in the Province of Nova Scotia, and between intermediate points, including points within the Province of New Brunswick. As to the part of these operations on routes beyond the Canadian border, the appellant holds a permit issued by the Interstate Commerce Commission, a United States federal body having jurisdiction, *inter alia,* over interstate transportation. With respect to the other part of the operations, carried on routes within the Province of New Brunswick, the appellant did, on the 17th of

June, 1949, obtain from the Motor Carrier Board of the province a licence in the following terms:

> Israel Winner doing business under the name and style of "MacKenzie Coach Lines", at Lewiston in the State of Maine, is granted a licence to operate public motor buses from Boston in the State of Massachusetts, through the Province of New Brunswick on Highways Nos. 1 and 2, to Halifax and Glace Bay in the Province of Nova Scotia and return, *but not to embus or debus passengers in the said province of New Brunswick after August 1, 1949.*

Having, before the issuance of such a licence, challenged the validity of *The Motor Carrier Act,* 1937, as amended by 13 Geo. 6, c. 47 (1949), the appellant, thereafter, consistently ignored and refused to comply with the restrictions above underlined in the licence. And he equally declared his intention to continue to do so until it shall have been judicially found that such operations are prohibited by *The Motor Carrier Act* and amendments thereto, or by any other applicable statute or law. In effect, and under such a licence, the only right granted to the appellant is to go across the Province of New Brunswick with passengers already embussed but with no right to embus or debus passengers in the province.

This attitude and these actions of the appellant gave, at first, rise to a claim by the respondent asking for (1) a declaration that the appellant had no legal right to do what his permit prohibited him from doing, (2) an injunction to restrain him from carrying on such operations and (3) damages, and to a counterclaim by the appellant for a declaration that his operations, actual or proposed, being primarily international and interprovincial, came within the purview of sub-s. 10(*a*) of s. 92 of the *British North America Act* and, as such, beyond control by provincial legislation related to such undertakings carried on wholly within the province.

Eventually, and in the course of these proceedings, three questions of law having been stated, they were subsequently answered, by the Supreme Court (Appellate Division) of the Province of New Brunswick, in a judgment now before this Court for review.

The essential point decisive of the present issue is whether or not, and, if in the affirmative, in what measure, the above described transportation business of the appellant constitutes an undertaking within the meaning of s. 92(10)

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of the B.N.A. Act and, as such, not only excluded from the provincial legislative field but by force of s. 91, (29) included amongst the classes of subjects exclusively within the legislative authority of Parliament.

S. 92(10) reads:

10. Local works and undertakings other than such as are of the following classes:—

(a) Lines of steam or other ships, railways, canals, telegraphs, and other *works and undertakings* connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

(b) Lines of steam ships between the province and any British or foreign country;

(c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

The time table and the index of stations, relative to the appellant's operations, indicate that his bus line extends from New Brunswick into Nova Scotia and into the United States of America. It also shows that it joins points in New Brunswick to points in Nova Scotia.

In the light of what was said by Viscount Dunedin *in re Regulation and Control of Radio Communication in Canada* (1), the conclusion that the operation of the bus line of the appellant is an undertaking within the meaning of the word in the subsection and that it is an undertaking which connects one province to another, is, with deference, inescapable.

The fact that the highways, over which the motor buses of the appellant must travel, are not part of his undertaking is not more material in the present case than the fact that the space, in which the material transmitted by radio has to travel, was not part of the undertaking, was material in the *Radio* case. In the judgment of the Judicial Committee rendered in the latter, it was stated, at page 315, that "'undertaking' is not a physical thing, but is an arrangement under which of course physical things are used." And it was also declared that "the undertaking of broadcasting is an undertaking connecting the province with other provinces and extending beyond the limits of the province."

(1) [1932] A.C. 304.

On the alleged factual premises that the appellant has no office, no place of business, no organization, no situs in the Province of New Brunswick but only in Lewiston, Maine, it was suggested that his undertaking is not local in the sense of the local undertakings excepted by the subsection. It may be stated, at first, that it appears in the material found in the record, that while what is described as the "main office" of the appellant is situated in Lewiston, Maine, the latter has, equally, agencies at several strategic points on the bus line he operates, particularly in the Provinces of New Brunswick and Nova Scotia, and that he also maintains one office in Halifax and another in Sydney. I cannot think that the point from which an undertaking is partly or wholly managed or directed may become the decisive element in the consideration of the question. The subsection is not related to the situs of management of the undertaking but to the larger field—the one which may connect—in which the undertaking is actually operated. In each of the two or more provinces covered by an undertaking, it may, with equal accuracy, be said that the undertaking connects the province to the other province or provinces. An interpretation of the subsection which would make this proposition well-founded only in the province where the undertaking has its origin and situs, and ill-founded in the other province or provinces, would fatally and completely nullify the purpose the subsection was meant to achieve. For, and assuming that identical legislation would be adopted in all these provinces by local legislative action, such legislation could be declared *ultra vires* in the province of origin and situs of the undertaking, and *intra vires* in all the others. In the result, the overall control by legislative and executive action, which, in proper cases, the B.N.A. Act contemplates, would not be achieved. That "the object of the paragraph" (10(*a*)) "is to deal with means of interprovincial communication", and that "Such communication can be provided by organizations *or* undertakings but not by inanimate things alone" is affirmed by the judgment of the Judicial Committee in *C.P.R.* v. *A.G. for British Columbia* (1).

(1) [1950] A.C. 122.

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In the measure in which it is interprovincial, the public transportation service of the appellant undoubtedly constitutes consequently an undertaking coming within the meaning of s. 92 (10) (*a*) and, as such, is within the classes of subjects transferred into s. 91. Thus, the carrying of passengers by the appellant (*a*) from outside the Province of New Brunswick to points along his route in the province, and (*b*) from points within the province to points beyond the province, and (*c*) between points in the province as an incident to stop-over privileges related to the operations mentioned in (*a*) and (*b*), having this interprovincial character, comes therefore within dominion jurisdiction as such.

However, and as described at the very beginning of these reasons, the actual and proposed operations of the appellant include, in addition to this interprovincial service, the transportation of passengers between intermediate points within the Province of New Brunswick. And the question arises whether this latter traffic, in essence exclusively local, should be dealt with in this case as necessarily incidental to what constitutes the interprovincial undertaking of the appellant, and be thus equally declared to come under the exclusive control of Parliament. I see no reason why it should. In law, it has by itself none of the features which, considered alone, would bring it within the meaning of s. 92(10) (*a*). In fact, such local transportation is not a necessary incident to the interprovincial service of the appellant. The operations carried on by S.M.T. (Eastern) Ltd., the respondent, sufficiently indicate that such local service is in itself a complete undertaking. It is true that both the interprovincial and local services may merge in one undertaking. This, however, is no reason to ignore the legal premises on which the issue must be determined and, further, to conclude that either the local or the interprovincial part of the whole service must be considered as a necessary incident of the other. These local operations remain within provincial control.

The above conclusions are, in my view, sufficient to dispose of the real issue which arose in this case.

There is no need to re-state here all that is said in the other reasons with respect to the difference, in pith and substance, between *The Motor Carrier Act* and *The Motor Vehicle Act* of the Province of New Brunswick. In brief, the former is related to the public service of transportation while the latter deals with vehicles and their operations, and the material principle laid down in *Provincial Secretary of P.E.I.* v. *Egan* (1), remains unaffected.

I equally agree with the views that the question related to the nature of the right to the use of a public highway, and the fact that the appellant is an alien, do not affect adversely the above conclusions as to the main issue.

I would, therefore, agree with my brother Locke as to the answers that should be given.

The appeal should be allowed and the reasons of the judgment of the Appellate Division of the Supreme Court of New Brunswick modified accordingly.

As to costs, I agree with the order proposed by my brother Kerwin.

Appeal allowed and Order appealed from set aside.

Solicitor for the appellant: *J. M. Neville.*

Solicitors for the respondent: *Gilbert & McGloan.*

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

Solicitor for the Attorney General of Ontario: *C. R. Magone.*

Solicitor for the Attorney General of Quebec: *L. E. Beaulieu.*

Solicitor for the Attorney General of Nova Scotia: *J. A. Y. MacDonald.*

Solicitor for the Attorney General of New Brunswick: *J. E. Hughes.*

Solicitor for the Attorney General of British Columbia: *H. A. Maclean.*

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Solicitor for the Attorney General of Prince Edward Island: *W. E. Darby.*

Solicitor for the Attorney General of Alberta: *H. J. Wilson.*

Solicitors for Canadian National Ry. Co. and Canadian Pacific Ry. Co.: *Tilley, Carson, Morlock & McCrimmon.*

Solicitor for Maccam Transport Ltd.: *F. R. Hume.*

Solicitor for Carwil Transport Ltd.: C. H. Howard

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bridge were also at fault, in neglecting to switch off the red light and switch on the green after the span had been raised; but (Rand and Locke JJ. contra) the easement provision in the agreement under which the mains were laid precluded the Water District from claiming against the Harbours Board for the damage. *Held* (Locke J. expressing no opinion), that under the *Admiralty Act* (S. of C. 1934, c. 31) the Exchequer Court had jurisdiction to deal with the claim of the Water District against the Harbours Board. *Per* Locke J. (dissenting in part): The trial judge having heard the evidence of the two operators of the span his finding that the green light was displayed as sworn to by them should not be disturbed, and therefore the appeal of the respondent, Water District, should be dismissed as against the National Harbours Board. (*Arpin* v. *The Queen* 14 Can. S.C.R. 736, *Granger* v. *Brydon-Jack* 58 Can. S.C.R. 491, *Powell* v. *Streatham* [1935] A.C. 243 and *Watt* v. *Thomas* [1947] 1 All. E.R. 583 referred to). SPARROWS POINT v. GREATER VANCOUVER WATER DISTRICT **396**

2.——*Shipping—Collision at sea—Fog—Both ships equipped with radar—Speed—Passing Port to Port—Change of course.* Two Ships, both equipped with radar, collided in fog-shrouded waters of Puget Sound, U.S.A. The trial judge found the *Dagmar Salen* two-thirds to blame and the *Chinook* one-third on the grounds that the *Dagmar Salen* disregarded the general practice of vessels on this seaway to pass port to port and that both were proceeding at too great speed. *Held* (Estey and Locke JJ. dissenting) and reversing the percentage findings of the trial judge, that the *Chinook* should be charged with two-thirds of the responsibility and the *Dagmar Salen* with one-third. Both ships were going at excessive speed under the circumstances and there was no rule nor invariable custom requiring vessels to pass port to port, but the main fault rested with the *Chinook* for changing her course just prior to the collision. If the *Chinook* had maintained her original course or if, at that point, the engines had been reversed, the accident would have been avoided; and if the radar screen on the *Chinook* had been closely and accurately observed, the course of the other ship would have been made clear and the risk eliminated. That blind action at the critical moment was primarily responsible for the collision. THE DAGMAR SALEN v. THE CHINOOK **608**

3.——*Contracts, prohibited—Charter-Party — Order-in-Council requiring Shipping Board's approval as condition precedent ignored—Whether expiry of Order validated contract.* Section 9 of Order-in-Council P.C. 6785 of July 31, 1942, provided that all parties proposing to charter any vessel exceeding 150 tons gross register, other

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than a fishing vessel, "shall submit in advance full particulars" for the approval of the Canadian Shipping Board and that "no such charter as aforesaid shall be made without such approval". The Order-in-Council was revoked at the end of 1946. On March 30, 1946 the appellant and respondent entered into a written agreement which purported the charter by the appellant to the respondent of a 4,700 ton vessel for a period of 84 months. The respondent took delivery of the ship on April 10, 1946 and operated and paid for it until April 15, 1950, when it notified the appellant that the agreement was a nullity, having been made in contravention of Order-in-Council 6785, and that it would no longer continue to operate or be responsible for the ship. The appellant thereupon brought an action for a declaration that the agreement was a valid and subsisting one, and for specific performance. Before this Court it put its case on the single ground that the charter party was subject to a condition precedent that the approval of the Canadian Shipping Board under Order-in-Council 6785 should be obtained and, that Order having expired at the end of 1946, that condition dropped, leaving the charter party in full force *ab initio*. *Held:* that, as Order-in-Council 6785 required that the terms of such a charter party be submitted "in advance" and approved by the Board and that "no such charter party as aforesaid shall be made without such approval"; there was no authority to give a retroactive approval. Assuming that a binding contract subject to such a condition could be made, the effect of the regulation was that no performance or execution of it could take place before that approval. PICBELL LTD. v. PICKFORD & BLACK LTD. **757**

4.——*Shipping—Ship time—chartered—Whether owner of ship lost at sea liable for cargo—Consignee of goods—Bill of lading—Whether lien de droit between owner of ship and owner of goods—Bills of Lading Act, R.S.C. 1927, c. 17, s. 2.* The appellant company, a ship owner and operator, granted a time charter of the SS. Hamildoc to Saguenay Terminals Limited. Demarara Bauxite Company Limited shipped a cargo of bauxite upon the vessel from a port in British Guiana for delivery to a port in Trinidad, for reforwarding to the plaintiff at Arvida, P.Q. The bill of lading was signed by an agent of Saguenay Terminals Ltd. at Georgetown on behalf of the master. The cargo was lost at sea, owing to the unseaworthiness of the vessel, and the holder of the bill of lading claiming as the owner and consignee of the goods sought to recover its value from the appellant. The appellant contended that it was not bound by the contract evidenced by the bill of lading and that there was no privity of contract as between the parties. The action was maintained by the Superior Court and by the Court of Appeal for

TAXATION — *Taxation — Tax liability — Statute increasing tax rate—Whether retroactif.* By s. 39*a* of c. 55 of the Vancouver Incorporation Act, 1921, enacted by s. 3, c. 78 of the statutes of 1931 and amended by s. 7, c. 68 of the statutes of 1936, it was provided that "from January 1, 1937, until the year 1939, inclusive, and thereafter until amended by Statute", the public utility companies would be taxed at the rate of 1½ per cent per annum on the gross rentals received by the Telephone Co. and on the amount annually received for gas, light and power and for fares, by the other defendant companies. Each company was to file a return of its revenues forming the basis of taxation on or before January 31 of each year. In 1947, by ss. 3 and 4 of c. 103, s. 39*a* was amended to provide for an increase in rate to 2½ per cent and to change the basis of taxation in the case of the B.C. Electric Ry. Co. from "the amount of fares annually received" to "the basic fare revenue as defined in an agreement between the City and the said Company dated December 30, 1946", this last mentioned provision "to have had effect on and from the first day of January, 1947". The 1947 Act, which became effective on April 3, 1947, was not otherwise made retroactive. Appellant contended that the new rate became effective in respect of the taxation period of 1947, or alternatively as of the date the Act was assented to. The defendants claimed that it became effective commencing with the taxation year 1948. The Court of Appeal affirmed the dismissal of the action by the trial judge. *Held:* (Affirming the judgment appealed from), that the new rate of 2½ per cent did not apply to taxation of the respondents for the year 1947, and was not retroactive to January 1, 1937. *Held:* Respondents became liable for the tax before the new rate under the 1947 Act had become effective, and not at the time that the rating by-law for 1947 was passed on April 18, 1947. *Miller* v. *Salomons* (1852) 7 Ex. 476; *Queen* v. *Judge of City of London* (1892) 1 Q.B. 273; *Mersey Dock* v. *Turner* [1893] A.C. 468 and *Bradlaugh* v. *Clarke* [1883] 8 A.C. 354 referred to. CITY OF VANCOUVER v. B.C. TELEPHONE CO..... **3**

2.——*Constitutional law—Railways—Taxation of C.P.R. in respect of its branch lines in Saskatchewan—"Canadian Pacific Railway"—Effect of clauses 16 and 14 of contract between Dominion and C.P.R. in schedule to chapter 1 of S. of C. 1881—Saskatchewan Act, S of C. 1905, c. 42, s. 24—Act respecting*

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the Canadian Pacific Railway, S. of C. 1881, c. 1—Constitutional Questions Act, R.S.S. 1940, c. 72..... **190**
See CONSTITUTIONAL LAW 3.

3.——*Assessment — Taxes — Personal Property — Situs — Contractor having head office and chief place of business in one parish and equipment and machinery in another—Where taxable—"Place of Business"—Meaning—The Rates and Taxes Act, R.S.N.B.1927, c. 190, s. 20. The Rates and Taxes Act,* R.S.N.B. 1927, c. 190, s. 20 provides that all personal property shall be assessed to the owner in the parish where he resides except that if he has a "place of business" in another parish all personal property connected therewith or employed therein shall be assessed in the parish where he has such place of business. The respondent, whose head office was in the Parish of Lancaster, Saint John County, contracted to pave among others, a road leading through the Parish of Bathurst, Gloucester County to Douglastown, Northumberland County and acquired 59 acres of land in Bathurst Parish on which it erected 38 buildings, including an office, mess hall, sleeping camps, repair shops, an asphalt plant and a gravel-crushing plant. During the winter months moveable equipment was stored at the property and some 20 men employed in repairing it. The Bathurst Parish Assessors purporting to act under the authority of s. 20 assessed the respondent's personal property in the parish at $600,000. On appeal to the County Court Judge the latter reduced the assessment to $275,000 but otherwise confirmed it. On appeal by way of *certiorari* to the Appeal Division, Supreme Court of New Brunswick, the assessment was set aside on the grounds that the company had no place of business within the meaning of s. 20 of the Act. *Held:* (Reversing the decision of the New Brunswick Supreme Court, Appeal Division). 1. That on the facts the assessors could properly find the existence of a business carried on at a "place" in the parish of Bathurst within the meaning of s. 20 of *The Rates and Taxes Act. De Beers Consolidated Mines Ltd.* v. *Howe* [1906] A.C. 455 and *Kirkwood* v. *Gadd* [1910] A.C. 422 referred to and distinguished; *Swedish Central Ry. Co.* v. *Thompson* [1925] A.C. 495, *Mitchell* v. *Egyptian Hotels Ltd.* [1915] A.C. 1022, and *San Paulo (Brazillian) Ry. Co.* v. *Carter* [1896] A.C. 31, referred to. 2. That only the machinery and other property used for repairing and storing purposes could be taken to be "connected with or employed in" the business: what was repaired or stored, was not in that language. 3. That in making the assessment the assessors proceeded upon a wrong principle in whole or in part but a legal and correct assessment could have been made and as provided by s. 126 the matter should be remitted to them for re-assessment on the principles